Information on the Court of Justice of the European Communities

1982 – II

I N F O R M A T I O N

on

THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

II

1982

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C O N T E N T S

COMPOSITION OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

for the judicial year 1982

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Order of precedence

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J. MERTENS DE WILMARS, President of the Court
F. CAPOTORTI, First Advocate General
G. BOSCO, President of the First Chamber
A. TOUFFAIT, President of the Third Chamber
O. DUE, President of the Second Chamber
P. PESCATORE, Judge
Lord MACKENZIE STUART, Judge
G. REISCHL, Advocate General
A. O'KEEFFE, Judge
T. KOOPMANS, Judge
U. EVERLING, Judge
A. CHLOROS, Judge
Sir Gordon SLYNN, Advocate General
S. ROZES, Advocate General
P. VERLOREN VAN THEMAAT, Advocate General
F. GREVISSE, Judge
P. HEIM, Registrar

First Chamber	Second Chamber	Third Chamber
G. BOSCO President	O. DUE President	A. TOUFFAIT President
A. O'KEEFFE Judge	A. CHLOROS Judge	Lord MACKENZIE STUART Judge
T. KOOPMANS Judge	F. GREVISSE Judge	U. EVERLING Judge
	P. PESCATORE[1] Judge	

1 - Judge Pescatore is attached to the Second Chamber in respect of cases in which he is required to sit.

J U D G M E N T S

of the

C O U R T O F J U S T I C E

of the

E U R O P E A N C O M M U N I T I E S

Judgment of 1 April 1982

Case 11/81

Firma Anton Dürbeck v Commission of the European Communities

(Opinion delivered by Mr Advocate General Reischl on 21 January 1982)

Procedure - Raising of a fresh issue during proceedings - Condition - New matter - Concept

(Rules of Procedure, Article 42 (2))

For a new fact to be able to justify the raising of a fresh issue during the proceedings the fact must not have existed or must not have been known to the applicant when the action was commenced. Since measures adopted by the Community institutions are presumed to be valid until such time as the Court may declare them incompatible with the Treaties establishing the Communities, a judgment of the Court finding that there is nothing capable of affecting the validity of a measure cannot be regarded as a matter allowing the raising of a fresh issue in other proceedings.

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NOTE

The undertaking Anton Dürbeck of Frankfurt am Main brought an action under the second paragraph of Article 215 of the EEC Treaty for compensation for damages which it considered it had suffered or would suffer as a result of protective measures against the importation of dessert apples from Chile.

In support of its action Dürbeck alleges that since Regulation No. 687/69 in conjunction with Regulations Nos. 797/79 and 1152/79 (Protective measures and amending regulations) contained no transitional provisions from which the applicants in particular might have benefited, they were unlawful on the following grounds:

Lack of legal basis for making agreements on self-limitation;

Breach of the principle with regard to legitimate expectation;

Breach of the general principle of non-discrimination;

Breach of certain provisions of the aforementioned regulations.

On 5 May 1981 the Court considered a preliminary question put to it by the Hessisches Finanzgericht [Finance Court, Hesse] relating to the validity of the regulations and ruled:

"Consideration of the question raised has disclosed no factor of such a kind as to affect the validity of Commission Regulations Nos. 687/79, 797/79 and 1152/79."

Principle of non-discrimination

The applicant alleges that the finding in paragraphs 52 to 54 of the judgment of 5 May 1981 that the regulations in question intended solely to adapt the application of the protective measures to goods already in transit to the Community is based in part on an error of fact because it is well-known that the goods of which import was allowed under Regulation No. 1152/79 were not in transit to the Community until after 12 April 1979 when according to Regulation No. 797/79 the dessert apples ought to have left Chile.

Dürbeck stresses that on 10 April 1979 it sent a telex message to the Commission asking to be allowed to import some 2 000 tonnes of apples but was not allowed to do so.

The Commission observed that the treatment of Dürbeck was not discriminatory. It explained at the hearing that the quantities of apples originating in Chile and shipped after 12 April 1979 had first of all been held up in the customs depots of a Member State and their importation was authorized subsequently for objective reasons independent of the identity of the persons concerned after it was found that part of the apples already imported would be re-exported outside the Community.

It would not have been reasonably possible to share among a large number of firms the small quantity of apples the importation of which thus became possible and it was accordingly logical to give preference to goods already in store in a Community port.

What the Commission did does not exceed the limits of its discretion.

Breach of the principle of legitimate expectation

Dürbeck alleges that the Commission disregarded the principle of the protection of legitimate expectation by not informing it that a certain quantity of apples could still be imported should it subsequently be found that quantities of apples already imported were not intended for the Community market.

That submission does not coincide with that put forward in the application which aimed to show that the applicant's legitimate expectation had been affected by the Commission by the very adoption of the protective measures and must accordingly be regarded as a fresh issue.

The rules of procedure of the Court provide that "No fresh issue may be raised in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the written procedure." That is not so in the present case.

The possible liability of the Commission for adopting lawful measures

That view was raised only in the oral procedure and is therefore also a fresh issue.

The Court rules:

1. The action is dismissed as unfounded as regards the issue of the breach of the principle of non-discrimination.

2. The action is rejected as inadmissible as regards the other issues raised by the applicant.

Judgment of 1 April 1982

Case 89/81

Staatssecretaris van Financiën v
Hong Kong Trade Development Council

(Opinion delivered by Mr Advocate General
VerLoren van Themaat on 2 March 1982)

Tax provisions - Harmonization of legislation - Turnover taxes - Common system of value added tax - Taxable person - Concept - Person providing services free of charge - Excluded

(Council Directive No. 67/228, Art. 4)

A person who habitually provides services for traders, free of charge in all cases, cannot be regarded as a taxable person within the meaning of Article 4 of the Second Directive on the harmonization of legislation of Member States concerning turnover taxes.

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NOTE

The Hoge Raad [Supreme Court] of the Netherlands submitted two references for preliminary rulings on the interpretation of Articles 4 and 11 of the Second Council Directive, No. 67/228 of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes - Structure and procedures for application of the common system of value added tax.

The questions arose in proceedings between the Staatssecretaris van Financiën [Secretary of State for Finance] of the Netherlands and the Hong Kong Trade Development Council, an organization established in Hong Kong in 1966 to promote trade between Hong Kong and other countries, which opened an office in Amsterdam in 1972.

Its activities in the Netherlands consist in providing free of charge for traders information and advice about Hong Kong and providing similar information concerning the European market for undertakings in Hong Kong.

The income of the Amsterdam office is provided in the form of a grant from the Hong Kong Government and from the proceeds of a charge of 0.5% of the value of goods imported into and exported from Hong Kong.

The action by the Netherlands revenue authorities against the Hong Kong organization arose from the fact that the Netherlands authorities, having until 1978 refunded to the Hong Kong organization the amount of the value added tax invoiced by the undertakings which provided services or delivered goods to it, ceased to recognize its status as a taxable person and accordingly reclaimed the amount which, according to the revenue authorities, had been improperly refunded.

The Netherlands court submitted the following question:

"Can a person who regularly provides services for traders be regarded as a taxable person within the meaning of Article 4 of the Second Directive in the event of those services being provided free of charge?"

Article 4 provides: "'Taxable person' means any person who independently and habitually engages in transactions pertaining to the activities of producers, traders or persons providing services whether or not for gain.

If the national court emphasizes the fact that the services provided by the organization in question are provided free of charge, it is because Article 4 does not describe the "transactions" whereas Article 2 of the same directive provides that only the provision of services by a taxable person against payment is subject to value added tax.

It is therefore appropriate to consider what are the relevant features of the common system of value added tax, in the light of its purpose.

The recitals in the preamble to the Second Directive refer to the need to harmonize legislation on turnover taxes whose object is to eliminate factors which may distort conditions of competition and therefore to ensure neutrality in competition.

In order to attain that objective, the First Directive states that the principle of the common system of value added tax involves the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, whatever the number of transactions which take place in the production and distribution process before the stage at which the tax is charged.

Under that system, the tax is no longer deductible when the chain of transactions comes to an end. The tax is then charged to the final consumer who cannot pass on the amount of the tax unless there is a further transaction in which a price is paid.

Where an organization's activity consists exclusively in providing services for which there is no direct payment, there is no taxable basis; services provided free of charge are not therefore subject to value added tax.

In such circumstances the organization in question must be treated in the same way as a final consumer because it is at the final stage in the production and distribution process.

The Court ruled that:

"A person who regularly provides services to undertakings free of charge cannot be regarded as a taxable person within the meaning of Article 4 of the Second Directive".

Judgment of 1 April 1982

Joined Cases 141 to 143/81

Gerrit Holdijk and Others

(Opinion delivered by Advocate General Sir Gordon Slynn on 4 March 1982)

1. Reference for a preliminary ruling - Reference to the Court - Duty of national courts to supply adequate information - Limits

(EEC Treaty, Art. 177)

2. References for a preliminary ruling - Jurisdiction of the Court - Limits

(EEC Treaty, Art. 177)

3. Free movement of goods - Quantitative restrictions on exports - Measures having an equivalent effect - National minimum standards for enclosures for fatting calves - Permissibility

(EEC Treaty, Art. 34)

4. Agriculture - Common organization of the markets - Discrimination between consumers and producers - Prohibition - Scope - Conditions of production fixed by national rules which are general in character and intended to attain objectives other than those of the common organization - Conditions not included in the prohibition

(EEC Treaty, Art. 40 (3))

5. Free movement of goods - Agriculture - Common organization of the markets - National minimum standards for enclosures for fatting calves - Permissibility

1. The information furnished in the decisions making references does not serve only to enable the Court to give helpful answers but also to enable the Governments of the Member States and other interested parties to submit observations in accordance with Article 20 of the Protocol on the Statute of the Court (EEC).

Provided that the judgment making the reference, although not making apparent the grounds for the question referred to the Court for a preliminary ruling with the clarity advocated for the purpose of the application of Article 177 of the Treaty, enables the conclusion to be drawn that the national court's doubts relate to the question whether a condition imposed by national legislation on livestock production falling within

a common organization of the market is compatible with Community law, it cannot be said that because of the very succinct nature of that judgment the Member States have been deprived of the opportunity to submit observations relevant to the answer to be given to the question submitted for a preliminary ruling.

2. It is not for the Court, in proceedings under Article 177 of the Treaty, to adjudicate upon the compatibility of existing or proposed national rules with Community law but only upon the interpretation and validity of Community law.

3. 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.

   That is not the case where a provision lays down the minimum standards for enclosures for fatting calves, without making any distinction as to whether the animals or their meat are intended for the national market or for export.

4. The establishment of a common organization of the market pursuant to Article 40 of the Treaty does not have the effect of exempting agricultural producers from any national provisions intended to attain objectives other than those covered by the common organization,even though such provisions may, by affecting the conditions of production, have an impact on the volume or cost of national production and therefore on the operation of the Common Market in the sector concerned. The prohibition of any discrimination between the producers in the Community, laid down in Article 40 (3), refers to the objectives pursued by the common organization and not to the various conditions of production resulting from national rules which are general in character and pursue other objectives.

5. As Community law stands at present, the general rules on the free movement of goods and on the common organizations of the markets in the agricultural sector do not prevent a Member State from maintaining or introducing unilateral rules concerning the standards which must be observed in the installation of enclosures for fatting calves with a view to protecting the animals and which apply without distinction to calves intended for the national market and to calves intended for export.

NOTE

The Kantongerecht [Cantonal Court], Apeldoorn, submitted a reference to the Court for an interpretation of Community law to enable it to decide whether the provisions of Netherlands law regarding enclosures for fatting-calves are compatible with Community law.

The question was submitted in connexion with criminal proceedings instituted against a farmer, a dealer in fodder and a company engaged in the production of animal feeding-stuffs, who are accused of having kept fattening-calves in enclosures which did not satisfy a provision of the Netherlands Royal Decree implementing Article 1 of the Law on the Protection of Animals, in so far as the dimensions of the enclosures were such that the animals were unable to lie down unhindered on their side.

The Netherlands court considered that to deal with these cases it was important to determine whether, as regards the conditions in which animals for fattening are kept, that decree is contrary to or incompatible with the EEC Treaty and, if so, whether that is also the case if a specific set of rules, which still does not exist, is adopted in an amended decree in that regard concerning the enclosure in which a calf is kept.

Community law, as now in force, contains no specific rules concerning the protection of animals on farms. It follows that the examination requested in the reference for a preliminary ruling may be limited to the general rules on the free movement of goods and on the common organization of the markets in the agricultural sector.

As regards Article 34 of the Treaty, the Court considered that that article refers to national measures whose object or effect is specifically to restrict the flow of exports and thus to establish a difference of treatment between the domestic trade of a Member State and its export trade, so as to secure a particular advantage for national production or for the internal market in the State concerned.

As regards the rules on the common organization of the agricultural market, it should be emphasized in the first place that the establishment of such an organization in accordance with Article 40 of the Treaty does not have the effect of exempting argicultural producers from compliance with any national provisions intended to achieve objectives other than those covered by the common organization of the markets but which rather, by affecting conditions of production, may have an impact on the volume or the costs of national production and therefore on the functioning of the common market in the sector concerned.

The prohibition of any discrimination between producers in the Community refers to the objectives pursued by the common organization

of the market and not to the various conditions of production laid down by national provisions of a general nature which pursue other objectives.

Accordingly, the Court ruled that:

"Community law, as now in force, does not prevent a Member State from maintaining or introducing unilateral rules relating to standards which must be observed regarding the arrangement of enclosures for fatting-calves in order to ensure protection of the animals, which apply without distinction to calves intended for the national market and to calves intended for export".

Judgment of 29 April 1982

Case 17/81

Pabst & Richarz KG v Hauptzollamt Oldenbourg

(Opinion delivered by Mrs Advocate General Rozès on 28 January 1982)

1. Preliminary questions - Jurisdiction of the national court - Ascertainment and appraisal of the facts of the case

   (EEC Treaty, Art. 177)

2. Community law - Uniform application - Legal classification in Community law of a national measure - Independent classification

3. Tax provisions - Internal taxation - Discrimination between domestic products and similar imported products - Prohibition - Scope - Relief for national products at the expense of similar imported products - Relief prohibited

   (EEC Treaty, Art. 95)

4. Tax provisions - Internal taxation - Selling price of a product covered by a national monopoly - Component in the nature of taxation forming part of that price - Tax on imported products - Tax corresponding to a non-tax component in the selling price of the similar product covered by the monopoly - Discriminatory taxation - Relief by an equal amount for the two products - Continuation of discrimination

   (EEC Treaty, Art. 95, para. 1)

5. Tax provisions - Internal taxation - Whether discriminatory taxation may come under a system of State aids - Application in any case of the tax provisions of the Treaty

   (EEC Treaty, Arts. 92 and 95)

6. State monopolies of a commercial character - Specific provisions of the Treaty - Matters covered - Activities intrinsically connected with the specific function of monopolies - Relief for spirits on which tax was previously charged - Provisions not applicable

   (EEC Treaty, Art. 37)

7. International agreements - Association Agreement between the EEC and Greece - Prohibition of discrimination in taxation - Tax relief at the expense of products imported from Greece - Prohibition - Direct effect

(EEC Treaty, Art. 95; Association Agreement between the EEC and Greece of 9 July 1961, Art. 53 (1))

1. It is not for the Court of Justice but for the national court to ascertain the facts which have given rise to the dispute and to establish the consequences which they have for the judgment which it is required to deliver.

2. The legal classification in Community law of a national measure does not depend upon how that measure is viewed or appraised in the national context. The need to ensure that the provisions of the Treaty are applied in a uniform manner throughout the Community requires that they should be interpreted independently.

3. Article 95 of the Treaty is intended to cover all taxation procedures which conflict with the principle of equality of treatment of domestic products and imported products. Accordingly that provision applies to measures of relief which, within the framework of an increase in taxes on spirits, accord more favourable treatment to similar domestic products than to imported products even though such measures were adopted on the basis of administrative instructions.

4. The term "taxation", contained in Article 95 of the Treaty, must be regarded as covering, in so far as the selling price for spirits fixed by a national monopoly is concerned, only that part of the price which the monopoly is required by law to remit to the State Treasury as a tax on spirits, determined as to amount, to the exclusion of all other elements or charges, economic or other, included in the calculation of the monopoly selling price.

It follows that a tax component included in the taxation of imported spirits and corresponding to a non-tax component in the selling price of spirits marketed by the Federal Mononpoly Administration is discriminatory. Consequently if the same amount of relief is available in respect of different taxes imposed on imported spirits on the one hand and on the domestic spirits of a monopoly on the other the less favourable tax treatment of the imported spirits continues and the said discrimination subsists.

5. A measure carried out by means of discriminatory taxation, which may be considered at the same time as forming part of an aid within the meaning of Article 92 of the Treaty, should in any case be governed by Article 95.

6. The rules contained in Article 37 of the Treaty concern only activities intrinsically connected with the specific business of the monopoly in question. They are thus irrelevant to national provisions which have no connexion with such specific business, like those concerning relief for spirits on which tax was previously charged.

7. Article 53 (1) of the Agreement establishing an Association between the European Economic Community and Greece fulfils, within the framework of that Agreement, the same function as that of Article 95 of the Treaty. It forms part of a group of provisions the purpose of which was to prepare for the entry of Greece into the Community by the establishment of a customs union, by the harmonization of agricultural policies, by the introduction of freedom of movement for workers and by other measures for the gradual adjustment to the requirements of Community law.

It accordingly follows from the wording of Article 53 (1), cited above, and from the objective and nature of the Association Agreement of which it forms part that that provision precludes a national system of relief from providing more favourable tax treatment for domestic spirits than for those imported from Greece. It contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure. In those circumstances Article 53 (1) must be considered as directly applicable from the beginning of the third year after the entry into force of the Agreement, on which date all measures conflicting with that provision was, by virtue of its third subparagraph, to be abolished.

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NOTE

The Finanzgericht [Finance Court] Hamburg submitted to the Court for a preliminary ruling three questions on the interpretation of Articles 37, 92 and 95 of the EEC Treaty and of Article 53 (1) of the Agreement establishing an Association between the European Economic Community and Greece.

The dispute in the main action concerns the application of a system of tax relief set up by three orders of the Federal Minister of Finance in order to take account of a modification of the German monopoly in spirits to the requirements of Community law to a quantity of raw spirits coming from France, Italy and Greece which was held in a storage tank [Tanklager] at the reference date laid down by these orders.

In order to bring the monopoly in spirits into line with Community law the Federal Monopoly Administration, in implementation of the judgments of the Court of Justice (REWE, Case 45/75, and Miritz, Case 91/75), ceased to apply, to spirits coming from other Member States, the monopoly in the importation of spirits which it held under German legislation. That measure caused a deficit for the monopoly, which was met through the State budget, thereby leading inter alia to a general increase in taxes on spirits of 10%.

The Federal Minister of Finance adopted various administrative measures in order to permit producers, manufacturers and importers of spirits to adapt themselves more easily to the new commercial and tax situation. Accordingly the Minister issued three orders containing administrative instructions including the measures of relief.

These measures apply to spirits held on 22 February 1976 in a bonded warehouse [Zollager]. The spirits with which this case is concerned were held in a storage tank which is not included amongst the warehouses for which the orders of the Minister provide measures of relief.

The plaintiff in the main action, the proprietor of a storage tank, concluded that the system of relief provided for by the orders of the Minister had not been applied to it and on that ground claims additional relief amounting to DM 80 per hectolitre of wine-spirit on the ground that it is contrary to equality of treatment that spirits purchased from the Federal Monopoly Administration which were held at the reference date in individually-owned spirits warehouses [Branntweineigenlager] should qualify for relief amounting to DM 80 per hectolitre of wine-spirit without having previously been liable to any tax whilst spirits stored in its own storage tank did not qualify for comparable relief.

The Finanzgericht, before which the matter was brought, proceeded on the view that the problem to be resolved was that of discrimination between, on the one hand, monopoly spirits qualifying for a fixed refund without having previously been liable to tax and, on the other, imported spirits where the fixed reimbursement was intended to compensate for the previous payment of the marginal element of the monopoly equalization duty [Monopolausgleichspitze].

The Finanzgericht considers that, from this point of view, the system of relief infringes Article 95 of the EEC Treaty and, so far as spirits imported from Greece are concerned, Article 53 (1) of the Association Agreement with Greece.

That dispute led the national court to submit for a preliminary ruling a question concerned in substance with establishing whether a system of relief introduced on the basis of administrative instructions in connexion with an alteration in the taxes on spirits following the adjustment of the national monopoly in spirits must be judged in the light of Article 95 of the Treaty and of Article 53 (1) of the Association Agreement with Greece or whether that is precluded by the possible application of Article 37 or of Articles 92 and 93 of the Treaty and, in the former case, whether the importer may rely upon the application of the provisions in question before a national court.

The Court replied to these questions by ruling that "an importer of spirits coming from other Member States or from Greece may rely before a national court on the provisions of Article 95 of the Treaty or of the first paragraph of Article 53 (1) of the Association Agreement with Greece against the application of national measures of tax relief for spirits, introduced on the basis of administrative instructions in connexion with an alteration in the taxes on spirits following the adjustment of the national monopoly in spirits if such measures have the effect of according less favourable treatment to such spirits than to similar domestic products".

Judgment of 29 April 1982

Joined Cases 66 and 99/81

Arnold Pommerehnke, Firma Wilhelm Franzen and Hans-Harald Witt
v Bundesanstalt für landwirtschaftliche Marktordnung

(Opinion delivered by Mr Advocate General VerLoren van Themaat on 18 March 1982)

1. Agriculture - Common organization of the markets - Milk and milk products - Butter from public stocks - Sale at reduced prices for direct consumption - Article 6 (2) of Regulation No. 349/73 - Application to the sale of concentrated butter

   (Regulation No. 349/73 of the Commission, Art. 6 (2))

2. Agriculture - Common organization of the markets - Milk and milk products - Butter from public stocks - Sale at reduced prices for direct consumption - Contract of sale to be drawn up in writing - Detailed rules - Limits

   (Regulation No. 349/73 of the Commission,Art 6 (2))

1. Since all concentrated butter disposed of under the rules governing the sale thereof at reduced prices introduced by Regulation No. 349/73 must be directly consumed, the conditions laid down in Article 6 (2) of that regulation as regards the resale of butter also apply to the sale of concentrated butter in order to avoid any possibility of the diversion of that concentrated butter from its intended use.

2. In order to satisfy the requirement as to writing laid down in Article 6 (2) of Regulation No. 349/73 only the buyer's undertaking must be made in writing - even if it contains no details as to price or quantity - provided that the written undertaking mentions the penalties for which the buyer is liable if the obligations provided for are not complied with, particularly as regards the final intended use.

   It is sufficient for the requirements of Community law for only the first order to have been made in writing provided that the other subsequent contracts of sale may be presumed to refer to the first order, even if they were made orally, and that it is guaranteed that the penalties may also be imposed in the same of subsequent orders.

   The other conditions of those contracts and their legal effects are governed by national law.

NOTE

The Bundesgerichthof [Federal Finance Court] submitted for a preliminary ruling two questions on the interpretation of Article 6 of Regulation No. 349/73 of the Commission of 31 January 1973 on the sale at reduced prices of intervention butter for direct consumption as concentrated butter.

The Commission adopted the regulation in question in order to dispose of stocks of butter arising as a result of intervention on the butter market under Regulation No. 804/68 of the Council.

To that end it provided an opportunity to sell butter in the form of concentrated butter at a reduced price; this was to be done "at the request of a Member State which considers itself in a position to use it properly", that is to say, to ensure that the concentrated butter was put to its intended use and did not cause disturbances on the market in butter.

In order to ensure that these aims were observed the Commission laid down the following provisions in Article 6 of Regulation No.349/73:

"(1) Any person who holds the butter or the concentrated butter must keep records showing for each delivery the name and address of buyers of the butter or the concentrated butter and the quantities purchased.

(2) Where the butter is resold, the obligation concerning processing, putting up and the final intended use of the butter shall be mentioned in the contract of sale.

Such contract must be made in writing and specify that the buyer is aware of the penalties imposed by the Member State in question, for breaches of the aforesaid obligations".

The Commission authorized the Federal Republic of Germany to sell 4 000 tonnes of concentrated butter at a reduced price and the intervention agency issued orders enjoining purchasers not to sell the concentrated butter save on the basis of a written contract which must contain an undertaking concerning a penalty for non-compliance if the butter was not put to its prescribed use.

That is the framework within which the appellants in the main action purchased a certain quantity of concentrated butter. Some of these purchases were effected without the documents termed "contract of sale and undertaking" being signed whilst the written declaration of sale on the part of the supplier was absent in all cases; certain of the documents stated the quantity purchased but not the price and others failed to indicate either price or quantity but each undertaking contained a clause whereby the purchaser undertook to observe the provisions contained in the orders of the intervention agency on pain of payment of the difference between the intervention price and the selling price fixed by the Commission.

Some of the butter acquired was resold to third parties without the transactions being recorded in writing. These parties put it to a use contrary to the prescribed purpose.

The appellants in the main action, who were ordered to pay a fine, appealed against the fine on a point of law to the Bundesgerichtshof, claiming that they were not bound to pay on the ground that they had not entered into a written contract of sale with their suppliers.

The national court considered that the outcome of the dispute turned on the question whether the undertaking to pay a contractual fine had been given in writing as required and requested the Court of Justice to provide an interpretation of Article 6 (2) of Regulation No.349/73.

In reply the Court gave the following ruling:

"1. Article 6 (2) of Regulation No. 349/73 of the Commission of 31 January 1973 on the sale at reduced prices of intervention butter for direct consumption as concentrated butter for direct consumption (Official Journal No. L 40 p.1) also applies to the resale of concentrated butter.

2 (a) In order to satisfy the requirement of writing laid down in Article 6 (2) of Regulation No. 349/72 only the purchaser's undertaking must be given in writing - even if it contains no details as to price or quantity - provided that the written undertaking mentions the penalties to which the purchaser is liable if the obligations provided for are not observed, particularly as regards final intended use;

(b) It is sufficient for only the first order to be made in writing since the other subsequent contracts of sale are deemed to refer to the first order, even if they were made orally, and it is guaranteed that the penalties may also be imposed in the case of the subsequent orders;

(c) The other conditions of those contracts and their legal effects are governed by national law."

Judgment of 29 April 1982

Case 147/81

Merkur Fleisch-Import GmbH v Hauptzollamt Hamburg-Ericus

(Opinion delivered by Mr Advocate General Capotorti on 11 February 1982)

Agriculture - Common organization of the market - Beef and veal - Frozen meat intended for processing - Importation subject to suspension of the levy - Time-limit for processing - Failure to observe - Forfeiture of security by way of levy - Breach of principle of proportionality - None

(Commission Regulation No. 572/78, Art. 1 (3))

Whilst special arrangements for the importation, subject to suspension of the levy, of certain frozen meat intended for processing is intended to guarantee adequate supplies for the processing industries in the Community, that must bot be at the expense of the fundamental principle of preference for Community-produced meat.

Since the Community market is capable of developing relatively swiftly, Community preference cannot be guaranteed if a time-limit for processing is not prescribed for undertakings qualifying for suspension of the levy on imports. Failure to carry out the processing within the period laid down thus directly jeopardizes the objectives pursued by the system and the penalty attached to it, namely forfeiture of the security by way of levy, is by no means disproportionate.

NOTE

The Finanzgericht [Finance Court] Hamburg submitted for a preliminary ruling a question as to the validity of Article 1 of Commission Regulation No. 572/78 laying down detailed rules for the application of special import arrangements for certain types of frozen beef intended for processing.

The national court decided to request the Court of Justice to give a ruling on the question whether the above-mentioned provision was invalid in so far as it provides that the security lodged by the importer shall be forfeit and retained as levy if the time-limit laid down in that provision for the proper processing of frozen beef is exceeded, or whether, in accordance with the Treaty, the regulation is rather to be interpreted as allowing the security not to be forfeit if the period is exceeded by a very small margin, in this case twelve days.

In its decision to that question the Court ruled that Article 1 (3) of Regulation No. 572/78 is not invalid in providing that the security lodged by the importer must be retained as levy when the period prescribed by that provision for the due processing of the frozen beef is exceeded.

Judgment of 5 May 1982

Case 15/81

Gaston Schul Douane Expéditeur BV v
Inspecteur der Invoerrechten en Accijnzen

(Opinin delivered by Mrs Advocate General Rozès on 16 December 1981)

1. Tax provisions - Harmonization of laws - Turnover tax - Common system of value added tax - Value added tax levied on the importation of products from another Member State supplied by a private person - Nature of internal taxation - Discriminatory character - Conditions

(EEC Treaty, Arts. 12, 13 (2) and 95)

2. Tax provisions - Harmonization of laws - Value added tax - Common system of value added tax - Value added tax levied on the importation of products from another Member State supplied by a private person - Compatibility with the Treaty - Conditions

(EEC Treaty, Art. 95; Council Directive No. 77/388, Art. 2, point 2)

3. Tax provisions - Internal taxation - Discrimination - Prohibition - Value added tax levied on the importation of products from another Member State supplied by a private person - Unlawfulness - Criteria

(EEC Treaty, Art. 95)

1. Value added tax which a Member State levies on the importation of products from another Member State supplied by a private person where no such tax is levied on the supply of similar products by a private person within the territory of the Member State of importation does not constitute a charge having an effect equivalent to a customs duty on imports within the meaning of Articles 12 and 13 (2) of the Treaty but must be considered as an integral part of a general system of internal taxation and its compatibility with Community law must be considered in the context of Article 95. Value added tax

constitutes internal taxation in excess of that imposed on similar domestic products within the meaning of Article 95 of the Treaty to the extent to which the residual part of the value added tax paid in the Member State of exportation which is still contained in the value of the product on importation is not taken into account. The burden of proving facts which justify the taking into account of the tax falls on the importer.

2. Article 2, point 2, of the Sixth Council Directive No. 77/388, according to which "the importation of goods" is to be subject to value added tax, is compatible with the Treaty and therefore valid since it must be interpreted as not constituting an obstacle to the obligation under Article 95 of the Treaty to take into account, for the purpose of applying value added tax on the importation of products from another Member State supplied by a private person where no such tax is levied on the supply of similar products by a private person within the territory of the Member State of importation, the residual part of the value added tax paid in the Member State of exportation and still contained in the value of the product when it is imported.

3. Article 95 of the Treaty prohibits Member States from imposing value added tax on the importation of products from another Member State supplied by a private person where no such tax is levied on the supply of similar products by a private person within the territory of the Member State of importation, to the extent to which the residual part of the value added tax paid in the Member State of exportation and still contained in the value of the product when it is imported is not taken into account.

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NOTE

The limited liability company Gaston Schul, customs forwarding agents, imported a second-hand pleasure and sports boat on the instructions and on behalf of a private person resident in the Netherlands who had bought it in France from a private person.

The Netherlands revenue authority thereupon levied value added tax at the rate of 18% on the sale price which was the normal rate applicable within the country on the delivery of goods for valuable consideration. The main action is concerned with the levying of that tax.

The Netherlands authorities relied on the Netherlands law of 1968 which provides that turnover tax applies on the one hand to goods delivered and services rendered within the country by traders in the course of their business and on the other hand to imports of goods.

The company Gaston Schul brought the matter before the Gerechtshof, 's-Hertogenbosch. It claimed that the tax was contrary to the provisions of the EEC Treaty and in particular to Articles 12 and 13 on the one hand and Article 19 on the other.

The case led the national court to put to the Court of Justice a number of questions inquiring basically whether it was compatible with the provisions of the Treaty and in particular Articles 12, 13 and 95, for a Member State to levy, pursuant to Community directives, turnover tax in the form of value added tax on imports of products from another Member State delivered by a non-taxable person (hereinafter referred to as "a private person").

The plaintiff in the main action alleges that the tax is incompatible with the Treaty because similar deliveries within a Member State by a private person are not subject to value added tax. It maintains further that the levying of value added tax on the importation of products from another Member State delivered by a private person gives rise to aggregation of tax since in contrast to deliveries made by persons liable there is no exemption from value added tax levied in the exporting Member State. In consequence value added tax levied on the importation of such products must be regarded as a charge having an effect equivalent to a customs duty or as discriminatory internal taxation.

The common system of value added tax

The principle of the common system is to levy on goods and services up to and including the retail stage a general consumer tax exactly proportional to the price of the goods and services whatever the number of transactions which have taken place in the process of production and distribution prior to the stage of levy. Nevertheless value added tax is chargeable on each transaction only after deducting the amount of value added tax which has been payable directly on the cost of the various items making up the price. The mechanism of deduction is such that only those liable are allowed to deduct from the value added tax for which they are liable previously charged on the goods.

The following are liable to value added tax: "The supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such" and "the importation of goods".

"Taxable person" means any person who independently carries out in any place any economic activity, namely that of producer, trader and person supplying services.

It is right to stress that the directives bring about only a partial harmonization of the system of value added tax. At the present stage of Community law Member States are free to fix the rate of value added tax, it nevertheless being understood that the rate applicable to the importation of goods must be that applicable within the country on the delivery of similar goods.

The event giving rise to the tax is the delivery of goods for valuable consideration by a taxable person acting as such whereas as regards imports the event giving rise to the tax is the sole entry of goods into a Member State whether or not there is a transaction, whether the transaction is for valuable consideration or free of charge and whether by a taxable person or a private person.

Although deliveries for export themselves are exempt from value added tax whether made by taxable persons or private persons, only taxable persons are authorized to make deduction. From that follows that goods delivered for export by private persons or on their behalf remain liable to value added tax proportional to their value at the time of export.

Since all imports are subject to value added tax in the importing country there is in such case aggregation of taxes both in the exporting and importing States.

First question: The interpretation of Articles 12 and 13 of the Treaty

The national court asks in substance whether the levying of value added tax on the importation of products from another Member State delivered by a private person is compatible with Articles 12 and 13 of the Treaty when no such tax is levied on the delivery of similar products by a private person within the importing Member State.

The essential characteristic of a charge having an effect equivalent to a customs duty distinguishing it from internal taxation is that the first is payable solely on imported products as such whereas the second is payable both on imported products and domestic products.

A tax of the kind referred to by the national court does not have the characteristics of a charge having effect equivalent to a customs duty on imports within the meaning of the Treaty. Such a tax is part of the common system of value added tax the main structure and terms of which were adopted by Council directives on harmonization. They established a uniform revenue procedure systematically covering according to objective criteria both transactions made within Member States and import transactions.

The tax in question must therefore be regarded as an integral part of the general system of internal taxation within the meaning of Article 95 of the Treaty and judged in that light.

The Court held in answer to the first question that:

"Value added tax which a Member State levies on the importation of products from another Member State delivered by private person where no such tax is payable on the delivery of similar products by a private person within the importing Member States does not constitute a charge having an effect equivalent to a customs duty on import within the meaning of Articles 12 and 13(2) of the Treaty".

Second question: The interpretation of Article 95 of the Treaty

The national court asks in substance whether the levying of value added tax on the importation of products from another Member State delivered by a private person is compatible with Article 95 of the Treaty where no such tax is payable on the delivery of similar products by a private person within the importing Member State.

The plaintiff in the main action considers that such difference in treatment is contrary to Article 95 since on the one hand it prejudices the delivery of products between private persons resident in different Member States in relation to that by private persons resident in the importing Member State and on the other hand it gives rise to aggregation of tax as regards products delivered by private persons across the frontier.

The Member States, Council and Commission contend that the elimination of aggregation of taxation within the Community, however desirable it may be, can be achieved only by means of progressive harmonization of the national taxation systems pursuant to Article 99 or 100 of the Treaty and not by applying Article 95.

The aim of Article 95 of the Treaty is to ensure free movement of goods within the Community under normal conditions of competition by eliminating all form of protection which may arise from the application of discriminatory internal taxation against products from other Member States.

Article 95 does not prevent value added tax from being chargeable on an imported product where the delivery of a similar product within the country is also liable.

It is necessary to consider whether the importation of a product may be liable to value added tax when the delivery of a similar product within the country, in the present case delivery by a private person, is not so liable.

The Member States, the Council and the Commission maintain that value added tax may be chargeable upon imports provided that the rate of the value added tax, its basis and terms of levy are the same as those for the delivery of a similar product by a taxable person within that Member State.

The plaintiff in the main action alleges that there is breach of the principle of equal treatment since the products imported by private persons are already burdened with value added tax in the exporting Member State and there is no refund on export.

It may be observed that at the present stage of Community law Member States are free pursuant to Article 95 to charge the same duty on imports as the value added tax which they charge on similar domestic products. Nevertheless, such tax is justified only in so far as the imported products are not already burdened with value added tax in the exporting Member State since otherwise the tax on import would in fact be an additional charge burdening imported products more heavily than domestic products.

That interpretation accords with the need to take account of the objectives of the Treaty including primarily the establishment of a common market, that is to say the elimination of all obstacles to intra-community trade in order to fuse the national markets into a single market. Apart from trade circles, private persons who are likely to engage in business transations across national frontiers must also be able to enjoy the benefits of that market.

Consequently, it is necessary also to take into account value added tax levied in the exporting Member State in considering the compatibility with the requirements of Article 95 of a charge to value added tax on products from another Member State delivered by private persons where the delivery of similar products within the importing Member State is not so liable.

Therefore in so far as the imported product delivered by a private person may not lawfully benefit from a refund on export and so remains burdened on import with part of the value added tax paid in the exporting Member State, the amount of value added tax payable on import must be reduced by the residual part of the value added tax of the exporting Member State which is still contained in the value of the product on import.

The Member States objected that the value added tax paid in the exporting Member State is difficult to check.

With regard to that it must be pointed out that it is for the person who seeks exemption from or a reduction in the value added tax usually payable on import to establish that he satisfies the conditions for such exemption or reduction.

The Court ruled with regard to the second question that:

"Value added tax which a Member State levies on the importation of products from another Member State delivered by a private person where no such tax is levied on the delivery of similar products by a private person within the importing Member State constitutes internal taxation in excess of that imposed on similar domestic products within the meaning of Article 95 of the Treaty to the extent to which the residual part of the value added tax paid in the exporting Member State incorporated into the value of the product on importation is not taken into account. The burden of proving facts justifying the taking into account of the tax is on the importer".

Third question: The validity of Article 2, point 2, of the Sixth Directive

The third question concerns the validity of Article 2, point 2, of the Sixth Directive in so far as it imposes value added tax on products imported from another Member State and delivered by a private person.

The requirements of Article 95 of the Treaty are mandatory but nevertheless in a general way they do not prohibit the levying of value added tax on imported products even though the delivery of similar domestic products within the importing Member State is not so subject but it simply requires that the part of the value added tax paid in the exporting Member State and still burdening the product on import should be taken into account.

On the third issue the Court rules:

"Article 2, point 2, of the Sixth Council Directive No. 77/388 of 17 May 1977 is compatible with the Treaty and therefore valid since it must be interpreted as providing no obstacle to the obligation under Article 95 of the Treaty to take into account, for the application of value added tax on the importation of products from another Member State delivered by a private person where no such tax is levied on the delivery of similar products by a private person within the importing Member State, the residual part of the value added tax paid in the exporting Member State and incorporated into the value of the product on import."

Fourth question: The direct effect of Article 95 of the Treaty

The national court is basically inquiring whether Article 95 of the Treaty has direct effect and if so the consequences thereof on national laws and their terms of application.

On this last question the Court ruled:

"Article 94 of the Treaty prohibits Member States from imposing value added tax on imports of products from other Member States delivered by a private person where no such tax is levied on the delivery of similar products by a private person within the importing Member State to the extent to which the residual part of the value added tax paid in the exporting Member State and incorporated into the value of the product on import is not taken into account."

Judgment of 6 May 1982

Case 54/81

Firma Wilhelm Fromme v
Bundesanstalt für landwirtschaftliche Marktordnung

(Opinion delivered by Mr Advocate General VerLoren van Themaat on 21 January 1982)

1. European Communities - Own resources - Sums wrongly paid - Recovery - Application of national law - Conditions and limits

2. Agriculture - Common organization of the markets - Cereals - Denaturing premiums wrongly paid - Recovery - Interest - Application of national law - Conditions

1. In so far as Community law has not provided otherwise actions for the recovery of sums which have been wrongly paid under Community law must be decided by national courts. In particular, it is for the national authorities to settle all ancillary questions relating to such recovery, such as the question of payment of interest.

However, the application of national law must not adversely affect the scope or impair the effectiveness of Community law by making the recovery of sums wrongly paid impossible in practice. Nor may it make the recovery of such sums subject to conditions or detailed rules less favourable than those which apply to similar procedures governed by national law alone. In such matters the national authorities must proceed with the same care as they exercise in implementing corresponding national laws so as not to impair, in any way, the effectiveness of Community law.

2. It is compatible with Community law in its present state for a Member State to charge, in accordance with the rules of its own national law, interest on wrongly-paid Community denaturing premiums provided that those rules do not give rise to any difference in treatment which is not objectively justified between traders receiving such premiums and those who, as the case may be, obtain similar benefits of a purely national nature.

NOTE

The Verwaltungsgericht [Administrative Court] Frankfurt am Main referred to the Court a series of questions for a preliminary ruling on the interpretation of various provisions of the Treaty, certain principles of Community law and also of Article 8 of Regulation No. 729/70 of the Council on the financing of the Common Agricultural Policy, in order to enable that court to rule on the compatibility with those provisions of the order of the Federal Minister for Food, Agriculture and Forestry concerning premiums for the denaturing of cereals.

Those questions were posed in the context of a dispute between Fromme, a German dealer in agricultural products, and the Bundesanstalt für Landwirtschaftliche Marktordnung [Federal Office for the Organization of Agricultural Markets], (hereinafter referred to as "the Federal Office"), which claimed from the former repayment of the premiums for the denaturing of common wheat, provided for by Regulation No. 172/67 of the Council, which it is agreed were paid,though not due.

By separate decisions, in application of the above-mentioned orders, the Federal Office reclaimed from Fromme interest calculated from the day when the premiums were paid to the day of repayment at a rate 3% over the discount rate of the German Federal Bank and not less than 6.5%.

That dispute caused the national court to refer to the Court for a preliminary ruling the following questions:

"(1) Is it compatible with the Treaty establishing the European Economic Community for the Federal Republic of Germany to charge on undue payments of denaturing premiums interest calculated from the day of payment of 3% above the prevailing discount rate of the German Federal Bank but at any rate not less than 6.5%, without being authorized to do so by any provision of Community law?

(2) If the answer to the foregoing is in the negative:

Does Article 8 (1) of Regulation (EEC) No. 729/70 of the Council of 21 April 1970 on the financing of the Common Agricultural Policy (Official Journal, English Special Edition 1970 (I), p.218) confer any authority entitling the Federal Republic to charge interest of the kind mentioned in Question (a)?

(3) If the answer to the foregoing is in the negative:

Is there any other provision or general principle of Community law from which such authority may be deduced?"

It should be remembered that, although the Court deplores the inequalities in treatment between traders in different Member States that such a solution may involve, it has repeatedly held that disputes concerning the recovery of amounts improperly paid under Community law must be determined by the national courts in application of their national law, in so far as there are no provisions of Community law on the subject. However, the application of national law must not affect the scope or the efficacy of Community law by making it impossible in practice to recover payments unduly made.

It must not subject that recovery to conditions or procedures less favourable than those applicable to similar procedures of a purely national character, and the national authorities must act in the matter with the same care as that which they exercise in the implementation of corresponding national law, so as to avoid any damage to the efficacy of Community law.

The Court replied to the questions posed by ruling that:

"In the present state of Community law it is compatible with that law for a Member State to charge interest pursuant to the rules of its own national law on undue payments of Community denaturing premiums provided that those rules do not give rise to any difference in treatment which is not objectively justified between traders receiving such premiums and those who, in certain circumstances, receive similar advantages of a purely national nature."

Judgment of 6 May 1982

Case 126/81

Wünsche Handelsgesellschaft v Federal Republic of Germany

(Opinion delivered by Mrs Advocate General Rozès on 25 March 1982)

Agriculture - Common organization of the markets - Products processed from fruit and vegetables - Protective measures applicable to imports of preserved mushrooms - Commission's discretion - Regulations Nos. 1412/76 and 2284/76 - Validity
(Commission Regulations Nos. 1412/76 and 2284/76)

In view of the situation on the market in question, it cannot be denied that the Commission kept within the limits of its discretion in considering, when it adopted Regulations Nos. 1412/76 and 2284/76 laying down detailed rules for applying protective measures applicable to imports of preserved mushrooms, that the protective measures introduced in 1974 should not be abolished.

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NOTE

The Bundesverwaltungsgericht referred a question to the Court for a preliminary ruling on the validity of Regulation No. 2107/74 of the Commission laying down protective measures applicable to imports of preserved mushrooms and Commission Regulations Nos. 1412/76 and 2284/76 fixing for purposes of the application of the system of import licences for preserved mushrooms the percentage applicable to the reference quantity for the third and fourth quarters of 1976 respectively.

In the recitals to Regulation No. 2107/74 the Commission stated that imports of preserved mushrooms into the Community in 1973 and 1974 were considerably higher than the figure for previous years and the offer prices in third countries were some 20 to 30% below the cost price of the Community industry and stocks of preserved mushrooms manufactured in the Community were considerably higher than those of previous years.

In July 1976 the plaintiff in the main action asked the German authorities for a licence to import 1 000 tonnes of preserved mushrooms from Taiwan. The authorities refused the application in reliance on the quota system established by the Commission and the company brought an action claiming that there was no justification for maintaining that system beyond 1 July 1976.

The case led the national court to put the following question to the Court:

"Did Regulation (EEC) No. 2107/74 of the Commission of 8 August 1974 laying down protective measures applicable to imports of preserved mushrooms (Official Journal 1974 No. L 218, p. 54) infringe the combined provisions of Article 7(1) of Regulation (EEC) No. 1927/75 of the Council of 22 July 1975 concerning the system of trade with third countries in the market in products processed from fruit and vegetables (Official Journal 1975 No. L 198, p. 7) and Article 2(2) of Regulation (EEC) No. 1928/75 of the Council of 22 July 1975 laying down detailed rules for applying protective measures in the market in products processed from fruit and vegetables (Official Journal 1975 No. L 198, p.11) in so far as it was retained in force after 30 June 1976?"

Consideration of the German market in preserved mushrooms and price trends during the period when the regulations in question were adopted showed that the Commission kept within the limits of its discretion in considering, when adopting the contested regulations, that the market situation did not yet allow the protective measures introduced in 1974 to be abolished.

In consequence the Court held:

"Consideration of Commission Regulations No. 1412/76 of 18 June 1976 and No. 2284/76 of 21 September 1976 has disclosed no factor of such a nature as to affect their validity."

Judgment of 6 May 1982

Joined Cases 146, 192 and 193/81

BayWa AG and Others v
Bundesanstalt für landwirtschaftliche Marktordnung

(Opinion delivered by Mr Advocate General Capotorti on 18 March 1982)

1. Agriculture - Common organization of markets - Cereals - Premium for the denaturing of cereals of bread-making quality - Conditions governing the grant - Methods of denaturing - Strict compliance with the rules laid down

   (Regulation No. 172/67 of the Council, Art. 4 (2); Regulation (EEC) No. 1403/69 of the Commission, Annex I)

2. Agriculture - Common organization of markets - Cereals - Premium for the denaturing of cereals of bread-making quality - Denaturing operations - Detailed rules for supervision - Discretion of the national authorities

   (Regulation No. 172/67 of the Council, Art. 7; Regulation (EEC) No. 1403/69 of the Commission, Art. 4 (3))

3. Measures adopted by the institutions - Regulations - Implementation by Member States - Formal and procedural rules of national law - Conditions governing application

4. Agriculture - Common Agricultural Policy - Financing by EAGGF - Duty of Member States to recover sums unduly and irregularly granted - Discretion - Absence - Equal treatment of undertakings - Uniform application of Community law

   (Regulation No. 729/70 of the Council, Art. 8 (1))

1. In the case of denaturing by colouring only the standard method defined by Annex I to Regulation No. 1403/69 may be used. A denaturing premium granted on the basis of Article 4 (2) of Regulation No. 172/67 must be regarded as wrongly paid if the rules for the use of that method have not been complied with.

   In the case of denaturing by methods other than the colouring method which may be prescribed by national law, the rules governing those methods must be complied with in full if the denaturing operation is to confer entitlement to the premium.

2. Community law in its present state does not restrict to a specific method the supervision, by the competent authorities of the Member States, of the regularity of denaturing operations conferring entitlement to payment of the premium. Supervision may inter alia take the form of an audit of the accounting records. It is for the competent national authorities to determine, subject to review by the national courts, what probative value it is appropriate to attribute to the results of the various types of supervision to which denaturing operations are subject.

3. Where the implementation of a Community regulation is a matter for the national authorities subject to review by the national courts, implementation must comply with the procedural and formal rules prescribed by the national law of the Member State concerned. However, recourse to rules of national law is possible only in so far as it is necessary for the implementation of provisions of Community law and in so far as the application of those rules of national law does not jeopardize the scope and effectiveness of that Community law.

4. Article 8 (1) of Regulation No. 729/70 concerning the recovery by the Member States of sums lost as a result of irregularities, expressly requires the national authorities responsible for operating Community machinery for agricultural intervention to recover sums unduly or irregularly paid; and such authorities, acting on behalf of the Community, may not, on such occasions, exercise a discretion as to the expediency of demanding repayment of Community funds unduly or irregularly granted. The opposite interpretation would lead to an erosion both of the principle of equal treatment between undertakings from different Member States and of the application of Community law which must, so far as possible, remain uniform throughout the Community.

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NOTE

The Verwaltungsgericht [Administrative Court] Frankfurt am Main submitted for a preliminary ruling three questions on the interpretation of provisions of Regulation No. 172/67/EEC of the Council on general rules governing the denaturing of wheat and rye of bread-making quality, Annex I to Regulation No. 1403/69 of the Commision laying down detailed rules for the application of the provisions concerning denaturing of common wheat and rye of bread-making quality and certain provisions of Regulation No. 729/70 of the Council on the financing of the Common Agricultural Policy, in the framework of actions brought challenging decisions taken by the Bundesanstalt für Landwirtschaftliche Marktordnung [Federal Office for the Organization of Agricultural Markets], (hereinafter referred to as "the Federal Office"), requiring the repayment of denaturing premiums unlawfully granted.

Between 1969 and 1974, the plaintiffs in the main proceedings, four agricultural co-operatives in the Federal Republic of Germany, carried out or arranged to be carried out denaturing operations on cereals of bread-making quality as provided by Regulations No. 172/67 and No. 1403/69, in respect of all or part of which inspectors of the Federal Office were present. Those inspectors' reports did not contain any complaints. However, following accounting audits the Federal Office took the view that the denaturing operations had not been carried out in accordance with the compulsory rules which it considered to be applicable. It ordered the repayment of the denaturing premiums granted.

The first question

The first question seeks a ruling by the Court as to whether a premium on the denaturing of cereals has been allocated unlawfully when the wheat and rye denatured can still be used for human consumption or when the rules of the standard method laid down in Annex I to Regulation No. 1403/69 have not been adhered to.

The plaintiffs in the main action contend that, if the standard method may not have been strictly complied with in the course of the denaturing operations carried out on their behalf, the object set out in the Community rules, that is to say the denaturing and withdrawal of denatured cereals from the market for human consumption, was attained. Thus their behaviour is free from any intent to defraud. In their view, strict compliance with the standard method does not constitute a pre-condition of the right to the premium.

The Commission and the Federal Republic of Germany, on the other hand, contend that it follows from the provisions of Regulations No. 172/67 and No. 1403/69, and from the requirement that Community law should be applied uniformly, that compliance with the Community standard method, or with the methods which may be substituted therefor by national law under the conditions laid down by Regulatin No. 172/67, is compulsory.

It results from the very wording of Regulation No. 1403/69 that in the case of denaturing by colouring only the method defined by Community law may be used. Those provisions are mandatory in nature. That is moreover in accordance with the principles set out on several occasions in the judgments of the Court whereby the provisions of Community law and in particular those of regulations of the Council or the Commission which contain a right to payments financed by Community funds must be interpreted strictly.

The Court replied to that first question by ruling that:

"A denaturing premium granted on the basis of Article 4 (2) of Regulation No. 172/67 must, when the standard method laid down in Annex I to Regulation No. 1403/69 of the Commission is chosen, be regarded as unlawfully allocated when the rules relating to that method have not been complied with."

The second question

The national court asks the Court whether those provisions authorize the withdrawal of the denaturing premium as a result of audits subsequent to the denaturing operations, and, if they do, how important those checks are in relation to the exercise of the supervision provided for in the relevant provisions of Regulations Nos. 172/67 and 1403/69.

The plaintiffs in the main action argue that an ex post facto check, carried out in application of the provisions of national law, cannot have the same significance as the control on the spot by the officers of the Federal Office which is, in their opinion, that provided for by Community law. They take the view that the evidential value of a control on the spot is greater than that of an abstract control subsequent to the denaturing operations.

The Commission and the Federal Republic of Germany, on the other hand, argue that Article 8 of Regulation No. 729/70 of the Council enables the Member State to lay down ex post facto checks in addition to the the supervision provided for in Article 4 of Regulation No. 1403/69 and that the national checks are not of less value than the supervision defined by Community law.

As the Court has noted, the Community legislature refrained from enacting provisions regulating the procedure for supervision in detail, leaving to the Member States the power to determine the detailed rules for supervision under their own legal system and on their own responsibility by choosing the most appropriate solution.

In reply, the Court ruled:

"Community law does not at present restrict to a given method the supervision by the competent authorities of the Member States of the regularity of denaturing operations which give rise to the right of the payment of premiums. That supervision may take the form inter alia of an audit. It is for the competent national authorities, subject to review by the national courts, to assess the probative value which should be attributed to the results of the different methods of supervision to which denaturing operations are subject."

The third question

The national court asks the Court whether those provisions require Member States in every case to recover unlawfully granted denaturing premiums or whether Article 8 of Regulation No. 729/70 makes that requirement optional and allows Member States to leave individual cases to the discretion of the competent national authority.

The Court points out that the very wording of Article 8 of Regulation No. 729/70 on the recovery by Member States of sums lost as a result of irregularities expressly obliges the national authorities entrusted with administering the Community agricultural intervention machinery to recover sums unduly or irregularly paid, and those authorities, acting on behalf of the Community, cannot exercise discretion in that regard as to the expediency of recovering the Community funds unduly or irregularly paid. A different interpretation would endanger the equality of treatment between traders in the different Member States and the application of Community law, which must, so far as possible, remain uniform in the whole of the Community.

In reply, the Court ruled:

"Article 8 (1) of Regulation No. 729/70 of the Council does not simply enable but requires Member States to recover Community denaturing premiums unduly or irregularly granted and does not make it possible to leave individual cases of recovery to the discretion of the competent national authorities."

Judgment of 18 May 1982

Case 155/79

AM & S Europe Ltd. v Commission of the European Communities

(Opinion delivered by Advocate General Sir Gordon Slynn on 26 January 1982)

1. Competition - Administrative procedure - Commission's investigatory powers - Power to require production of business records - Concept of "business records" - Communications between lawyer and client - Inclusion - Conditions

   (Regulation No. 17 of the Council, Art. 14)

2. Competition - Administrative procedure - Commission's investigatory powers - Power to demand production of the documents whose disclosure it considers necessary - Power to decide whether or not a document must be produced

   (Regulation No. 17 of the Council, Art. 14)

3. Competition - Administrative procedure - Commission's investigatory powers - Power to demand production of communications between lawyer and client - Limits - Protection of the confidentiality of such communications

   (Regulation No. 17 of the Council, Art. 14)

4. Competition - Administrative procedure - Commission's investigatory powers - Refusal of the undertaking to produce communications with its lawyer on the ground of confidentiality - Powers of the Commission

   (Regulation No.17. of the Council, Art. 14)

1. Article 14 (1) of Regulation No. 17 empowers the Commission when investigating an undertaking to require production of "business records", that is to say, documents concerning the market activities of the undertaking, in particular as regards compliance with those rules. Written communications between lawyer and client fall, in so far as they have a bearing on such activities, within that category of documents.

2. Since by virtue of Article 14 (1) of Regulation No. 17 the Commission may demand production of the documents whose disclosure it considers "necessary" in order that it may bring to light an infringement of the Treaty rules on competition, it is in principle for the Commission itself, and not the undertaking concerned or a third party, to decide whether or not a document must be produced to it.

3. The national laws of the Member States protect, in similar circumstances, the confidentiality of written communications between lawyer and client provided that, on the one hand, such communications are made for the purposes and in the interests of the client's rights of defence and, on the other hand, they emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment. Viewed in that context Regulation No. 17 must be interpreted as protecting, in its turn, the confidentiality of written communications between lawyer and client subject to those two conditions, and thus incorporating such elements of that protection as are common to the laws of the Member States. Such protection must, if it is to be effective, be recognized as covering all written communications exchanged after the initiation of the administrative procedure under Regulation No. 17 which may lead to a decision on the application of Articles 85 and 86 of the Treaty or to a decision imposing a pecuniary sanction on the undertaking. It must also be possible to extend it to earlier written communications which have a relationship to the subject-matter of that procedure. The protection thus afforded must apply without distinction to any lawyer entitled to practise his profession in one of the Member States, regardless of the Member State in which the client lives.

However, the principle of confidentiality does not prevent a lawyer's client from disclosing the written communications between them if he considers that it is in his interests to do so.

4. Since disputes concerning the application of the protection of the confidentiality of written communications between lawyer and client affect the conditions under which the Commission may act in a field as vital to the functioning of the Common Market as that of compliance with the rules on competition, their solution may be sought only at Community level. If, therefore, an undertaking which is the subject of an investigation under Article 14 of Regulation No. 17 refuses, on the ground that it is entitled to protection of the confidentiality of information, to produce, among the business records demanded by the Commission, written communications between itself and its lawyer, and the Commission is not satisfied that proof of the confidential nature of the documents has been supplied, it is for the Commission to order, pursuant to Article 14 (3) of the above-mentioned regulation, production of the communications in question and, if necessary, to impose on the undertaking fines or periodic penalty payments under that regulation as a penalty for the undertaking's refusal either to supply such additional evidence as the Commission considers necessary or to produce the communications in question whose confidentiality, in the Commission's view, is not protected by law.

NOTE

The company Australian Mining & Smelting Europe Limited instituted proceedings to have Article 1(b) of an individual decision notified to it, namely Commission Decision No. 79/760/EEC of 6 July 1979, declared void. That provision required the applicant to produce for examination by officers of the Commission charged with carrying out an investigation all documents for which legal privilege was claimed, as listed in the appendix to AM & S Europe's letter of 25 March 1979 to the Commission.

The application is based on the submission that in all the Member States written communications between lawyer and client are protected by virtue of a general principle common to all those States. It follows from that principle which also applies in Commumity law that the Commission may not when undertaking an investigation in relation to competition claim production, at least in their entirety, of written communications between lawyer and client if the undertaking claims protection and shows that its claim to legal privilege is well founded.

The applicant concedes that the Commission has a prima facie right to see documents in the possession of an undertaking and that by virtue of that right it is still the Commission that takes the decision whether the documents are protected or not, but on the basis of a description of the documents and not on the basis of an examination of the whole of such documents by its inspectors.

The contested decision, based on the principle that it is for the Commission to determine whether a given document should be used or not, requires AM & S Europe to allow the Commission's authorized inspectors to examine the documents in question in their entirety. Claiming that those documents satisfy the conditions for legal protection the applicant requested the Court to delcare Article 1(b) of the above-mentioned decision void.

The United Kingdom maintains that the principle of legal protection of written communications between lawyer and client is recognized as such in the various countries of the Community, even though there is no single, harmonized concept the boundaries of which do not vary.

The view taken by the Consultative Committee of the Bar and the Law Societies of the European Community is that a right of confidential communication between lawyer and client (in both directions) is recognized as a fundamental, constitutional or human right, accessory or complementary to other such rights which are expressly recognized and applied as part of the Community law.

To all those arguments the Commission replies that even if there exists in Community law a general principle protecting confidential communications between lawyer and client, the extent of such protection is not to be defined in general and abstract terms, but must be established in the light of the special features of the relevant Community rules, having regard to their wording and structure, and to the needs which they are designed to serve.

The Commission concludes that, on a correct construction of Article 14 of Regulation No. 17, the principle on which the applicant relies cannot apply to documents the production of which is required in the course of an investigation which has been ordered under that article, including written communications between the undertaking concerned and its lawyers.

The applicant's argument is, the Commission maintains, all the more unacceptable inasmuch as in practical terms it offers no effective means whereby the inspectors may be assured of the true content and nature of the contested documents.

The Government of the French Republic supports the conclusions of the Commission and observes that as yet Community law does not contain any provisions for the protection of documents exchanged between a legal adviser and his client. Therefore, it concludes, the Commission must be allowed to exercise its powers under Article 14 of Regulation No. 17 without having to encounter the objection that certain documents are confidential.

It is apparent from the application, as well as from the legal basis of the contested decision, that the dispute in this case is essentially concerned with the interpretation of Article 14 of Regulation No. 17 of the Council of 6 February 1962 for the purpose of determining what limits, if any, are imposed upon the Commission's exercise of its powers of investigation.

(a) The interpretation of Article 14 of Regulation No. 17

The purpose of Regulation No. 17 of the Council is to ensure compliance with the prohibitions laid down in Article 85(1) and in Article 86 of the Treaty and to lay down detailed rules for the application of Article 85(3). it confers on the Commission wide powers of investigation and of obtaining information "as are necessary".

Article 14(1) empowers the Commission to require production of business records, that is to say, documents concerning the market activities of the undertaking, in particular as regards compliance with those rules.

Written communications between lawyer and client, fall, in so far as they have a bearing on such activities, within the category of documents referred to in Articles 11 and 14.

The Commission may require documents whose disclosure it considers "necessary" from which it follows that in principle it is for the Commission itself and not the undertaking to decide whether or not any document must be produced to it.

(b) Applicability of the protection of confidentiality in Community law

However, the above rules do not exclude the possibility of recognizing that certain business records are of a confidential nature. Community law must take into account the principles and concepts common to the laws of those States concerning the observance of confidentiality, in particular, as regards certain communications between lawyer and client.

As far as the protection of written communications between lawyer and client is concerned, all Member States recognize the principle but vary the scope and the criteria for its application. In some of the Member States the protection against disclosure afforded to written communications between lawyer and client is based principally on a recognition of the very nature of the legal profession, inasmuch as it contributes towards the maintenance of the rule of law. In other Member States the same protection is justified by the more specific requirements that the rights of the defence must be respected.

The Member States have however one criterion in common to the effect that confidentiality is protected provided that it relates to correspondence from an independent lawyer, that it is to say one not bound to the client by a relationship of employment.

Viewed in that context Regulation No. 17 must be interpreted as protecting, in its turn, the confidentiality of written communications between lawyer and client subject to those two conditions, and thus incorporating such elements of that protection as are common to the laws of the Member States.

Regulation No. 17 (the eleventh recital and Article 19) itself is concerned to ensure that the rights of the defence may be exercised to the full and the protection of the confidentiality of written communications between lawyer and client is an essential corollary to those rights. Such protection must, if it is to be effective, be recognized as covering all written communications exchanged after the initiation of the administrative procedure and extending to earlier written communications which have a relationship to the subject-matter of that procedure.

It should be stated that the requirement as to the position and status as an independent lawyer is based on a conception of the lawyer's rôle as collaborating in the administration of justice. The counterpart of that protection lies in the rules of professional ethics and discipline which are laid down and enforced in the general interest by institutions endowed with the requisite powers for that purpose.

Having regard to the principles of the Treaty concerning freedom of establishment and the freedom to provide services the protection thus afforded by Community law must apply without distinction to any lawyer entitled to practise his profession in one of the Member States, regardless of the Member State in which the client lives. In view of all these factors it must therefore be concluded that although Regulation No. 17, and in particular Article 14 thereof, empowers the Commission to require, in the course of an investigation within the meaning of that Article, production of the business documents, the disclosure of which it considers necessary, including written communications between lawyer and client, for proceedings in respect of any infringement of Articles 85 and 86 of the Treaty, that power is, however, subject to a restriction imposed by the need to protect confidentiality, on the conditions defined above and provided that the communications in question are exchanged between an independent lawyer, that is to say one who is not bound to his client by a relationship of employment, and his client.

(c) The procedures relating to the application of the principle of confidentiality

If an undertaking refuses, on the ground that it is entitled to protection of the confidentiality of information, to produce, among the business records demanded by the Commission, written communications between itself and its lawyer, it must nevertheless provide the Commission's authorized agents with relevant material of such a nature as to demonstrate that communications fulfil the conditions for being granted legal protection, although it is not bound to reveal the contents of the communications.

Where the Commission is not satisfied that such evidence has been supplied, the appraisal of those conditions is not a matter which may be left to an arbitrator or to a national authority. The solution must be sought at a Community level. It is for the Commission to order production of the communications in question. Although by virtue of Article 185 of the EEC Treaty any action brought by the undertaking concerned against such decisions does not have suspensory effect, its interests are safeguarded by the possibility which exists under Article 185 and 186 of the Treaty, as well as under Article 83 of the Rules of Procedure of the Court, of obtaining an order suspending the application of the decision which has been taken, or any other interim measure.

(d) The confidential nature of the documents at issue

It is apparent from the documents which the applicant lodged at the Court that almost all the communications which they include were made or are connected with legal opinions which were given towards the end of 1972 and during the first half of 1973.

The communications were drawn up when the United Kingdom joined the Community and are principally concerned with how far it might be possible to avoid conflict between the applicant and the Community authorities over application of the Community rules on competition.

In so far as the written communications emanate from an independent lawyer entitled to practise his profession in a Member State they must be considered as confidential and on that ground beyond the Commission's power of investigation under Article 14 of Regulation No. 17.

The Court in its judgment:

"1. Declares Article 1(b) of Commission decision No. 76/760 of 6 July 1979 void inasmuch as it requires the applicant to produce the documents which are mentioned in the appendix to the letter from the applicant to the Commission of 26 March 1979 and listed in the schedule of documents lodged at the Court on 9 March 1981 under Nos. 1(a) and (b), 4(a) to (f), 5 and 7;

2. For the rest, dismisses the application."

Judgment of 18 May 1982

Joined Cases 115 and 116/81

Rezguia Adoui v (1) Belgian State (2) City of Liège
Dominique Cornuaille v Belgian State

(Opinion delivered by Mr Advocate General Capotorti on 16 February 1982)

1. Free movement of persons - Derogations - Grounds of public policy - Concept - Sufficiently serious misconduct - Criteria

   (EEC Treaty, Art. 48(3) and Art. 56(1))

2. Free movement of persons - Derogations - Grounds of public policy - Measures not justified by the individual case - Not permissible

   (Council Directive No.64/221/EEC, Art. 3(1))

3. Free movement of persons - Derogations - Decisions relating to the control of aliens - Persons in respect of whom an expulsion order has been validly adopted - Fresh application for a residence permit - Host State's obligation to examine such an application - Right of access of the person concerned to the territory of the Member State during the examination of the application - No such right

   (EEC Treaty, Art. 48(3))

4. Free movement of persons - Derogations - Decisions relating to the control of aliens - Expulsion order - Statement of grounds on which it is based - Extent of the obligation

5. Free movement of persons - Derogations - Decisions relating to the control of aliens - Procedure for review and the issue of an opinion by the competent authority - Competent authority - Prescribed condition - Absolutely independent exercise of duties - Court - Authority composed of members of the judiciary - Conditions not necessary

   (Council Directive No.64/221/EEC, Art. 9)

6. Free movement of persons - Derogations - Decisions relating to the control of aliens - Procedure for review and the issue of an opinion by the competent authority - Direct application by the person concerned to the competent authority - Compulsory procedure - Non-existence thereof - Powers of the Member States - Limits

   (Council Directive No.64/221/EEC, Art. 9(2))

7. Free movement of persons - Derogations - Decision relating to the control of aliens - Procedure for review and the issue of an opinion by the competent authority - Application of national rules of procedure - Conditions

1. Reliance by a national authority upon the concept of public policy presupposes the existence of a genuine and sufficiently serious threat affecting one of the fundamental interests of society. Although Community law does not impose upon the Member States a uniform scale of values as regards the assessment of conduct which may be considered contrary to public policy, conduct may not be considered as being of a sufficiently serious nature to justify restrictions on the admission to or residence within the territory of a Member State of a national of another Member State in a case where the former Member State does not adopt, with respect to the same conduct on the part of its own nationals, repressive measures or other genuine and effective measures intended to combat such conduct.

2. By virtue of Article 3(1) of Directive No.64/221, circumstances not related to the specific case may not be relied upon in respect of citizens of Member States of the Community as justification for measures intended to safeguard public policy and public security.

3. Any national of a Member State who wishes to seek employment in another Member State may, even if a decision has been taken ordering his expulsion from the territory of that Member State, re-apply for a residence permit. Such an application, when submitted after a reasonable period has elapsed, must be examined by the competent administrative authority in the host State, which must take into account, in particular, the arguments put forward by the person concerned purporting to establish that there has been a material change in the circumstances which justified the first decision ordering his expulsion. However, where such a decision has been validly adopted in his case in accordance with Community law and continues to be legally effective so as to exclude him from the territory of the State in question, Community law contains no provision conferring upon him a right of entry into that territory during the examination of his further application.

4. The notification of the grounds relied upon to justify an expulsion measure or a refusal to issue a residence permit must be sufficiently detailed and precise to enable the person concerned to defend his interests.

5. As regards the composition of the competent authority provided for in Article 9 of Directive No.64/221, the essential requirement is that it should be clearly established that the authority is to perform its duties in absolute independence and is not to be directly or indirectly subject, in the exercise of its duties, to any control by the authority empowered to take the measures provided for in the directive.

6. Although Article 9(2) of Directive No.64/221 does not prevent the person concerned from making a direct application to the competent authority it does not require such an application and it allows the Member State a choice in that respect, provided that the person concerned is entitled to make such an application if he so requests.

7. The conditions on which the person concerned must be entitled to put forward to the competent authority his arguments in defence and to be assisted or represented in such conditions as to procedure as are provided for by domestic legislation must not be less favourable to him than the conditions applicable to proceedings before other national authorities of the same type.

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NOTE

The President of the Tribunal de Première Instance [Court of First Instance], Liège, in interlocutory proceedings referred to the Court of Justice for a preliminary ruling a number of questions on the interpretation of a number of provisions of the Treaty and of Council Directive No. 64/221 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health.

Those questions arose in the framework of disputes between the Belgian State and the plaintiffs in the main proceedings, of French nationality, on the refusal by the administrative authority to issue a residence permit for Belgian territory, on the ground of the conduct of the persons concerned, which was considered to be contrary to public policy inasmuch as they worked in a bar of questionable moral character.

The Belgian Law of 21 August 1948 repealing the national rules on prostitution prohibits soliciting, incitement to vice, exploitation of prostitution and living on immoral earnings.

I. The concept of public policy

Questions 1 to 9, 11 and 12

The questions in substance concern the problem whether a Member State may, by virtue of the reservations contained in Articles 48 and 56 of the Treaty, expel from its territory a national of another Member State or refuse to permit him to enter the territory by reason of conduct which, when attributable to its own nationals, does not give rise to repressive measures.

Indeed, Belgian law does not prohibit prostitution in itself, but only relates to certain secondary activities which are particularly socially harmful.

The reservations contained in Articles 48 and 56 of the Treaty permit Member States to rely upon public policy in order to take certain measures which they may not apply to their own nationals, inasmuch as they do not have the power to expel them from the national territory or to refuse them entry.

However, in a Member State, the authority competent to take those measures may not base the exercise of its powers on assessment of certain conduct which would result in an arbitrary distinction being made to the detriment of nationals of other Member States.

In answer to that series of questions, the Court ruled that:

"A Member State may not, by virtue of the reservation relating to public policy contained in Articles 48 and 56 of the Treaty, expel a national of another Member State from its territory or refuse him entry to its territory by reason of conduct which, when attributable to the former State's own nationals, does not give rise to repressive measures or other genuine and effective measures intended to combat such conduct."

The tenth question

The national court asks whether the action of a Member State which, being anxious to remove from its territory prostitutes from a given country because they might promote criminal activities, does so systematically, declaring that their business of prostitution endangers the requirements of public policy and without bothering to consider whether the persons concerned may or may not be suspected of contact with the underworld, constitutes a general preventive measure within the meaning of Article 3 of Directive No. 64/221.

Referring to its judgment in Case 67/74, (Bonsignore, [1975] ECR 295), the Court ruled that:

"Circumstances not related to the specific case may not be relied upon in respect of citizens of the Community as justification for measures intended to safeguard public policy and public security."

The thirteenth question

This question relates to the possibility for a person who has been expelled from the territory of a Member State to regain entry to the territory of the State concerned and apply for a new residence permit.

The Court ruled that:

"Any national of a Member State who wishes to seek employment in another Member State may, if a measure expelling him from the territory of that State has previously been adopted, re-apply for a residence permit."

The fourteenth question

This question relates to the notification to the person concerned of the decisions in his case according to Article 6 of Directive No. 64/221.

The Court ruled that:

"The notification of the grounds relied upon to justify an expulsion measure or a refusal to issue a residence permit must be sufficiently detailed and precise to enable the person concerned to defend his interests."

The questions concerning procedural safeguards

In reply the Court ruled that:

"Community law does not require that the competent authority referred to in Article 9 of Directive No. 64/221 be a court or be made up of members of the judiciary, or that its members be appointed for a specified period. It is not contrary to Community law for the remuneration of the members of the authority to be charged to the budget of the department of the administration of which the authority empowered to take the decision in question forms part, or for an official belonging to that administration to serve as secretary to the competent authority.

Although Directive No. 64/221 does not prevent the person concerned from making a direct application to the competent authority it does not require such an application and it allows the Member States a choice in that respect, provided that the person concerned is entitled to make such an application if he so requests.

The opinion of the competent authority must be duly notified to the person concerned.

The person concerned must be entitled to put forward to the competent authority his arguments in defence and to be assisted or represented in such conditions as to procedure as are provided for by domestic legislation. Those conditions must not be less favourable to the person concerned than the conditions applicable to proceedings before other national authorities of the same type."

Joined Cases 64 and 113/76,
167 and 239/78 and 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 27 April 1982)

Non-contractual liability - Damage - Assessment - Date to be taken into account - Damage caused by the abolition of production refunds - Payment of the equivalent amount ordered by interlocutory judgment - Rate for conversion into national currency - Exchange rate prevailing at the date of the interlocutory judgment

(EEC Treaty, Art. 215, second para.)

It is clear from the interlocutory judgment of 4 October 1979 by which the European Economic Community was ordered to pay to the applicants by way of damages for non-contractual liability amounts equivalent to the production refunds unlawfully abolished, with interest as from the date of judgment, that the Court intended to assess the damage as it stood at the date of that judgment.

The only method of calculation allowing the damage to be assessed, on the basis of the refunds abolished, equally for all producers in the Community, irrespective of their place of establishment, is to determine the amount of the refunds in question by carrying out the conversion between national currency and the European currency unit, which had in the meantime replaced the unit of account, at the rate of exchange prevailing at the date of the interlocutory judgment.

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NOTE

In its interlocutory judgment of 4 October 1979 ([1979] ECR 3091) in these cases, the Court ordered the European Economic Community to pay to the applicants in damages in respect of its non-contractual liability the amounts equivalent to the production refunds on maize gritz used by the brewing industry which each of those undertakings would have been entitled to receive if, during the period from 1 August 1975 to 19 October 1977, the use of maize for the production of gritz had conferred an entitlement to the same refunds as the use of maize for the manufacture of starch. The Court further ordered that interest at 6% was to be paid on the amounts as from the date of the judgment.

The purpose of that order was to compensate the applicants for the damage resulting from the discrimination to which gritz producers were subjected in relation to starch producers owing to the abolition of refunds for maize gritz during the said period.

The judgment provided that the parties were to inform the Court of the amounts of compensation arrived at by agreement or, in the absence of agreement, a statement of their views, with supporting figures.

In January 1981 the parties concluded an agreement which set out the quantities of maize used in the production of gritz during the period in question, as well as the amounts of refunds expressed in units of account which each of the undertakings would have been entitled to receive if, at the time, that production had conferred an entitlement to the same refunds as for the manufacture of starch.

The parties were, on the other hand, unable to reach agreement on the date to be taken into consideration for the conversion of those amounts into French francs, the national currency of all the applicants in this matter.

The Court ordered the Community not to grant refunds to the applicants but to pay them equivalent amounts. By that wording the Court clearly indicated that the refunds constituted only the basis for calculation of the amount of compensation.

Furthermore, in giving the grounds on which its decision on the claim for interest was based, the Court stated that, taking into account the criteria for the assessment of damages laid down by it, the obligation to pay interest arose on the date of the judgment, inasmuch as it had established the obligation to make good the damage. It follows that the Court intended to assess the damage as it appeared at that date.

The Court ordered the European Economic Community to pay compensation as follows:

(a) to P. Dumortier Frères S.A., Tourcoing,
FF 2 603 760.80;

(b) to Maïseries du Nord S.A., Marquette-lez-Lille,
FF 1 792 890.60;

(c) to Moulins et Huileries de Pont-à-Mousson S.A., Pont-à-Mousson,
FF 3 400 881.70;

(d) to Maïseries de Beauce S.à r.l., Marboue,
FF 2 603 786.80;

(e) to Costimex S.A., Strasbourg,
FF 6 567 331.20;

(f) to "La Providence Agricole de la Champagne", Agricultural Co-operative Society, Rheims,
FF 5 333 358.60;

(g) to Maïseries Alsaciennes S.A., Colmar,
FF 651 178.30;

after deducting the amounts of compensation already provisionally paid, but with 6% interest as from 4 October 1979.

Judgment of 19 May 1982

Case 84/81

Staple Dairy Products Limited v
Intervention Board for Agricultural Produce

(Opinion delivered by Advocate General Sir Gordon Slynn
on 16 March 1982)

1. Measures adopted by the institutions - Application ratione temporis - Principle that they may not be retroactive - Exceptions - Conditions

2. Agriculture - Monetary compensatory amounts - Application to exports of milk products from the United Kingdom between 1 and 25 April 1980 - Regulation No 1011/80 - Retroactive confirmation - Limits - Rights acquired by operators

(Council Regulation No 1011/80, Article 1)

1. Although in general the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected.

2. Article 1 of Council Regulation No 1011/80 of 23 April 1980 retroactively confirmed the application by the competent national authority of monetary compensatory amounts to exports of milk products from the United Kingdom to other Member States between 1 and 25 April 1980, those amounts being granted in accordance with Commission Regulation No 846/80, that is to say in relation to the ECU and taking account of the franchise of 1.50 points, without prejudice, however, to rights definitely conferred on operators by individual decisions adopted by the competent national authority between 1 and 25 April 1980.

NOTE

The High Court of Justice referred to the Court for a preliminary ruling three questions on the interpretation of Council regulations on the impact of the European Monetary System on the Common Agricultural Policy and also on the validity of Commission Regulation No. 846/80 amending Regulation No. 2140/79 as regards the abolition of monetary compensatory amounts for the United Kingdom in certain sectors and their introduction in other sectors.

Those questions were raised in the course of an action brought by Staple Dairy Products Limited against the Intervention Board for Agricultural Produce. Between 1 and 26 April 1980, the plaintiff exported milk products from the United Kingdom to other Member States. The Intervention Board for Agricultural Produce granted it monetary compensatory amounts pursuant to Commission Regulation No. 846/80, which fixed the monetary compensatory amounts in relation to the European currency unit known as "the ECU", and took account of the franchises used by Council Regulation No. 652/79, in this case 1.50 points. That system of franchises was maintained by Council Regulation No. 652/79, which substituted the ECU for the unit of account for the purposes of the application of the Common Agricultural Policy. That regulation was extended until 31 March 1980. On 2 April 1980, following a change in the value of the pound sterling, the Commission adopted Regulation No. 846/80 by which it introduced positive monetary amounts with regard to the United Kingdom, whilst maintaining the method of calculation in relation to the ECU and the franchise of 1.50 points.

On 23 April 1980 the Council adopted Regulation No. 1011/80, amending Regulation No. 652/79 on the impact of the European Monetary System on the Common Agricultural Policy, by extending Regulation No. 652/79 with effect from 1 April 1980 until 30 June 1980 "without the individual rights acquired by operators being thereby affected". The regulation entered into force on 26 April 1980.

Claiming that no franchise was applicable to the monetary compensatory amounts payable on exports of milk products from the United Kingdom to other Member States carried out between 1 and 26 April 1980, Staple Dairy Products brought an action in the High Court for a declaration that it was entitled to monetary compensatory amounts without deduction of the franchise. In that context, the High Court submitted the following questions for a preliminary ruling:

"(1) Having regard to the date prescribed in Article 5 of Council Regulation (EEC) No. 652/79, as amended by Article 1 of Council Regulation (EEC) No. 1264/79, were the competent authorities in the United Kingdom bound in respect of transactions undertaken between 1 April 1980 and 26 April 1980 inclusive to pay monetary compensatory amounts on exports of milk products from the United Kingdom to other Member States of the European Communities, without making a deduction of 1.50 percentage points?

(2) Is Commission Regulation (EEC) No. 846/80 adopted after the date prescribed in Article 5 of Council Regulation (EEC) No. 652/79, as so amended, invalid for lack of competence or for any other reason in so far as it purported prior to the publication of Council Regulation (EEC) No. 1011/80 to reduce the monetary compensatory amounts payable on exports of milk products from the United Kingdom to other Member States of the European Community by 1.50 percentage points?

(3) With regard to Article 1 of Council Regulation (EEC) No. 1011/80:

(a) What is the effect of that provision with regard to transactions undertaken relating to exports of milk products from the United Kingdom to other Member States in the period between 1 April 1980 and 26 April 1980?

(b) What is the nature of the individual rights of operators there referred to, how and in what circumstances are such rights acquired and in what way are they not to be affected?"

With regard to the third question, the plaintiff in the main proceedings maintained that the contested provision was invalid, because it produced an unlawful retroactive effect, in so far as it extended to exports carried out during the said period. However, the Court has already stated in its judgments that although in general the principle of legal certainty precludes a Community measure from taking effect from a point of time before its publication, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected.

Indeed, the aim to be achieved required the re-establishment with effect from 1 April 1980 of the system instituted by Regulation No. 652/79. That regulation introduced a number of measures concerning the European Monetary System in relation to the Common Agricultural Policy. Those measures form an indissoluble whole, covering both the replacement of the unit of account by the ECU for the purposes of the Common Agricultural Policy and the introduction of the franchise in order to avoid distortions in prices and also gradually to abolish monetary compensatory amounts.

There was proper respect for the legitimate expectations of those concerned. The situation at that time gave no cause for the traders concerned to expect the franchise system to be abolished after 31 March 1980. The history of the rules in question, as well as their scope and purpose, were such as to lead traders to conclude that the franchise - a well-established feature of the system of monetary compensatory amounts - would be maintained for some time.

The reference in Article 1 of Regulation No. 1011/80 to individual rights acquired by operators refers only to rights definitively conferred on those operators by individual decisions adopted by the competent national authority between 1 and 25 April 1980.

In view of the reply to the third question, it is no longer necessary to reply to the first and second questions.

On those grounds, the Court ruled:

Article 1 of Council Regulation No. 1011/80 of 23 April 1980 retroactively confirmed the application by the competent national authority of monetary compensatory amounts to exports of milk products from the United Kingdom to other Member States between 1 and 25 April 1980, those amounts being granted in accordance with Commission Regulation No. 846/80, that is to say in relation to the ECU and taking account of the franchise of 1.50 points, without prejudice, however, to rights definitively conferred on operators by individual decisions adopted by the competent national authority between 1 and 25 April 1980.

Judgment of 25 May 1982

Case 96/81

Commission of the European Communities v Kingdom of the Netherlands

(Opinion delivered by Mr Advocate General Capotorti on 31 March 1982)

1. Action for failure of a State to fulfil its obligations - Proof of failure - Non-compliance with the obligation to provide information imposed by a directive - Presumption of non-implementation of the directive - Not permissible
(EEC Treaty, Art. 169)

2. Measures adopted by the institution - Directives - Implementation by the Member State - Adoption of binding national provisions - Implementation by way of administrative practices - Inadequacy
(EEC Treaty, Art. 169)

1. In proceedings under Article 169 of the EEC Treaty for failure to fulfil an obligation it is incumbent upon the Commission to prove the allegation that the obligation has not been fulfilled. It is the Commission's responsibility to place before the Court the information needed to enable the Court to establish that the obligation has not been fulfilled, and in so doing the Commission may not rely on any presumption.

If a directive imposes on the Member States the obligation to inform the Commission about the bringing into force of the national provisions needed to comply with the directive, the failure of a Member State to fulfil that obligation, whether by providing no information at all or by providing insufficiently clear and precise information, may of itself justify recourse to the procedure under Article 169 of the EEC Treaty in order to establish the failure to fulfil the obligation, but it does not entitle the Commission to presume that the obligation to bring into force the measures for implementing the directive has not been fulfilled.

2. Although each Member State is free to delegate powers to its domestic authorities as it considers fit and to implement the directive by means of measures adopted by regional or local authorities, it may not however be released from the obligation to give effect to the provisions of the directive by means of national provisions of a binding nature. Mere administrative practices, which by their nature may be altered at the whim of the administration, may not be considered as constituting the proper fulfilment of the obligation deriving from the directive in question.

NOTE

The Commission of the European Communities brought an action for a declaration that the Kingdom of the Netherlands had failed to fulfil one of its obligations under the EEC Treaty, by not adopting within the period prescribed the laws, regulations and administrative provisions needed in order to comply with Council Directive No. 76/160/EEC of 8 December 1975 concerning the quality of bathing water.

Pursuant to that directive, Member States are obliged to determine, for all bathing areas or for each individual bathing area, the values applicable to bathing water for the physical, chemical and micro-biological parameters laid down by the directive, to take the necessary measures to ensure that the quality of bathing water conforms with those values within a period of 10 years and to carry out sampling operations and the like.

Article 12 of the directive provides that the Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with the directive within two years of its notification - a period which expired on 10 December 1977 - and to inform the Commission thereof immediately.

The Commission considers that the Netherlands Government has failed to fulfil its obligation of notification under the above-mentioned provision. In the Commission's view, that failure to comply with the directive provides grounds for the presumption that the obligation to bring into force the necessary measures has not been fulfilled.

The proceedings however are concerned not with a failure to effect the required notification but with failure to fulfil the obligation to bring into force the laws, regulations and administrative provisions necessary to ensure compliance with the directive.

On the one hand, it is incumbent upon the Commission to establish the existence of the alleged failure to fulfil an obligation but, on the other hand, the Member States are required to assist the Commission in the discharge of its duties. The information which the Member States are required to give to the Commission must be clear and precise. It must indicate unequivocally which laws, regulations and administrative provisions have, in the view of the Member State, satisfied the various requirements imposed on it by the directive.

Failure by a Member State to discharge that obligation, whether by providing no information at all or by providing insufficiently clear and precise information, may of itself justify commencement of the procedure under Article 169 of the EEC Treaty in order to establish the failure to fulfil the obligation.

In order to examine whether the application is well founded, it is appropriate to compare those provisions with the laws, regulations and administrative provisions existing in the Netherlands by means of which the Netherlands Government considers it has implemented the directive.

The Netherlands Government referred to the fact that the supervision of water quality is carried out in the Netherlands within the framework of a de-centralized system. The regional and local authorities are directly bound by the provisions of the directive and give effect to the directive in the practical management of water quality, under the control of the national authorities.

But the Netherlands Government adduced no evidence to support the view that provisions of a mandatory nature had effectively been adopted, either by the national authorities or by the regional or local authorities, in order to determine for all bathing areas or for each individual bathing area the values applicable to bathing water for all the parameters indicated in the annex to the directive and to ensure that the quality of bathing water conforms to the values thus determined.

The Court held that:

"1. By not bringing into force within the periods prescribed the provisions necessary to ensure the complete application of Council Directive No. 76/160/EEC of 8 December 1975 concerning the quality of bathing water, the Kingdom of the Netherlands has failed to fulfil its obligations under the Treaty establishing the European Economic Community.

2. The Kingdom of the Netherlands is ordered to pay the costs".

Judgment of 25 May 1982

Case 97/81

Commission of the European Communities v Kingdom of the Netherlands

(Opinion delivered by Mr Advocate General Capotorti on 31 March 1982)

1. Action for failure of a State to fulfil its obligations - Proof of failure - Non-compliance with the obligation to provide information imposed by a directive - Presumption of non-implementation of the directive - Not permissible
(EEC Treaty, Art. 169)

2. Measures adopted by the institution - Directives - Implementation by the Member State - Adoption of binding national provisions - Implementation by way of administrative practices - Inadequacy
(EEC Treaty, Art. 169)

1 In proceedings under Article 169 of the EEC Treaty for failure to fulfil an obligation it is incumbent upon the Commission to prove the allegation that the obligation has not been fulfilled. It is the Commission's responsibility to place before the Court the information needed to enable the Court to establish that the obligation has not been fulfilled, and in doing so the Commission may not rely on any presumption.

If a directive imposes on the Member States the obligation to inform the Commission about the bringing into force of the national provisions needed to comply with the directive, the failure of a Member State to fulfil that obligation, whether by providing no information at all or by providing insufficiently clear and precise information, may of itself justify recourse to the procedure under Article 169 of the EEC Treaty in order to establish the failure to fulfil the obligation, but it does not entitle the Commission to presume that the obligation to bring into force the measures for implementing the directive has not been fulfilled.

2. Although each Member State is free to delegate powers to its domestic authorities as it considers fit and to implement the directive by means of measures adopted by regional or local authorities, it may not however be released from the obilgation to give effect to the provisions of the directive by means of national provisions of a binding nature. Mere administrative practices, which by their nature may be altered at the whim of the administration, may not be considered as constituting the proper fulfilment of the obligation deriving from the directive in question.

NOTE

In its judgment, the Court held that by not bringing into force, within the prescribed periods, provisions needed to ensure complete application of Council Directive No. 75/440/EEC of 16 June 1975 concerning the quality required of surface water intended for the abstraction of drinking water in the Member States, the Kingdom of the Netherlands had failed to fulfil its obligations under the Treaty establishing the European Economic Community (see judgment in Case 96/81 above).

Judgment of 25 May 1982

Case 100/81

Commission of the European Communities v Kingdom of the Netherlands

(Opinion delivered by Mr Advocate General Capotorti on 31 March 1982)

Member States - Obligations - Implementation of directives - Absence - Justification - Not possible

(EEC Treaty, Art. 169)

A Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with obligations resulting from Community directives.

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NOTE

The Commission brought an action for a declaration that, by not introducing within the period prescribed the provisions needed in order to comply with the requirements of Council Directive No. 74/561/EEC on admission to the occupation of road-haulage operator in national and international transport operations, the Kingdom of the Netherlands had failed to fulfil its obligations under the EEC Treaty.

The period prescribed expired on 1 January 1977.

The Netherlands Government did not deny that it had not fulfilled those obligations in full. It had satisfied the conditions laid down at the Community level as to professional competence and financial standing of the operator. The only outstanding matter was the condition relating to the good repute of the road haulage operator.

In a consistent line of decisions the Court has held that a Member State may not rely on provisions, practices, or circumstances existing in its internal legal system in order to justify a failure to comply with obligations resulting from Community directives.

The Court declared that:

"1. By not adopting within the period prescribed the provisions needed to comply with Council Directive No. 74/561/EEC of 12 November 1974 on admission to the occupation of road haulage operator in national and international transport operations (Official Journal 1974, No. 308, p.18), the Kingdom of the Netherlands has failed to fulfil its obligations under the Treaty.

2. The Kingdom of the Netherlands is ordered to pay the costs."

Judgment of 26 May 1982

Case 149/79

Commission of the European Communities v Kingdom of Belgium

(Opinion delivered by Mrs Advocate General Rozès on 12 May 1982)

Free movement of persons - Derogations - Employment in the public service - Concept - Participation in the exercise of powers conferred by public law and in the safeguarding of the general interests of the State

(EEC Treaty, Art. 48 (4))

Employment in the public service within the meaning of Article 48 (4) of the EEC Treaty must be connected with the specific activities of the public service in so far as it is entrusted with the exercise of powers conferred by public law and with responsibility for safeguarding the general interests of the State, to which the specific interests of local authorities such as municipalities must be assimilated.

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NOTE

On 28 September 1979 the Commission of the European Communities brought an action for a declaration that the Kingdom of Belgium had failed to fulfil its obligations under Article 48 of the EEC Treaty as well as under Regulation (EEC) No. 1612/68 of the Council on freedom of movement for workers within the Community by making Belgian nationality or allowing it to be made a condition for entry for posts which did not come under Article 48 (2) of the EEC Treaty.

By an interim judgment of 17 December 1980 the Court ordered the Commission and the Kingdom of Belgium "to re-examine the issue between them in the light of the legal considerations contained in this judgment and to report to the Court on the result of that examination before 1 July 1981, after which date the Court will give a final decision".

Disagreement continued to exist between the parties so the task fell on the Court to settle the dispute by examining whether and to what extent the posts at issue had to be regarded as posts which came within the ambit of Article 48 (4), as defined in the judgment of 17 December 1980.

It followed from that judgment that employment within the meaning of Article 48 (4) of the Treaty is employment which is connected with the specific activities of the public service in so far as it is responsible for the exercise of powers conferred by public law and for safeguarding the general interests of the State which must be taken to include the specific interests of public authorities such as municipalities.

The Court determined which posts came under Article 48 (4) and declared that "by making Belgian nationality or allowing it to be made a condition of entry for the posts considered in the reports lodged by the parties on 29 and 30 October 1981, other than those of head technical office supervisor, principal supervisor, works supervisor, stock controller and night-watchman with the municipality of Brussels and that of architect with the municipalities of Brussels and Auderghem, the Kingdom of Belgium has failed to fulfil its obligations under the Treaty".

Judgment of 26 May 1982

Case 44/81

Federal Republic of Germany and Bundesanstalt für Arbeit
v Commission of the European Communities

(Opinion delivered by Mr Advocate General VerLoren van Themaat on 16 March 1982)

1. Procedure - Forms of action provided by the EEC Treaty against an institution's refusal to pay - Action for payment - Inadmissibility - Remedy al law of persons concerned - Action for a declaration of nullity or for failure to act - Conditions

(EEC Treaty, Arts. 164, 173, 175 and 176)

2. Action for a declaration of nullity - Acts which may be the subject of an action - Act defining unequivocally and definitively the institution's position

(EEC Treaty, Art. 173)

3. Social policy - European Social Fund - Administration and control - Powers of the Commission - Scope - Determination of time-limits for clearance of fund's accounts - Failure to observe - Penalties - Permissibility

(EEC Treaty, Art. 124; Regulation No. 2396/71 of the Council, Arts. 11 and 13)

4. Community law - Principles - Legal certainty - Preclusive periods - When applicable - Conditions - Clear and precise determination - Decision No. 78/706, Art. 4(1) - Conditions unfulfilled

(Commission Decision No. 78/706, Art. 4(1))

1. Whilst it is true that there is no provision in the EEC Treaty entitling a person in favour of whom an institution has entered unilaterally into a financial commitment to bring before the Court an action for payment against that institution, that of itself does not mean that the person concerned has no remedy where that institution refuses to honour its commitments. Indeed, in so far as the institution, by refusing payment, disputes a prior commitment or denies its existence, it commits an act which in view of its legal effects may give rise to an action for a declaration of nullity under Article 173 of the Treaty. If as a result of the action the refusal to make the payment is declared void, the applicant's right will be established and it will be for the institution concerned, pursuant to Article 176 of the Treaty, to ensure that the payment which has been unlawfully refused is made. Moreover, if an institution fails to reply to a request for payment, the same result may be obtained by means of Article 175.

2. In the event of a refusal by an institution to make a payment, a letter from the institution defining unequivocally and definitively its attitude with regard to the request for payment submitted to it constitutes an act which may be the subject of an action for a declaration of nullity under Article 173 of the Treaty. These conditions are not fulfilled by a communication from an institution whose content the institution subsequently states that it is ready to discuss and reconsider.

3. The duty of administration and control with which the Commission is entrusted as regards the European Social Fund by Article 124 of the EEC Treaty and Articles 11 and 13 of Regulation No. 2396/71 of the Council as well as by the requirements relating to the sound administration of Community finances necessarily imply that the accounts of the Social Fund must be cleared within a reasonable period and that the Commission is empowered to determine that period and to attach to it penalties which will ensure its observance. In view of the importance of that period for the sound administration of the Social Fund, it is impossible to rule out the possibility that the penalties provided for may extend to the loss of the right to payment as a result of the fixing of a preclusive period.

4. The principle of legal certainty requires that a provision laying down a preclusive period, particularly one which may have the effect of depriving a Member State of the payment of financial aid its application for which has been approved and on the basis of which it has already incurred considerable expenditure, should be clearly and precisely drafted so that the Member States may be made fully aware of the importance of their complying with the time-limit.

Article 4 of Commission Decision No. 78/706 cannot be regarded as laying down a time-limit failure to comply with which involves the loss by the State concerned of the right to the payment of the balance of the assistance from the European Social Fund which has been approved.

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NOTE

The Federal Republic of Germany and the Bundesanstalt für Arbeit [Federal Labour Office] brought an action primarily for an order that the Commission should pay the sum of DM 16 928 855.52 payable pursuant to the Commission decision of 1977 granting assistance from the social fund in respect of four projects undertaken by the Bundesanstalt für Arbeit and, in the alternative, for a declaration under the first paragraph of Article 173 that the Commission Decision of 10 December 1980 refusing to pay that amount was void.

I - The claim for payment

The applicants maintain that in a situation such as theirs, where assistance has been granted to them by a Commission decision, non-payment of that assistance by the Commission entitles them to bring an action for payment.

According to the Commission, an action for payment such as that brought by the applicants does not fall within the remedies provided for by the Treaty and is therefore inadmissible. That is the case particularly in view of the fact that the applicants are not deprived of all effective legal protection, such protection being adequately provided by the opportunity available to them under Article 175 of the Treaty to complain to the Court that the Commission has failed to act.

If an institution does not respond to a claim for payment, payment of the unlawfully withheld amount may be secured by means of Article 175.

Accordingly, although the EEC Treaty does not provide for an action such as that brought by the applicants, there is no lacuna in the Treaty which needs to be remedied in order to ensure that individuals enjoy effective protection of their rights. The claim for payment made by the applicants must therefore be declared inadmissible.

II - The application in the alternative for a declaration that the Commission's letter of 10 December 1980 withholding the payments claimed is void

(a) Admissibility

A refusal to make a payment is a measure regarding which an action for annulment may be brought pursuant to Article 173 of the Treaty. The Commission maintains however that that part of the action is also inadmissible since it is directed against a letter, in this case the letter of 10 December 1980, which merely confirms a decision which was definitively adopted and notified to the applicants in July 1980.

The Commission refers to the letters of 11 and 15 July 1980 sent by the Director General for Employment and Social Affairs which stated that it would not be possible to meet the claims for payment since they had not been submitted within the periods laid down in Article 4 (1) of Commission Decision No. 78/706.

Between July and December 1980 there was an exchange of letters between the Federal Ministry of Labour and the Vice-President of the Commission. In that correspondence, and specifically in the contested letter of 10 December 1980, the Vice-President of the Commission told the Federal Ministry of Labour and Social Affairs that he saw no possibility of instructing the directorate responsible to reverse its decision.

It appears therefore that it was not by the letter of 10 December 1980 that the Commission unequivocally and definitively adopted its position regarding the claim for payment submitted to it. That letter in fact embodies the measure whereby the Commission gave notice, in a form which enabled the nature thereof to be identified, of its final decision concerning the payments claimed. The action for annulment is therefore admissible.

(b) The substance

The applicants contest that Article 4 of Commission Decision No. 78/706 may be interpreted as prescribing a period of limitation. The Commission's powers to lay down time-limits and penalties for non-observance thereof must be seen in the light of the authority vested in the Council and the Commission by the Treaty and by the provisions adopted to give effect thereto and also of the requirements of good administration.

As regards the European Social Fund, Article 124 of the Treaty expressly provides that the Fund is to be administered by the Commission.

That necessarily implies that the clearance of accounts of the Social Fund must take place within reasonable periods and that the Commission is empowered to lay down such periods and to impose sanctions to ensure respect thereof. The principle of legal certainty however requires that a provision laying down a period of limitation must be clear and precise in its terms so that the Member States may be made fully aware of the importance of their complying with the time-limit.

It should be noted that no specific details are provided, either in the contested provision or in the preamble to the decision relating to that provision, as to the existence or the nature of the penalties applicable to non-observance of the time-limit.

In consequence, Article 4 of Commission Decision No. 78/706 may not be interpreted as laying down a time-limit the failure to respect which would involve the loss of a Member State's entitlement to payment of the assistance granted.

The Court held that:

"1. The Commission's Decision of 10 December 1980 refusing to pay to the Federal Republic of Germany balances of assistance from the Social Fund amounting to DM 16 928.52 is declared void.

2. The remainder of the application is dismissed.

3. The parties are ordered to bear their own costs".

Judgment of 26 May 1982

Roger Ivenel v Helmut Schwab

(Opinion delivered by Mr Advocate General Reischl on 11 May 1982)

Convention on Jurisdiction and Enforcement of Judgments - Special jurisdiction - Court for the place of performance of a contractual obligation - Claims based on different obligations resulting from a contract of employment - Obligation to be taken into account for the purpose of jurisdiction - Obligation characterizing the contract in question
(Convention of 27 September 1968, Art. 5 (1))

The obligation to be taken into account for the purposes of the application of Article 5 (1) of the Convention of 27 September 1968 in the case of claims based on different obligations arising under a contract of employment as a representative binding a worker to an undertaking is the obligation which characterizes the contract.

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NOTE

The French Cour de Cassation submitted a question for a preliminary ruling by the Court on the interpretation of Article 5 (1) of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

The question arose in proceedings between Mr Ivenel, residing in Strasbourg, and the undertaking Schwab Maschinenbau, of Bavaria, in connexion with an alleged breach of a contract of agency which gave rise to an action for payment of commission, allowances for clients, notice and paid holidays.

The Cour de Cassation considered that since the proceedings related to the performance of a contract of agency involving mutual obligations, at least some of which were performed in France, the question regarding the place where the obligation within the meaning of Article 5 (1) of the Convention had to be performed raised a problem of interpretation.

The question submitted by the national court seeks to determine which contested obligation is to be taken into account for the purpose of the definition embodied in that provision, where the action brought before the court is based on various obligations contained in a single contract of agency which was described as an employment contract by the trial court.

In its judgment of 6 October 1976 (De Bloos), the Court held that the obligation to be taken into account for the purposes of applying Article 5 (1) of the Convention was the obligation which served as a basis for the legal action.

The introduction of special rules of jurisdiction as provided for in Articles 5 and 6 of the Convention is justified, in particular, by the view that there is a close connexion between the dispute and the court called upon to deal with it.

In matters of contract, Article 5 (1) of the Convention seeks in particular to establish that the courts in the country which has a close connexion with the dispute has jurisdiction; in the case of a contract relating to work as an employee, that connexion consists particularly of the law applicable to the contract; according to the development of the relevant conflict rules, that law is determined by the obligation which characterizes the contract in question and which is normally the obligation to carry out the work. In a case such as this, where the Court has before it claims relating to obligations deriving from a contract of agency, some of which relate to remuneration allegedly owed to the worker by an undertaking established in one State and others to allowances based on the manner in which the work was carried out in another State, it is important to interpret the provisions of the Convention in a manner ensuring that the court before which the action is brought is not induced to declare that it has jurisdiction to deal with some of the claims but lacks jurisdiction to deal with others.

Such a result is wholly contrary to the objectives and general scheme of the Convention in the case of a contract relating to the provision of work as an employee in respect of which, as a general rule, the applicable law embodies provisions protecting the worker, that law normally being the law of the place where the work by which the contract is characterized is carried out.

In answer to the question submitted, the Court ruled that:

"The obligation to be taken into account in the application of Article 5 (1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters in the case of claims based on various obligations arising under an agency contract binding an employee to an undertaking is that which characterizes that contract.

Judgment of 27 May 1982

Case 49/81

Paul Kaders GmbH v Hauptzollamt Hamburg-Waltershof

(Opinion delivered by Mr Advocate General VerLoren van Themaat on 18 February 1982)

Common Customs Tariff - Tariff headings - "Essential oils and resinoids" within the meaning of heading 33.01 - Concept - Gingerol - Exclusion

"Essential oils and resinoids" of products which contain, in addition to odoriferous substances, a far higher proportion of other plant substances, such as cholorphyll, tannins, bitter principles or other flavouring substances, carbohydrates and other extractive matter which help to determine the typical character of the product, do not fall within heading 33.01 of the Common customs Tariff. In particular, a product such as gingerol is not among the odoriferous substances which fall within the said tariff heading, since its essential characteristics are determined largely by taste and not by smell.

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NOTE

The Bundesfinanzhof [Federal Finance Court] referred to the Court questions as to the interpretation of heading 13.03 (vegetable extracts) and subheading 33.01 C (resinoids) of the Common Customs Tariff.

The plaintiff in the main proceedings imported from the United States of America a commodity described as extract of ginger which was classified as vegetable extract in tariff heading 13.03 of the Common Customs Tariff.

Later, on the basis of an expert's report, the Hauptzollamt [Principal Customs Office] classified the commodity as resinoid in tariff subheading 33.01 C and made a re-assessment of customs duty.

The Court ruled that:

1. "Essential oils and resinoids" of products which, in addition to odoriferous substances, contain a far higher proportion of other plant substances, such as chlorophyll, tannins, bitter principles or other flavouring substances, carbohydrates and other extractive matter which help to determine the typical character of the product, do not fall within heading 33.01 of the Common Customs Tariff.

2. A product such as "gingerol" is not among the odoriferous substances which fall within the said tariff heading, since its essential characteristics are determined largely by taste and not by smell.

Judgment of 27 May 1982

Case 50/81

Paul Kaders GmbH v Hauptzollamt Hamburg-Ericus

(Opinion delivered by Mr Advocate General VerLoren van Themaat on 18 February 1982)

Common Customs Tariff - Tariff headings - "Essential oils and resinoids" within the meaning of heading 33.01 - Piperine - Exclusion

"Essential oils and resinoids" of products which contain, in addition to odoriferous substances, a far higher proportion of other plant substances, such as chlorophyll, tannins, bitter principles or other flavouring substances, carbohydrates and other extractive matter which help to determine the typical character of the product, do not fall within heading 33.01 of the Common Customs Tariff. In particular, a product such as piperine is not among the odoriferous substances which fall within the said tariff heading, since its essential characteristics are determined largely by taste and not by smell.

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NOTE

See Case 49/81.

Judgment of 27 May 1982

Case 113/81

Otto Reichelt GmbH v Hauptzollamt Berlin-Süd

(Opinion delivered by Mrs Advocate General Rozès on 11 March 1982)

1. European Communities - Own resources - Customs duties unduly levied - Remission on equitable grounds - Application of national law - Conditions and limits

2. European Communities - Own resources - Repayment or remission of import or export duties - Regulation (EEC) No. 1430/79 - Retroactivity - None

(Council Regulation (EEC) No. 1430/79)

1. In the absence of relevant Community legislation, a national customs authority may apply the provisions of its national law to a claim for remission on equitable grounds of customs duties paid in excess of the amount due. The conditions for such remission must be the same as those applied to claims for the remission of charges imposed by national law.

2. The provisions of Regulation No. 1430/79 on the repayment or remission of import or export duties do not apply to a decision concerning the remission of customs duties adopted by the national customs authorities before the entry into force of the regulation.

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NOTE

The Finanzgericht [Finance Court] Berlin submitted a question for a preliminary ruling by the Court on the interpretation of Community law, in particular Article 27 of Council Regulation No. 1430/79 on the repayment or remission of import or export duties.

The question arose in an action brought by a company engaged in the retail food trade contesting the decision whereby the German customs authority refused to grant a remission, on equitable grounds, in respect of customs duty overpaid.

In 1977 and 1978 the company in question paid customs duty on imports of raw coffee based on a rate of 7%, whereas the rate applicable at that time was only 5% owing to a suspension of customs duty.

The customs authorities refunded part of the amount overpaid but refused to refund the remainder since the period in which, under German law, the refund of customs duties was available had expired.

The company then applied for a remission on equitable grounds under German law, in respect of the amount of which it had been unable to secure the refund. The customs administration refused to allow it the benefit of the German rules of equity, taking the view that Community law prevented it from doing so.

The Finanzgericht submitted the following question: "Does Community law, especially Article 27 of Council Regulation (EEC) No. 1430/79 prohibit the repayment under national tax law, in this case Article 227 of the Abgebenordnung [Revenue Code], of customs duty overpaid which is not subject to appeal, in cases occurring before 1 July 1980 for accounting purposes?".

In this case, the application for a remission on equitable grounds referred to by the national court relates to amounts which, it is acknowledged, would not have had to be paid if Community law had been correctly applied.

In such circumstances, the rules of Community law relating to the basis of assessment, the taxation conditions and the amount of the customs duties are in no way affected by the application of a provision of national law concerning the remission of customs duty on equitable grounds, in view of the fact that the conditions for any such remission must be the same as those applied to applications for remission in respect of taxes provided for by national law.

It is appropriate to consider whether Regulation No. 1430/79, Article 1 of which lays down the conditions subject to which the competent authorities are to allow repayment or remission of import or export duties, is applicable to the case before the national court.

The decision with which the main proceedings are concerned was adopted on 6 April 1979. Regulation No. 1430/79 entered into force on 1 July 1980; it contains no transitional provisions.

The essential question is whether Regulation No. 1430/79 has retroactive effect and whether therefore its provisions are applicable to a decision of a national customs administration regarding the remission of customs duties which was adopted before 1 July 1980.

It is evident from a reading of the regulation that neither its terms nor its objectives provide sufficiently clear grounds for the conclusion that it makes provision otherwise than for the future.

In answer to the question submitted, the Court ruled that:

"1. In the absence of relevant Community legislation, a national customs authority may apply the provisions of its national law to a demand for remission on equitable grounds of customs duties paid in excess of the amount due. The conditions for remission must be the same as those applied for demands for remission of charges imposed by national law.

2. The provisions of Regulation No. 1430/79 do not apply to a decision concerning the remission of customs duties adopted by the national customs authorities before the entry into force of that regulation".

Judgment of 27 May 1982

Case 196/81

Provveditorie Marittime S. Giacomo S.p.A. v
Amministrazione delle Finanze dello Stato - Dogana di Genova

(Opinion delivered by Mr Advocate General Reischl on 1 April 1982)

Agriculture - Common organization of markets - Sugar - Export levy - Payable at the latest at the time of completion of the customs formalities - Collection at a later date - Forfeiture of the debt - None

(Regulation (EEC) No. 1076/72 of the Commission, Art. 3 (2))

The expression "payable at the latest" at the time of completion of the customs formalities, contained in Article 3 (2) of Regulation (EEC) No. 1076/72 of the Commission laying down detailed rules for applying export levies on sugar, must be understood not as involving forfeiture of rights but rather as applying where the debt is determined, and consequently becomes payable, before the day of completion of the customs formalities. Accordingly, the calculation and actual collection of the levy, that is to say payment thereof, may be made at a later stage.

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NOTE

The Court of Genoa referred to the Court a question as to the interpretation of Article 3 (2) of Regulation (EEC) No. 1076/72 of the Commission laying down detailed rules for applying export levies on sugar and amending Regulation (EEC) No. 2637/70.

The main action was over the recovery of the Community levy on exports to Switzerland in 1974 of consignments of refined sugar by the undertaking San Giacomo, agents for the ships of the company Italia. The levy was not collected at the time of that export, that is to say when the customs formalities were being completed.

Later, in January 1975, the Genoa customs office served a demand on the plaintiff for payment of the levy contending that it was an error that no levy had been charged.

The purpose of the levies was to guarantee the Community sufficient supplies of sugar by discouraging exports in periods in which increases in world prices made them attractive.

San Giacomo opposed the applications made to the Court of Genoa whereupon that court referred a question to the Court of Justice as to the true meaning of the expression "at the latest" and in particular as to whether it is to be understood as referring to the time of determination of the amount of the levy or to the first or last moment when payment in the proper sense (collection) may be required.

Article 3 (2) of Regulation No. 1076/72 provides that: "The levies shall be collected by the Member State on whose territory the formalities referred to in paragraph (1) are completed. They shall be payable at the latest at the time of the completion of those formalities".

The Court resolved that question by ruling that: "The expression 'payable at the latest' contained in Article 3 (2) of Regulation (EEC) No. 1076/72 of the Commission of 25 May 1972 laying down detailed rules for applying export levies on sugar and amending Regulation (EEC) No. 2637/70 (Official Journal, English Special Editions 1972 (II), p.470) must be understood not as involving forfeiture of rights but rather as applying where the debt is determined,and consequently falls due, before the date of completion of the customs formalities. Accordingly, the calculation and collection of the levy stricto sensu, that is to say payment thereof, may be made at a later stage."

Judgment of 27 May 1982

Case 227/81

Francis Aubin v UNEDIC and ASSEDIC

(Opinion delivered by Advocate General Sir Gordon Slynn on 29 April 1982)

Social security for migrant workers - Unemployment - Benefits - Unemployed worker who when last employed resided in a Member State other than the competent State - Worker's choice - Making himself available to the employment office of one of those two Member States - State responsible for payment of benefit

(Regulation No. 1408/71 of the Council, Art. 71 (1) (b))

Article 71 (1) (b) of Regulation No. 1408/71 offers the worker a choice. He may apply to the unemployment benefit scheme in the State in which he was last employed, or claim benefit in the State where he resides. In the case of a wholly unemployed worker who elects to be governed by the legislation of the State where he resides that choice is made by the worker's making himself available to the employment office of the State from which he is claiming the benefits. The worker may not, however, either aggregate the unemployment benefit from both States or, if he has made himself available only to the employment office in the territory of the Member State where he resides, claim unemployment benefits from the State in which he was last employed.

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NOTE

The Court of Cassation of France referred to the Court for a preliminary ruling two questions as to the interpretation of Regulation No. 1408/71 on the application of social security schemes to employed persons and their families moving within the Community and in particular as to the provisions relating to unemployment. Those questions were raised in the course of a dispute between Mr. Aubin and the two defendant associations.

Mr Aubin, a French national, was working in Paris for a Belgian undertaking. In 1970 he took up a post in Brussels and moved to Brussels with his family. In December 1972 he took up other employment and returned to work in France but retained his home in Belgium.

In 1975 Mr Aubin was made redundant for economic reasons and since he had paid regular unemployment insurance contributions in France he sought information as to how to set about claiming benefits. The Inspecteur du Travail for the Yvelines informed Mr Aubin that he must register as a person seeking work with the employment institution of his place of residence in Belgium and that he would be paid unemployment benefit by the Belgian authorities.

In August 1975 the Belgian National Employment Office informed Mr Aubin that he was not entitled to benefit because he could not show that he had engaged in paid work in Belgium for at least one day in the course of the eighteen months preceding his being made redundant.

On 1 October Mr Aubin found work in the Paris area and transferred his residence there. In 1977 Mr Aubin claimed unemployment benefit from the first defendant. His claim was refused on the ground that he had not registered as a person seeking work in France.

Mr Aubin brought proceedings against the two defendants which led the Court of Cassation of France to refer the following questions to the Court:

1. Is a French national, who worked in France until made redundant, who was not registered in France as a person seeking work and lived in Belgium where he had registered as a person seeking work, entitled under Community legislation to be paid unemployment benefit by the competent institution of the Belgian State, or is he entitled to claim it from that of the French State as well?

2. Is the fact that he had registered in Belgium as a person seeking work of such a nature as to require the condition of French legislation that he should be registered in France with the Agence Nationale pour l'Emploi as a person seeking work to be deemed to be fulfilled?

The Court answered those two questions by ruling that:

"1. A national of one of the Member States of the European Community, who worked in France until made redundant, who was not registered in France as a person seeking work and resided in Belgium where he had applied for registration as a person seeking work, is entitled to claim only the unemployment benefits provided for by Belgian legislation, irrespective of whether he has the status of a frontier worker.

2. No provision of Community law permits the registration of a migrant worker as a person seeking work in Belgium to be assimilated to registration as a person seeking work with the French Agence Nationale pour l'Emploi".

Judgment of 8 June 1982

Case 258/78

L.C. Nungesser KG and Kurt Eisele v
Commission of the European Communities

(Opinion delivered by Mrs Advocate General Rozès on 3 February 1982)

1. Competition - Agreements - Industrial and commercial property rights - Exercise of those rights - Conditions - Grant of exclusive licence - Exclusive distribuiton agreement - Agreements having the combined effect of granting absolute territorial protection - Prohibition

   (EEC Treaty, Art. 85 (1))

2. Competition - Community rules - Industrial and commercial property rights - Plant breeders' rights - Subject to the same system as other property rights - Specific nature of the products covered by plant breeders' rights - Need to take into consideration

3. Competition - Agreements - Industrial and commercial property rights - Plant breeders' rights - Open exclusive licence - Concept - Lawfulness - Conditions

   (EEC Treaty, Art. 85 (1))

4. Competition - Agreements - Exclusive licence conferring absolute territorial protection - Concept - Effects - Artificial maintenance of separate national markets - Prohibition

   (EEC Treaty, Art. 85 (1))

5. Competition - Agreements - Prohibition - Exemption - Exclusive licence in respect of plant breeders' rights conferring absolute territorial protection - Not indispensable for the improvement of production - Refusal of exemption justified

   (EEC Treaty, Art. 85 (3))

1. An industrial or commercial property right, as a legal entity, does not possess those elements of contract or concerted practice referred to in Article 85 (1) of the EEC Treaty, but the exercise of that right might fall within the ambit of the prohibitions contained in the Treaty if it were to manifest itself as the subject, the means or the consequences of an agreement. Such is the case where an agreement granting exclusive rights to utilize an industrial or commercial property right in a certain territory, in conjunction with an agreement appointing the licensee sole distributor for that territory, has the effect of ensuring absolute territorial protection for the licensee by preventing parallel imports.

2. The characteristics of plant breeders' rights, stemming from the particular nature of the procedure for the reproduction of seeds, are not of so special a nature as to require, in relation to the competition rules, a different treatment from other commercial or industrial property rights. That conclusion does not affect the need to take into consideration, for the purposes of the rules on competition, the specific nature of the products which form the subject-matter of breeders' rights.

3. In so far as the exclusive licence granted is in the nature of an open licence, that is to say that it relates solely to the contractual relationship between the owner of the right and the licensee, whereby the owner merely undertakes not to grant other licences in respect of the same territory and not to compete himself with the licensee on that territory, the grant of an exclusive licence of plant breeders' rights in respect of certain varieties of seeds newly developed in a Member State is not in itself incompatible with Article 85 (1) of the EEC Treaty, in view of the specific nature of the products in question, if it promotes the dissemination of a new technology and competition in the Community between the new product and similar existing products.

4. An exclusive licence or assignment with absolute territorial protection, under which the parties to the contract propose, as regards the products and the territory in question, to eliminate all competition from third parties, such as parallel importers or licensees for other territories, results in the artificial maintenance of separate national markets and is therefore contrary to the Treaty.

5. The absolute territorial protection conferred on the licensee of a plant breeder's rights in respect of certain varieties of seeds intended to be used by a large number of farmers for the production of an important product for human and animal foodstuffs manifestly goes beyond what is indispensable for the improvement of production or distribution or the promotion of technical progress and constitutes a sufficient reason for refusing to grant an exemption under Article 85 (3) of the Treaty.

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NOTE

The limited partnership Nungesser KG and Kurt Eisele, sole general partner and majority shareholder, brought an action for the partial annulment of Commission Decision IV/28.824 (breeders' rights - maize seed) relating to a proceeding under Article 85 of the EEC Treaty.

Breeders' rights are the rights conferred on the breeder of a new variety under which the production for purposes of commercial sale or propagation, of reproductive material of that new variety, or its sale and marketing, is subject to the prior authorization of the breeder.

The contested decision finds that the content and application of certain clauses of two contracts entered into between the Institut National de la Recherche Agronomique [National Institute for Agricultural Research] (hereinafter referred to as "INRA"), Paris, and Kurt Eisele in 1960 and 1965 granting, as regards the territory of the Federal Republic of Germany, plant breeders' rights over certain varieties of hybrid maize seeds developed by INRA and exclusive propagating and selling rights over those seeds on that territory, constitute an infringement of Article 85 (1) of the Treaty. It also finds that the content and application of the settlement reached in 1973 between Kurt Eisele and Louis David KG to prevent that undertaking from importing and selling INRA seeds in the Federal Republic of Germany also constitutes an infringement of that provision of the Treaty.

The decision also rejects the application made by Kurt Eisele under Article 85 (3) for the exemption of the agreements from the prohibition.

In support of their application the applicants make the following five contentions.

First contention: the contracts covered by the contested decision

The contract of 1960 marked the beginning of co-operation between INRA and Kurt Eisele. Kurt Eisele undertook to represent INRA before the Bundessortenamt, the German authority responsible for registering breeders' rights, in order to have the varieties of maize seed, which were already protected in France, registered in the Federal Republic of Germany. Kurt Eisele undertook to keep INRA informed of all matters relating to the marketing of its varieties in the Federal Republic of Germany.

To enable those varieties to be registered at the Bundessortenamt INRA granted to Kurt Eisele, with effect from the date of signing of the contract of I960,its breeders' rights in respect of the Federal Republic of Germany over four varieties of INRA maize seeds.

The contested decision refers to the content and application of certain provisions of the contract of 1960.

In their first contention the applicants claim that the decision is meaningless to the extent to which it refers to the 1960 contract, that contract having been "substantially superseded" by the assignments.

It is clear from the declarations of assignment themselves that the 1960 contract was amended and not abrogated.

It was also on the basis of the 1960 contract that Kurt Eisele registered in his own name with the Bundessortenamt the maize varieties developed by INRA. In addition the contract of 1960 marked only the beginning of co-operation between Kurt Eisele and INRA, a co-operation which was to increase as time went by, in particular as a result of the contract of 1965 which conferred on Kurt Eisele the exclusive right to organize sales of its varieties in the Federal Republic of Germany.

The assignments of rights formed part of a series of operations intended to organize the distribution of INRA maize seed in the Federal Republic of Germany.

Therefore the first contention must be dismissed.

Second contention: the applicability of Regulation No. 26/62

Under the terms of Article 2 of Regulation No. 26/62 Article 85 (1) of the Treaty does not apply to agreements, decisions and practices relating to the production and trade in agricultural products which form an integral part of a national market organization or are necessary for attainment of the objectives of the Common Agricultural Policy set out in Article 39 of the Treaty.

The decision states that the agreements between INRA and Kurt Eisele do not form an integral part of or an extension of a national market organization for maize seeds.

In 1973 INRA entrusted the commercial marketing of maize seeds in France as elsewhere to the Société des Semences de Base de Maïs [company dealing in basic maize seed], a French limited company. INRA maize seed is not of such a nature as to permit the organization of that market to be distinguished from that of the market for maize seeds in general.

As a result the agreements between INRA and Frasema cannot be considered as constituting a national organization of the market in maize seeds.

The decision then finds that the agreements at issue are not necessary to attain the objectives set out in Article 39 of the Treaty.

The agreements allowed the applicants to eliminate all competition on the German market as regards INRA maize seeds with the result that the prices of those seeds in the Federal Republic of Germany were very much higher than the prices prevailing in France. That result conflicts with two of the objectives of Article 39 of the Treaty: to ensure a fair standard of living for the agricultural community and to ensure that supplies reach consumers at reasonable prices.

The applicants maintain that the prices of INRA seeds in the Federal Republic of Germany were not markedly higher than those prevailing in France. They maintain that an exclusive territorial licence to exploit a new plant variety is the best means of attaining the objectives of Article 39 of the Treaty.

The second contention based on the argument that the contracts at issue, by granting an exclusive licence over plant breeders' rights for INRA seeds in respect of the Federal Republic of Germany, constituted the most appropriate means of attaining the objectives of the Common Agricultural Policy, will be examined in the context of the third contention.

Third contention (A): the particular nature of the plant breeders' rights

The applicants state that Kurt Eisele was the holder of breeders' rights which had been assigned to him by INRA in respect of the Federal Republic of Germany. Those rights confer on the holder the exclusive right to produce seeds for the purpose of marketing and to prevent the importation, without his agreement, of such seeds.

They argue that the principle of exclusive breeding rights as to territory pursuant to the relevant German legislation is justified by the particular nature of the plant species which are the subject of it. The hybrid seeds, once developed, must be constantly reproduced by a biological process in order that they may be maintained; the risk of degeneration of the variety is such that marketing which is not controlled by a breeder or his licensee is likely to cause considerable damage to the whole of agriculture on the territory in question.

The applicants infer from those arguments that the contested decision is unlawful to the extent to which it considers that the contracts at issue are intended to bring about a partitioning of the markets, whereas the territorial protection enjoyed by Kurt Eisele was merely the result of the legitimate exercise of the breeders' rights of which he was the owner in the Federal Republic of Germany.

It should be noted that the contested decision strikes down the 1960 contract to the extent to which it enabled Kurt Eisele "to invoke his own breeders' rights to prevent all imports into Germany or exports to other Member States of maize seed of INRA varieties".

It should be remembered that in accordance with the case-law of the Court an industrial or commercial property right, as a legal entity, does not possess those elements of contract or concerted practice referred to in Article 85 (1) but the exercise of that right might fall within the ambit of the prohibition contained in the Treaty if it were to manifest itself as the subject, the means or the consequence of an agreement.

There is also a prohibition where the licensee is assured of absolute territorial protection by preventing parallel imports.

The arguments put forward in support of the third contention, under A, state in substance that the case-law, developed in the light of trade-mark and industrial patent rights, may not apply to breeders' rights given the particular characteristics of that right and of the products which are the subject of it.

The certified seeds which are the subject of the contracts at issue are hybrid maize seeds, representing a seed variety whose stability can only be guaranteed if they are cultivated again every time from basic lines. According to the applicants the reproduction of those seeds poses a particular problem as opposed to the reproduction of products protected by trade-mark or industrial patent rights in particular in so much as the procedure to achieve it is more complicated and reproduction depends to a very marked degree on the hazards of the climate and soil.

That line of argument fails to take into account however that many products capable of forming the subject-matter of a trade-mark right or an industrial patent, in particular certain food or pharmaceutical products, are in a similar situation.

The reasons suggested by the applicants, although they are based on findings of fact which are correct, are not convincing enough to justify a special system for breeders' rights in relation to other industrial or commercial property rights.

The main argument which the applicants put forward in support of their contention was to maintain that the holder of breeders' rights in the Federal Republic of Germany is the guarantor, as regards the Bundessortenamt, of the stability of the protected variety.

The responsibility thus imposed on that holder requires on his part an absolute control over all marketing of seeds of the protected variety in the Federal Republic of Germany. Therefore the obstacle to parallel imports is justified.

A glance at the German legislation in the matter shows that seeds certified and admitted for marketing are subject to a quality control on the part of the public authorities and that control includes a check as to the stability of the variety. Breeders' rights on the other hand are not intended to substitute for checks carried out by the competent authorities controls carried out by the holder of those rights, but to confer on the holder a kind of protection the nature and effects of which all derive from private law. From that point of view the legal position of a breeder of seeds is not different from that of the holder of patent or trade-mark rights over a product subject to a strict control by the public authorities as is the case with pharmaceutical products.

It is therefore not correct to consider that breeders' rights are a species of commercial and industrial property right with characteristics of so special a nature as to require, in relation to competition rules, different treatment from other commercial or industrial property rights.

Third contention (B): the application of Article 85 of the Treaty to the exclusive licences

By this contention the applicants criticize the Commission for having wrongly considered that an exclusive licence of breeders' rights must by its very nature be assimilated to an agreement prohibited by Article 85 (1) of the Treaty.

The Commission's opinion in that respect is said not to be well founded in so far as the exclusive licence constitutes the sole means, as regards seeds which have been recently developed in a Member State and which have not yet penetrated the market of another Member State, of promoting competition between the new product and comparable products in that other Member State. Indeed no grower or trader would take the risk of launching the new product on a new market if it were not protected against direct competition from the holder of the breeders' rights and from his other licensees.

The grounds upon which the decision was adopted sets out two sets of circumstances to justify the applicability of Article 85 (1) to the exclusive licence in question.

The first set of circumstances is described as follows:

> "By licensing a single undertaking to exploit its breeders' rights in a given territory, the licensor deprives himself for the entire duration of the contract of the ability to issue licences to other undertakings in the same territory", "by undertaking not to produce or market the product himself in the territory covered by the contract the licensor likewise eliminates himself, as well as Frasema and its members, as suppliers to that territory".

Article 1 (b) corresponds to that part of the grounds for the decision declaring the exclusive nature of the licence provided for in the 1965 contract contrary to Article 85 (1) of the Treaty in so far as it entails:

> "The obligation upon INRA or those deriving rights through INRA to refrain from producing or selling the relevant seeds in Germany through other licensees".
>
> "The obligation upon INRA or those deriving rights through INRA to refrain themselves from producing or selling the relevant seeds in Germany".

The second set of circumstances set out in the decision is described as follows:

> "The fact that third parties may not import the same seed,(namely the seed under licence),from other Community countries into Germany or export from Germany to other Community countries, makes for market sharing and deprives German farmers of any real room for negotiation since seed is supplied by one supplier and one supplier only".

That part of the grounds of the decision is reflected in Article 1 (b) which states that the exclusive nature of the licence is contrary to Article 85 (1) to the extent to which it entails:

> "The obligation upon INRA or those deriving rights through INRA to prevent third parties from exporting the relevant seeds into Germany without the licensee's authorization, for use or sale there,
>
> Mr Eisele's concurrent use of his exclusive contractual rights and his own breeders' rights to prevent all imports into Germany or exports to other Member States of the relevant seeds".

It is necessary to examine whether, in the present case, the exclusive nature of the licence, to the extent to which it is in the nature of an open licence, where the exclusivity of the licence relates only to the contractual relationship between the holder of the rights and the licensee, has the effect of preventing or distorting competition within the meaning of Article 85 (1) of the Treaty.

The exclusive licence which is dealt with by the contested decision concerns the cultivation and marketing of hybrid maize seeds which cost INRA years of research and experimentation and which were unknown to the German farmers and users at the time when the co-operation between INRA and the applicants was taking shape. For that reason the concern shown by the intervening parties as regards the production of a new technology is justified.

Having regard to the specific nature of the products in question, the Court concludes that, in a case such as the present one, the grant of an exclusive open licence, namely a licence which does not affect the position of third parties such as parallel importers and licensees in respect of other territories, is not in itself incompatible with Article 85 (1) of the Treaty.

The third contention, under B, is thus justified to the extent to which it concerns that aspect of the exclusive nature of the licence.

As regards the position of third parties, the Commission criticizes in substance the parties to the contract for having extended the definition of exclusivity to importers who were not bound to the contract and in particular to parallel importers.

It is clear from the file that the contracts in question were effectively intended to restrict competition from third parties on the German market.

Article 1 (b) of the decision expressly refers to Article 5 of the 1965 contract as well as to the exercise of breeders' rights by Mr Eisele with a view to preventing the marketing of INRA seeds in the Federal Republic of Germany by third parties.

An examination of the third contention under B leads to the conclusion that that contention is in part well founded (see operative part of the judgment).

Fourth contention: the grant of an exemption under Article 85 (3) of the Treaty

The applicants maintain that the contested decision refuses to grant an exemption under Article 85 (3) of the Treaty because there is no question that a new market is being penetrated or a new product is being launched and because Mr Eisele enjoyed absolute territorial protection in the Federal Republic of Germany.

Those two reasons are incorrect: on the one hand the 1965 contract was precisely intended to open up a new market and to introduce a new product and secondly the exclusive elements of the contractual relationship established by that contract did not go beyond what was necessary for the distribution of plant species intended for cultivation outside their country of origin.

It should be recalled that under the terms of Article 85 (3) of the Treaty an exemption from the prohibition provided for in Article 85 (1) may be granted in the case of any agreement between an undertaking which contributes to improving the production or distribution of goods or to promoting technical progress, and which does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives.

Since what are involved are seeds intended to be used by a large number of farmers for the production of maize, an important product for human and animal feedstuffs, absolute territorial protection manifestly goes beyond what is indispensable to the improvement of production or distribution or the promotion of technical progress as is demonstrated in particular in the present case by the prohibition, agreed to by both parties to the agreement,of any parallel imports of INRA maize seeds into the Federal Republic of Germany even if those seeds were seeds bred by INRA itself and marketed in France.

It follows that the absolute territorial protection conferred on the licensee as the contested decision found constituted a sufficient reason to justify the refusal to grant an exemption under Article 85 (3) of the Treaty. Therefore the fourth contention must be rejected.

Fifth contention: the settlement reached between Louis David KG and Mr Eisele

The fifth contention relates to Article 1 (c) of the decision by which the Commission declares clause 1 of the settlement reached in 1973 between Louis David KG and Mr Eisele, contrary to Article 85 (1) of the Treaty to the extent to which that cluase 1 obliges Louis David KG not to sell or place on the market in the Federal Republic of Germany seeds of INRA varieties without the authorization of the German licensee.

It appears from the documents in the case that that settlement was reached in the framework of legal proceedings. Such a settlement which is legally enforceable is not a simple private contract but amounts to an order of the Court. The applicants infer from that that the Commission is not able to annul such a settlement without interfering with the jurisdictional powers of the Federal Republic of Germany.

Whilst it is true, as the applicants maintain, that a legal settlement is enforceable under German law it does not have the authority of res judicata and cannot therefore have effect as regards other courts, public authorities or third parties. The fifth contention must therefore be rejected.

The Court hereby:

(1) annuls Article 1 (b) of the decision of the Commission of 21 September 1978 relating to a proceeding under Article 85 of the EEC Treaty (IV/28.824 - breeders' rights - maize seed Official Journal No. L 286, p.23) to the extent to which it relates to Article 1 of the contract of 5 October 1965 and in so far as the latter entails:

> The obligation upon INRA or those deriving rights through INRA not to produce or sell through other licensees in the Federal Republic of Germany;
>
> The obligation upon INRA or those deriving rights through INRA to refrain themselves from producing or selling in the Federal Republic of Germany;

(2) Dismisses the rest of the application;

(3) Orders each party and each intervener to bear its own costs.

Judgment of 8 June 1982

Case 91/81

Commission of the European Communities v Italian Republic

(Opinion delivered by Mr Advocate General VerLoren van Themaat on 28 April 1982)

Social policy - Approximation of laws - Collective redundancies - Directive No. 75/129 - Purpose - Powers of the Member States

(EEC Treaty, Art. 117; Council Directive No. 75/129)

Directive No. 75/129, which the Council considers corresponds to the need, stated in Article 117 of the Treaty, to promote improved working conditions and an improved standard of living for workers, is intended to approximate the provisions laid down in this field by the Member States by law, regulation or administrative action relating to collective redundancies. The provisions of the directive are thus intended to serve to establish a common body of rules applicable in all the Member States, whilst leaving to the Member States power to apply or introduce provisions which are more favourable to workers.

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NOTE

The Commission of the European Communities has brought an action for a declaration that the Italian Republic has failed to fulfil its obligations under the Treaty by failing to adopt within the prescribed period the measures needed to comply with Council Directive No. 75/129/EEC on the approximation of the laws of the Member States relating to collective redundancies.

The recitals in the preamble to the directive state that "it is important that greater protection should be afforded to workers in the event of collective redundancies while taking into account the need for balanced economic and social development within the Community".

The directive determines the scope of the words "collective redundancies" whilst leaving the Member States to choose between the two criteria which it fixes.

The directive lays down a series of rules, such as that the employer must hold consultations with the workers' representatives with a view to reaching an agreement, that the employer is bound to notify the competent public authority in writing of any projected redundancies etc.

Article 6 of the directive requires the Member States to bring into force, within a period of two years following notification of the directive, the laws, regulations and administrative provisions needed in order to comply therewith.

The Italian Government observed that, having regard to the Italian system of protection in the case of dismissal as a whole which is provided both by the wide scope given by Italian law to the concept of "individual redundancies", which is very favourable to workers, by specific provisions laid down by regulation relating to collective redundancies and by the provisions of collective agreements, that system creates the conditions and establishes the procedures for attaining the objectives of the directive and indeed, in certain respects, exceeds its requirements.

The Italian Government nevertheless does not dispute that in certain branches, notably in agriculture and commerce, Italian legislation is not as comprehensive as the provisions of the directive.

It is clear from the foregoing that the provisions in this field which are in force in Italy do not suffice to meet the requirements as a whole of the directive.

The Court declared:

"By failing to adopt within the prescribed period the measures needed in order to comply with Council Directive No. 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies (Official Journal No. L 48, p.29), the Italian Republic has failed to fulfil its obligations under the Treaty."

Judgment of 9 June 1982

Joined Cases 206, 207, 209 and 210/80

Italo Orlandi e Figlio and Others v
Ministero del Commercio con l'Estero

(Opinion delivered by Advocate General Sir Gordon Slynn on 17 March 1982)

1. Free movement of goods - Quantitative restrictions - Measures having an equivalent effect - Goods imported from other Member States - Advance payment in foreign currency - Provision of security or bank guarantee - Application to transactions other than those for speculative purposes - Not permissible

(EEC Treaty, Art. 30)

2. Free movement of goods - Quantitative restrictions - Measures having an equivalent effect - Concept - Same meaning in the Treaty and the agricultural regulations for both trade between Member States and trade with non-member countries

(Regulation No. 120/67/EEC of the Council, Art. 18 (2), and Regulation No. 827/68 of the Council, Art. 2)

1. The concept of measures having an effect equivalent to a quantitative restriction in Article 30 of the Treaty is to be understood as meaning that that provision covers a national measure requiring all importers of goods coming from other Member States to provide a security or a bank guarantee amounting to 5% of the value of the goods when payment is in advance, the words "payment in advance" referring not only to payments for speculative purposes but also to normal and current payments in intra-Community transactions. That applies regardless of the point in time at which the authorities of the Member State consider the importation to have been effected.

2. The concept of measures having an effect equivalent to quantitative restrictions has the same meaning when applied to imports from non-member countries of products covered by Regulations Nos. 120/67 and 827/68 as it has when applied to trade between Member States.

Judgment of 9 June 1982

Case 95/81

Commission of the European Communities v Italian Republic

(Opinion delivered by Advocate General Sir Gordon Slynn on 17 March 1982)

1. Balance of payments - Provisions of the Treaty - Article 104 - Scope - Powers of the Member States - Limits

   (EEC Treaty, Art.104)

2. Free movement of goods - Exceptions - Article 36 of the Treaty - Strict interpretation - Scope

   (EEC Treaty, Art. 30)

3. Free movement of goods - Quantitative restrictions - Measures having an equivalent effect - Goods imported from other Member States - Advance payment in foreign currency - Provision of security or bank guarantee - Application to transactions other than those for speculative purposes - Not permissible

   (EEC Treaty, Art. 30)

1. The scope of Article 104 of the Treaty must be appraised in the light of the system as a whole of the chapter on the balance of payments. Within the framework of that chapter Article 104 merely sets out the general objectives of the economic policy which the Member States must pursue, regard being had to their membership of the Community. It accordingly may not be invoked in order to derogate from the other provisions of the Treaty.

2. Article 36 of the Treaty must be strictly interpreted and the exceptions which it lists may not be extended to cases other than those which have been exhaustively laid down; Article 36 refers to matters of a non-economic nature.

3. National rules which require all importers of goods coming from other Member States to provide a security or a bank guarantee amounting to 5% of the value of the goods when payment is in advance, the expression "payment in advance" referring not only to payments for speculative purposes but also to normal and current payments in intra-Community transactions, constitute a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty.

NOTE

Note covering Joined Cases 206, 207, 209 and 210/80 Orlandi and Others v Ministero del Commercio con l'Estero and Case 95/81 Commission of the European Communities v Italian Republic.

In these cases actions have been brought which require the Court to settle the compatibility with Community law of the Italian rules which render the advance payment for goods intended for import subject to the lodging of security or the provision of a bank guarantee. According to the provisions in question that security or guarantee is fixed at 5% of the exchange value in Italian lire of the payment to be effected and is required for imports whose value exceeds Lit. 10 000 000.

If no proof is provided that the importation was effected within the prescribed periods - at first fixed at 30 days after the advance payment and then at 120 days later - the competent authority proceeds to forfeit the security wholly or in part or calls up the guarantee.

In this context the word "importation" does not mean the physical arrival of the goods in Italian territory but their release for home consumption after the customs formalities have been completed. All payments are considered "advance" when they are made before the purchaser has the goods at his disposal, enabling him to put them to their intended use in Italy.

In Case 95/81 since the Commission considered that these rules as a whole constituted an infringement of Article 30 of the EEC Treaty it brought an action for a declaration that the Republic of Italy had failed to fulfil its obligations under the EEC Treaty.

In Joined Cases 206, 207, 209 and 210/80 the Tribunale Civile [Civil District Court], Rome, before which proceedings are pending between Italian importers and the Ministry for Foreign Trade concerning the said securities or guarantees, referred two preliminary questions to the Court of Justice.

The questions submitted are intended to establish on the one hand whether the provisions of Community law which prohibit measures having an effect equivalent to quantitive restrictions on intra-Community trade in goods and those concerning the duties of the Member State in relation to payments in intra-Community trade must be interpreted as extending to requiring the lodging of security through the procedures described above in the case of the advance payment of goods imported from other Member States and, on the other hand, whether the same interpretation must be placed upon Article 18 of Regulation No. 120/67 and upon Article 2 of Regulation No. 827/68 in relation to the agricultural products referred to by these regulations and imported into the Community from non-member countries.

Since the Court found that Article 104 of the EEC Treaty did not by itself permit derogations from the other provisions of the Treaty, including Article 30, and that the Italian rules in question were not covered by the provisions of Article 106 of the Treaty the Court considered the question whether these rules were contrary to Article 30 of the EEC Treaty.

As the Court of Justice has held on many occasions it is sufficient for the purposes of the prohibition of all measures having an effect equivalent to quantitive restrictions on imports laid down in Article 30 that the measures in question should be capable of acting as a direct or indirect, real or potential, hindrance to trade between the Member States.

It must be found that, although the measures in question may have been enacted for the purpose of repressing currency speculation, they do not constitute specific rules for the attainment of that objective but general rules dealing with intra-Community transactions as a whole where payment is made in advance. In fact in so far as the Italian Government extends its rules to cover payments made by letters of credit and similar documents, the financial method usually employed for importations of goods in certain commercial sectors, it is referring to a means of payment normally employed in international trade. The measures in question thus affect not only speculative operations but also ordinary commercial transactions and, since their effect is to render importations more difficult or more burdensome than internal transactions, they produce restrictive effects on the free movement of goods. For these reasons, and in so far as they produce these effects, the measures at issue are contrary to Article 30.

With regard to the argument put forward by the Italian Government that the rules in question are justified under Article 36 of the EEC Treaty on grounds of public policy it must be recalled that, according to the settled case-law of the Court, Article 36 must be strictly interpreted and the exceptions which it lists may not be extended to cases other than those which have been exhaustively laid down and, furthermore, that Article 36 refers to matters of a non-economic nature.

For these reasons the Court declared in Case 95:

"By requiring all importers of goods from other Member States to provide security or a bank guarantee equal to 5% of the amount of the value of the goods when payment is made in advance, the words "payments in advance" referring not only to payments for speculative purposes but also to usual and ordinary payments concerning intra-Community transactions, the Republic of Italy has failed to fulfil its obligations under Articles 30 and 36 of the Treaty."

With regard to the trade with non-member countries envisaged in the second question of the judgment making the reference it should be recalled that Article 18(2) of Regulation No. 120/67 of the Council which is inserted in Title II, "Trade with third countries", and Article 2 of Regulation No. 827/68 of the Council provide in particular that:

"Save as otherwise provided in this regulation or where derogation therefrom is decided by the Council ... the following shall be prohibited:

The levying of any customs duty or charge having equivalent effect;

The application of any quantitative restriction or measure having equivalent effect ...".

It appears from the files in the main actions that in these cases the prohibitions which have been laid down do not come under the exceptional provisions contained in the regulations in question or within any derogation decided by the Council.

The Court has already had occasion to interpret Articles 18 and 21 of Regulation No. 120/67 in its judgment of 10 October 1973 in which it held: "There is no consideration which would justify different interpretations of the concept of 'charge having equivalent effect' as it appears in Article 9 et seq. of the Treaty on the one hand and in Articles 18 and 21 of Regulation No. 120/67 on the other".

The same considerations also apply to the words "measure having an equivalent effect" as they have been employed in the Treaty, in Article 30 and in the above-mentioned articles of Regulations No. 120/67 and No. 827/68.

For these reasons the Court declared in Joined Cases 206, 207, 209 and 210/80:

"The concept of measure having an effect equivalent to a quantitative restriction appearing in Article 30 of the Treaty is to be understood as meaning that that provision covers a national measure requiring all importers of goods coming from other Member States to lodge security or provide a bank guarantee amounting to 5% of the value of the goods when payment is in advance, the words 'advance payments' referring not only to payments for speculative purposes but also to usual and ordinary payments in intra-Community transactions. The same also applies regardless of the time when the administration of the Member State considers that the importation has been effected. The concept of measure having equivalent effect which applies to importations of products covered by Regulations No. 120/67 and No. 827/68 and coming from non-member countries bears the same meaning as that in relation to trade between Member States".

Judgment of 9 June 1982

Case 58/81

Commission of the European Communities v
Grand Duchy of Luxembourg

(Opinion delivered by Mr Advocate General VerLoren van Themaat
on 18 May 1982)

Member States - Obligations - Implementation of directives - Failure to comply - Justification - Not possible

A Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with obligations resulting from Community directives.

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NOTE

The Commission brought an action for a declaration that the Grand Duchy of Luxembourg, by failing to take within the period laid down in Directive No. 75/117 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women the measures needed to eliminate distortion in the conditions for granting the head of household allowance to civil servants, has failed to fulfil its obligations under the EEC Treaty.

The Grand Duchy of Luxembourg did not dispute that it had failed in its obligations as was alleged and merely stated that the delay in adopting the measures necessary to conform to the directive in question arose on the one hand from the need to enact legislation and on the other from the fact that the implementation of the directive entailed carrying out a study of its consequences for the budget. Moreover it was necessary to amend the law governing part-time work, which entailed discussions with the representatives of the civil servants.

According to the settled case-law of the Court of Justice a Member State may not rely upon provisions, practices or situations in its internal legal system in order to justify a failure to fulfil obligations under Community directives.

The Court declared that:

"The Grand Duchy of Luxembourg, by failing to take within the period laid down in Article 8(1) of Directive No. 75/117 of 10 February 1975 the measures necessary to eliminate distortions in the conditions for the granting of the head of household allowance to its civil servants, has failed to fulfil its obligations under the EEC Treaty".

Judgment of 10 June 1982

Case 92/81

A. Caracciolo (née Camera) v Institut National d'Assurance Maladie-Invalidité et Union Nationale des Mutualités Socialistes

(Opinion delivered by Mr Advocate General VerLoren van Themaat on 28 January 1982)

1. Social security for migrant workers - Claims, declarations or appeals - Submission in a Member State other than the competent State - Effects - Irregular residence of the person concerned in the State where the claim was submitted - No effect

(Regulation No. 4 of the Council, Art. 83)

2. Social security for migrant workers - Benefits - Residence clauses - Waiver - Application to invalidity benefits

(Regulation No. 3 of the Council, Art. 10 (1))

1. Article 83 of Regulation No. 4 must be interpreted as meaning that the submission of a claim to an authority, institution or agency of a Member State other than the Member State called upon to pay the benefit has the same effect as if that claim had been submitted direct to the competent authority of the latter State. Moreover, such an interpretation is in keeping with the scheme of Regulation No. 4,which on that point seeks simply to avoid the loss of rights by migrant workers owing to mere administrative formalities. It follows that Article 83 of Regulation No. 4 does not concern the substantive rules applicable in the matter. The fact that the residence of the person concerned in the State where she submitted her claim was irregular under the legislation of the State of the competent authority in no way affects that interpretation.

2. Article 10 (1) of Regulation No. 3 must be interpreted as meaning that the insurance institution of the competent Member State is not permitted to apply to invalidity benefits the principle of territoriality.

NOTE

The Cour de Cassation de Belgique [Belgian Court of Cassation] referred to the Court three questions for a preliminary ruling as to the interpretation of Regulation No. 3 of the Council of the EEC concerning social security for migrant workers and of Regulation No. 4 on implementing procedures and supplementary provisions in respect of Regulation No. 3.

These questions were raised in the course of an appeal to the Court of Cassation against a judgment of the Cour du Travail [Labour Court], Brussels, dismissing Mrs Caracciolo's claim for payment of an invalidity pension from the national insurance institution.

The Cour de Cassation decided to submit to the Court the following questions:

"1. Where a worker in receipt of sickness and invalidity insurance benefits in cash in a Member State of the European Community, who has been authorized to stay in another Member State in order to receive treatment there, has remained in that other State after the expiry of the prescribed period and on conditions which are irregular under the legislation of the State of origin and under an administrative arrangement concluded between the two States which has remained applicable under Regulations (EEC) Nos. 3 and 4 concerning social security for migrant workers, must Article 83 of the said Regulation No. 4 be interpreted to mean that that provision determines not only the date on which a declaration or an appeal shall be deemed to have been made to the authority, institution or agency competent to take cognizance thereof but also the validity of the claim when it is addressed to an authority, institution or agency of a Member State other than that of the State whose authority, institution or agency is competent to take cognizance thereof?

2. If the answer to that first question is in the affirmative, must that provision be interpreted to mean that a claim which is submitted in the circumstances which have just been related must be considered valid although under the legislation of the State of the competent authority the claimant's residence in the other State was irregular?

3. Likewise, do the provisions of Article 10(1) of Regulation No. 3 concerning social security for migrant workers preclude the application by the insurance institution of the Member State of origin of the principle of the territoriality of benefits laid down by national legislation, in this case by Article 70(1) of the Belgian Law of 9 August 1963?"

The Court replied to the questions submitted to it with the following ruling:

"1. Article 83 of Regulation No. 4 of the Council of 3 December 1958 must be interpreted to mean that the submission of a claim to an authority, institution or agency of a Member State other than the State required to pay the benefit has the same effect as if that claim had been directly submitted to the competent authority of the latter State.

2. The fact that the residence of the person concerned in the State where she submitted her claim was irregular under the legislation of the competent State in no way alters the fact that the submission of that claim has the same effect as if it had been directly submitted to the competent authority of the State of origin.

3. Article 10(1) of Regulation No. 3 of the Council of 3 December 1958 must be interpreted as meaning that the insurance institution of the State of origin is not permitted to apply to invalidity benefits the principle of territoriality to which the national court refers."

Judgment of 10 June 1982

Case 217/81

Compagnie Interagra S.A. v Commission of the European Communities

(Opinion delivered by Mr Advocate General VerLoren van Themaat on 13 May 1982)

1. Agriculture - Common organization of the markets - Export refunds - Application of the Community rules - Powers of national authorities - Interpretation by the Commission - Not binding on the national authorities

2. Action for damages - Action brought against national measures implementing Community law - Inadmissible

(EEC Treaty, Art. 178 and second paragraph of Art. 215)

1. The application of Community provisions on export refunds is a matter for the national bodies appointed for this purpose. The Commission has no power to take decisions on their interpretation but may only express its opinion which is not binding on the national authorities.

2. The purpose of the action for damages provided for in Article 178 and 215 of the Treaty 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. On the contrary, a review of administrative acts of Member States in applying Community law is primarily a matter for national courts without prejudice to their power to refer questions for a preliminary ruling to the Court under Article 177 of the Treaty.

NOTE

Interagra S.A. brought an action for compensation for damage amounting to FF 61 956 250 incurred as a result of Commission Regulation (EEC) No. 2993/80 temporarily suspending advance fixing of the export refund for butter and butter-oil, pursuant to which it had been refused payment of the refund which it claimed to be entitled to receive in connexion with the transaction made on the basis of a contract awarded for supplying butter to the USSR, and as a result of the Commission's instructions concerning the application of that regulation.

On 17 November 1980 Interagra submitted an offer for the supply of 25 000 tonnes of butter, on the basis of the amount of refund laid down by Commission Regulation (EEC) No. 2943/80 of 13 November 1980. The offer remained open until 20 December 1980. On 17 November 1980 the applicant applied to the French intervention agency, the Fonds d'Orientation et de Régularisation des Marchés Agricoles (hereinafter referred to as "the Fund") for an advance fixing certificate in respect of 25 000 tonnes of butter.

On 20 November 1980 Commission Regulation No. 2993/80 came into force. The regulation suspended until 27 November 1980 the advance fixing of export refunds for butter. The suspension was subsequently extended to 11 December 1980.

On 28 November 1980 the Fund informed the applicant that because the Commission had suspended advance fixing for the period from 20 to 27 November 1980 applications for certificates submitted on or after 17 November 1980 no longer had any purpose as a result of the third paragraph of Article 3 of Regulation No. 2044/75 After accepting the applicant's offer on 10 December 1980, the Soviet agency requested it on 9 January 1981 to carry out its supply commitment.

By this action the applicant sought compensation from the Commission for the injury it suffered as a result of the application of the instructions given by the Commission and of the Community rules. The injury lay, it claimed, in the adverse consequences for the Soviet agency which must be compensated by the applicant, together with non-material damage and loss of earnings to the applicant itself.

Admissibility

The Commission contended that the application was not admissible. The decision rejecting the applications for export certificates was taken by the French intervention agency and those affected thereby must challenge such a decision in the national courts which might then, if appropriate, refer questions to the Court for a preliminary ruling. Review of the administrative actions of the Member States when applying Community law was a task which must be performed initially by the national courts.

The Court dismissed the application as inadmissible.

Judgment of 10 June 1982

Case 231/81

Hauptzollamt Würzburg v H. Weidenmann GmbH & Co.

(Opinion delivered by Advocate General Sir Gordon Slynn on 29 April 1982)

Common Customs Tariff - System of generalized preferences in favour of developing countries - Certificate of origin of goods - Production after expiry of the period of preferential treatment - Admissibility - Conditions - Failure to observe additional conditions imposed by national law - No influence

(Regulation (EEC) No. 3004/75 of the Council; Regulation (EEC) No. 3214/75 of the Commission, Arts. 7 and 11)

1. The suspension of customs duties pursuant to Article 1 of Regulation (EEC) No. 3004/75 of the Council opening preferential tariffs for certain textile products originating in developing countries might apply in the case of goods which were imported, presented and entered for home use in 1976 even though the certificate of origin was produced after that regulation ceased to apply, provided that the certificate was valid and that it was produced in accordance with the conditions laid down in Articles 7 and 11 of Regulation No. 3214/75 of the Commission.

2. A valid certificate of origin must be accepted notwithstanding any requirement which the national customs authorities have thought it necessary to impose unilaterally.

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NOTE

The Bundesfinanzhof [Federal Finance Court] referred to the Court for a preliminary ruling three questions concerning the interpretation of Regulation (EEC) No. 3004/75 of the Council opening preferential tariffs for certain textile products originating in developing countries and Council Regulation (EEC) No. 3022/76 opening, allocating and providing for the administration of Community tariff preferences for textile products originating in developing countries and territories.

The request for an interpretation was made in the course of an action between H. Weidenmann GmbH and Co., who had imported bales of worsted yarn fabric from Argentina, and the customs authorities in Würzburg, which was based on the latter's refusal to exempt the imported goods from customs duties pursuant to the regulations referred to above.

Weidenmann did not produce the certificate of origin for the goods until 2 February 1977, although they were imported on 20 December 1976 and the customs authorities had requested that the certificate of origin be produced by 15 January 1977.

Regulation No. 3004/75 provided for the suspension from 1 January to 31 December 1976 of customs duties on some products originating in certain countries.

Since the importation in question fell within the terms of that regulation the question arose whether it satisfied the restrictions as to quantity and time applicable to importations free of duty.

As far as determining when the maximum quantity had been reached was concerned, Regulation No. 3004/75 provided that "Imports of the products in question shall be actually charged against the Community ceilings and maximum amounts as and when the products are entered for home use and provided that they are accompanied by a certificate of origin" and stipulated that goods might be charged against a ceiling or maximum amount only if the certificate of origin was presented before the date on which the levying of duties was re-introduced.

The Bundesfinanzhof referred the following three questions to the Court:

"1. Is it possible for the suspension of customs duties pursuant to Article 1 of Regulation (EEC) No. 3004/75 to apply in the case of goods which were in fact imported, presented and entered for home use in 1976 but for which the certificate of origin was not produced until February 1977?

2. If the answer to Question 1 is in the affirmative: Is that also the case if production of the certificate of origin in 1977 was permissible, but only earlier - on or before 15 January 1977?

3. If the answer to Question 1 is in the negative: Is it possible for the suspension of customs duties pursuant to Article 1 of Regulation (EEC) No. 3022/76 to apply in the case of goods which were in fact imported, presented and entered for home use in 1976 but for which the certificate of origin was produced in 1977?"

In reply, the Court ruled as follows:

"1. The suspension of customs duties pursuant to Article 1 of Regulation (EEC) No. 3004/75 of the Council may apply in the case of goods which were imported, presented and entered for home use in 1976 even if the certificate of origin was produced after that regulation ceased to apply provided that the certificate is valid and that it is produced in accordance with the conditions laid down in Articles 7 and 11 of Regulation No. 3214/75 of the Commission.

2. A valid certificate of origin must be accepted notwithstanding any unilateral stipulation which the national customs authorities have seen fit to make."

Since the reply to the first question was in the affirmative there was no need to reply to the third question.

Judgment of 10 June 1982

Case 246/81

Lord Bethell v Commission of the European Communities

(Opinion delivered by Advocate General Sir Gordon Slynn on 6 May 1982)

Application for a declaration that a measure is void - Natural or legal persons - Conditions for admissibility

Action for failure to act - Natural or legal persons - Conditions for admissibility

(EEC Treaty, Art. 173, second paragraph, and Art. 175, third paragraph)

It may be seen from the second paragraph of Article 173 and the third paragraph of Article 175 of the Treaty that the applicant, for his application for a declaration that a measure is void or his action for failure to act to be admissible, must be in a position to establish either that he is the addressee of a measure of an institution having specific legal effects with regard to him, which is, as such, capable of being declared void, or that the institution, having been duly called upon to act in pursuance of the second paragraph of Article 175, has failed to adopt in relation to him a measure which he was legally entitled to claim by virtue of the rules of Community law.

A natural or legal person who is asking an institution, not to take a decision in respect of him, but to open an inquiry with regard to third parties and to take decisions in respect of them, may have an indirect interest, as other private persons may have, in such proceedings and their possible outcome, but he is nevertheless not in the precise legal position of the actual addressee of a decision which may be declared void under the second paragraph of Article 173 or in that of the potential addressee of a legal measure which the institution in question has a duty to adopt with regard to him, as is the position under the third paragraph of Article 175.

NOTE

Lord Bethell, a Member of the European Parliament, a Member of the House of Lords, and chairman of an association named "Freedom of the Skies Campaign" brought an action under the third paragraph of Article 175 of the Treaty for a declaration that the Commission was committing an infringement of the Treaty by failing to comply with the request of the applicant contained in a letter dated 13 May 1981 to take measures against an agreement existing between the European aviation companies concerning fares in passenger transport.

In the alternative the applicant claimed that the Court should, under the second paragraph of Article 173, annul the Commission's communication of 17 July 1981, the reply to the letter of 13 May 1981, in which the Commission refused to take the action requested by the applicant.

The background to the dispute

For some time Lord Bethell has been leading a campaign against a cartel which, according to him, is operated by the regular aviation companies concerning fares for the transport of passengers in Europe.

In a letter addressed to the Commission on 13 May 1981 the applicant complained that the Commission had done nothing to terminate that situation and that it should take steps to do so by requesting information and explanations from the aviation companies.

The Director General for Competition informed the applicant that in most cases the final fixing of airline fares was the sole responsibility of the Member States and that there was thus in principle no ground for scrutinizing the activity of the aviation companies under Article 85.

The Director General also informed the applicant of the steps which the Commission intended to take in future: to submit a report to the Council concerning the investigations previously carried out and to point out to the Member States that airline fares may not be fixed at excessive levels, in breach of Article 86.

Since Lord Bethell was not satisfied with that reply he brought an action based on Article 175, or in the alternative, Article 173 of the Treaty. The Commission submitted an objection of inadmissibility.

It appeared that the applicant requested the Commission not to take a decision in respect of him but to open an inquiry with regard to third parties and to take decisions in respect of them.

No doubt the applicant, in his double capacity as a user of the airlines and as a leading member of an organization of users of such services, had an indirect interest, as other users may have, in such proceedings and their possible outcome, but he was nevertheless not in the precise legal position of the actual addressee of a decision which might be declared void under the second paragraph of Article 173 or in that of the potential addressee of a legal measure which the Commission had a duty to adopt with regard to him, as is the position under the third paragraph of Article 175.

The Court accordingly declared that the application should be dismissed as inadmissible.

Judgment of 10 June 1982

Case 255/81

R.A. Grendel GmbH v Finanzamt für Körperschaften

(Opinion delivered by Advocate General Sir Gordon Slynn on 6 May 1982)

Tax provisions - Harmonization of laws - Turnover tax - Common system of value added tax - Exemptions provided for in the Sixth Directive - Exemption for credit negotiation transactions - Possibility of individuals' relying on the appropriate provision in the event of the directive's not being implemented - Conditions (Council Directive No. 77/388, Art. 13 B (d) 1,)

As from 1 January 1979 it was possible for the provision concerning the exemption from turnover tax of transactions consisting of the negotiation of credit contained in Article 13 B (d) 1. of Directive No. 77/388 to be relied upon, in the absence of the implementation of that directive, by a credit negotiator where he had refrained from passing that tax on to persons following him in the chain of supply and the State could not claim, as against him, that it had failed to implement the directive.

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NOTE

The Finanzgericht [Finance Court] Hamburg referred to the Court for a preliminary ruling a question on the interpretation of Article 13 B (d)1 of the Sixth Council Directive (No. 77/388/EEC) on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment. As amended, Article 1 of that directive required the Member States to adopt the necessary laws, regulations and administrative provisions for implementing it by 1 January 1979 at the latest. The Sixth Directive was not implemented by the Federal Republic of Germany, however,until it adopted the Law of 26 November 1979 which took effect on 1 January 1980.

Grendel, which carries on business in the Federal Republic of Germany as a finance broker, was assessed to turnover tax on revenue earned in 1979 in the form of commission on that business, pursuant to the German Law which was in force until 31 December 1979.

The broker claimed that it should be exempt from the tax, relying on the direct application of Article 13 of the Sixth Directive which provides expressly for exemption in the case of transactions for "the granting and the negotiation of credit", and for "the management of credit by the person granting it". The Tax Office did not accept the view that the directive confers rights which may be relied upon directly by individuals, and refused to grant exemption.

The Finanzgericht Hamburg, hearing the case, decided to stay the proceedings and referred the following question to the Court for a preliminary ruling.

> "Is Article 13 B (d) 1 of the Sixth Council Directive ... to be interpreted as conferring on a taxable person, as from the date on which it took effect,a direct legal right to exemption from tax in respect of the transactions referred to therein, even where exemption is not (yet) provided for under national law on turnover tax?"

It should be noted that the questions raised in the case have already been dealt with by the Court in its judgment of 19 January 1982 (Becker, Case 8/81 (see Proceedings No. 2/82) in which the subject-matter was identical).

Reference should therefore be made to the Court's ruling in its judgment of 19 January 1982 to the effect that the provision concerning exemption from turnover tax for transactions consisting in the negotiation of credit contained in Article 13 of Directive No. 77/388 might be relied upon as from 1 January 1979, in the absence of national provisions implementing that directive,by a credit negotiator if he has not passed that tax on to his customers, and that the State cannot rely in its defence on the absence of implementing measures.

On those grounds, the Court ruled in this case as follows:

> "The provision concerning the exemption from turnover tax of transactions consisting in the negotiation of credit contained in Article 13 B (d) 1 of the Sixth Council Directive (No. 77/388/EEC) of 17 May 1977, on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: Uniform basis of assessment, may, in the absence of implementation of that directive, be relied upon from 1 January 1979 by a credit negotiator where he had refrained from passing that tax on to persons following him in the chain of supply, and the State may not rely against him upon its failure to implement the directive".

Judgment of 17 June 1982

Case 3/81

Ludwig Wünsche & Co. v
Bundesanstalt für landwirtschaftliche Marktordnung

(Opinion delivered by Mrs Advocate General Rozès on 18 February 1982)

1. Agriculture - Common organization of the markets - Cereals - Export refunds - Pearled grains of barley - Tariff definition - Reference criteria - Concept

   (Regulation No. 19 of the Council, Annex; Regulation No. 141/64 of the Commission, Art. 5 (1) (d); Regulation No. 11/66 of the Commission)

2. Agriculture - Common organization of the markets - Cereals - Export refunds - Pearled barley - Concept

   (Regulation No. 19 of the Council, Annex; Regulation No. 141/64 of the Commission, Art. 5 (1) (d); Regulation No. 11/66 of the Commission)

1. In so far as no definition of "pearled grains of barley" for the purpose of the grant of export refunds may be obtained either from the relevant agricultural rules or from heading 11.02 of the Common Customs Tariff, to which those rules expressly refer, or from the Explanatory Notes to the Common Customs Tariff, it is appropriate, in view of the fact that heading 11.02 of the Common Customs Tariff has exactly the same wording as a heading in the Customs Co-operation Council Nomenclature, to refer to the Explanatory Notes to that Nomenclature.

   "Pearled grains of barley", within the meaning of the Annex to Regulation No. 19, Article 5 (1) (d) of Regulation No. 141/64 and Regulation No. 11/66, must therefore be taken to mean grains of barley which satisfy, as a minimum, the conditions laid down in the Explanatory Notes to the Customs Co-operation Council Nomenclature concerning heading 11.02.

2. Pursuant to Community law in force in March and April 1966 regarding the export to non-member countries of cereal-based processed products, Member States were at that time permitted to treat as consignments of pearled barley capable of benefiting from a higher export levy than that provided for hulled barley only consignments of barley in which the proportion of pearled grains considerably exceeded 50% by weight of the dry matter.

NOTE

The Bundesfinanzhof referred to the Court for a preliminary ruling two questions on the interpretation of the expressions "pearled barley" (Regulation No. 19 of the Council) and "pearled grains of barley having an ash content expressed as a percentage of the dry matter of less than 1%" (Regulation No. 11/66 of the Commission).

That order was made in connexion with a dispute between a German importer and exporter of cereals (Wünsche) and the Bundesanstalt für Landwirtschaftliche Marktordnung, the German intervention agency in agricultural matters.

That agency, after granting Wünsche the maximum entitlement to export refunds, consisting in this case in authorization to import free of levy 220 kg of basic product (unprocessed barley) per 100 kg of processed product (pearled barley), decided, in the light of the experts' reports on the processed product, to deny authorization to import the goods free of levy and, in two cases, to revoke the import licences already granted. The case was brought before the Bundesfinanzhof which referred two questions to the Court of Justice for a preliminary ruling.

First question

The first question seeks in substance to establish whether the concept of "pearled barley" can be defined solely by reference to the criterion of ash content if such content is less than 1% or whether other factors, including the requirements contained in the Explanatory Notes to the Customs Co-operation Council Nomenclature, must be taken into consideration.

Regulations Nos 19 of the Council and 141/64 and 11/66 of the Commission do not contain any definition whatever of the concept of "pearled barley". Accordingly, recourse must be had to the Explanatory Notes to the Customs Co-operation Council Nomenclature.

Those notes contain the following definitions: "Grain which has been hulled or otherwise worked to remove wholly or partially the pericarp"; "Pearled grains i.e. grain from which practically the whole pericarp has been removed; these are more rounded at the ends".

The notes make no mention whatever of the criterion of ash content. Wünsche contends that the notes are vitiated by a serious error but the Court did not share the plaintiff's reasoning.

On the first point, the Court ruled that:

"'Pearled barley' within the meaning of the Annex to Regulation No. 19, Article 5(1)(d) of Regulation No. 141/64 and Regulation No. 11/66, must be understood as meaning grains of barley which fulfil at least the requirements contained in the Explanatory Notes to the Customs Co-operation Council Nomenclature on heading 11.02".

Second question

The second question seeks in substance to ascertain, if an ash content of less than 1% by weight is not sufficient by itself to fall within the expression "pearled barley", what proportion of grains from which the pericarp has been removed is required?

The Court ruled that:

"Under the provisions of Community law in force at the time governing the exportation of processed cereal products to non-member countries, the Member States were permitted to regard as consignments of pearled barley only barley in which the proportion of pearled grains was considerably in excess of 50% by weight of the dry matter".

Judgment of 22 June 1982

Case 220/81

Criminal proceedings against Timothy Frederick Robertson and Others

(Opinion delivered by Mr Advocate General Capotorti on 13 May 1982)

Free movement of goods - Quantitative restrictions - Measures having equivalent effect - Prohibition on the sale of silver-plated articles not bearing a lawful hallmark - Application to similar articles imported from other Member States - Permissibility - Conditions - Assessment by the national court

(EEC Treaty, Art. 30)

Article 30 of the EEC Treaty does not prevent a Member State from applying national rules prohibiting the sale of silver-plated articles not stamped with a hallmark which complies with the requirements of those rules to like articles imported from another Member State in which they have been lawfully marketed, provided that such articles have not been stamped, in accordance with the legislation of the Member State of exportation, with a hallmark containing information equivalent to that provided by the hallmarks prescribed by the rules of the Member State of importation and intelligible to consumers of that State.
It is for the national court to make the findings of fact needed for the purpose of determining whether or not such equivalence exists by reference to the interpretative criteria specified by the Court.

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NOTE

The Tribunal de Première Instance, Brussels, referred to the Court of Justice for a preliminary ruling a question on the interpretation of Articles 30 to 36 of the EEC Treaty in order to determine the compatibility with Community law of the Belgian legislation relating to the hallmarking of silver-plated articles.

Those questions were raised in connexion with criminal proceedings instituted against certain importers for having sold silver-plated cutlery from other Member States whose hallmarks did not fulfil the requirements of the Belgian legislation.

The relevant Belgian legislation contains a set of rules relating to the hallmarking of articles made of precious metals and silver-plated articles.

The Tribunal de Premiĕre Instance, Brussels, took the view that it needed an interpretation of Article 30 et seq. of the EEC Treaty in order to give judgment and therefore asked the Court to determine whether Articles 30 to 36 of the Treaty preclude a Member State from applying national legislation prohibiting the sale of silver-plated articles not stamped with hallmarks which comply with the requirements of that legislation to similar articles imported from another Member State in which they have been lawfully marketed.

The answer to that question can be given only on the basis of Article 30 since the leglislation in question does not come within the scope of Article 36.

In the light of the principles laid down in its previous decisions, the Court finds that national legislation of the kind described by the court making the reference, the effect of which is to prohibit the marketing of silver-plated articles imported from other Member States which are not stamped with the hallmarks required by that legislation, constitutes an obstacle to the free movement of goods between the Member States. It renders the marketing of those products more difficult and more expensive.

However, the obligation on the part of the manufacturer or the importer to stamp silver-plated articles, which by their very nature are capable of being confused with articles made of solid silver, with special hallmarks which are indelible, inseparable from the article and indicate the quantity of pure silver coating as well as the name of the manufacturer of the article, is in principle capable of affording effective protection to consumers and promoting fairness in commercial transactions.

However, there is no longer any need for such protection where articles of that kind are imported from another Member State in which they have been lawfully marketed, if they are already hallmarked in accordance with the legislation of that State, on condition however that the indications set out in the hallmarks prescribed by that State, in whatever form, contain information which includes indications equivalent to those set out in the hallmarks prescribed in the Member State of importation. It is for the national court to make the factual assessments needed to determine whether or not such equivalence exists.

The Court ruled that:

1. "Article 30 of the EEC Treaty does not prevent a Member State from applying national legislation prohibiting the sale of silver-plated articles not stamped with a hallmark which complies with the requirements of that legislation to similar articles imported from another Member State in which they have been lawfully marketed, provided that such articles have not been stamped, in accordance with the legislation of the Member State of exportation, with a hallmark containing information equivalent to that set out in the hallmarks prescribed by the legislation of the Member State of importation and intelligible to consumers of that State.

2. It is for the national court to make the factual assessments needed to determine whether or not such equivalence exists by reference to the interpretative criteria specified by the Court."

A N A L Y T I C A L T A B L E

CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS

EUROPEAN COMMUNITIES

FREE MOVEMENT OF GOODS

FREE MOVEMENT OF PERSONS

MEASURES ADOPTED BY INSTITUTIONS

MEMBER STATES

NON-CONTRACTUAL LIABILITY

PROCEDURE

SOCIAL POLICY

SOCIAL SECURITY FOR MIGRANT WORKERS

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GENERAL INFORMATION ON THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

A. TEXTS OF JUDGMENTS AND OPINIONS AND GÉNERAL INFORMATION

1. Judgments of the Court and opinions of Advocates General

Orders for offset copies, provided some are still available, may be made to the International Services Branch of the Court of Justice of the European Communities, L - 2920, 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 2 250 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).

2. 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.

B. 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 1980 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 1980 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, 67 Rue de la Régence, 1000 Bruxelles
DENMARK	J.H. Schultz - Boghandel, Møntergade 19, 1116 København K
FRANCE	Editions A. Pedone, 13 Rue Soufflot, 75005 Paris
FEDERAL REPUBLIC OF GERMANY	Carl Heymann's Verlag, 18-32 Gereonstrasse, 5000 Köln 1
GREECE	
IRELAND	Stationery Office, Beggar's Bush, Dublin 4
ITALY	CEDAM - Casa Editrice Dott. A. Milani, 5 Via Jappelli, 35100 Padova (M 64194)
LUXEMBOURG	Office for Official Publications of the European Communities, L 2985 Luxembourg
NETHERLANDS	N.V. Martinus Nijhoff, 9 Lange Voorhout, '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, L - 2985 Luxembourg

2. Selected Instruments Relating to the Organization, Jurisdiction and Procedure of the Court

Orders, indicating the language required, should be addressed to the office for Official Publications of the European Communities, L - 2985, Luxembourg.

C. GENERAL LEGAL INFORMATION AND DOCUMENTATION

I. Digest of case-law relating to the European Communities

The Court of Justice has commenced publication of the "Digest of case-law relating to the European Communities" which will present in systematic form all the case-law of the Court of Justice of the European Communities and also a selection of decisions given by the courts of Member States. Its design follows that of the "Repertoire de la Jurisprudence relative aux Traités instituant les Communautés Européennes/ Europäische Rechtsprechung" prepared by H.J. Eversen and H. Sperl until 1976 (English edition 1973 to 1976 by J. Usher). The Digest will be produced in all the languages of the Community. It will be published in loose-leaf binders and periodical supplements will be issued.

The Digest will be made up of four series, concerning the following fields, which will appear and may be purchased separately:

A Series : Cases before the Court of Justice of the European Communities, excluding matters dealt with in the C and D Series.

B Series : Cases before the courts of Member States, excluding matters dealt with in the D Series.

C Series : Cases before the Court of Justice of the European Communities concerning officials of the European Communities.

D Series : Cases before the Court of Justice of the European Communities and before the courts of Member States concerning the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. (This series replaces the "Synopsis of case-law" published in successive parts by the Documentation Branch of the Court which has now been discontinued).

The first part of the A Series will be published during 1982, starting with the French language edition. This part will contain the decisions of the Court of Justice of the European Communities given during the period 1977 to 1979. Periodical supplements will be published.

The first part of the D Series will appear in Autumn 1981.

It relates to the case-law of the Court of Justice of the European Communities from 1976 to 1979 and the case-law of courts of the Member States from 1973 to 1978. The first supplement will deal with the 1980 case-law of the Court of Justice and the 1979 case-law of national courts.

The price of the first part of the D Series (about 700 pages, binder included) is:

Bfr	2 000	Lit	63 000
Dkr	387	Hfl	136
FF	290	DM	123
Dr	3 000	£stg	25.60
£Ir	33.40	US$	55

The price of the subsequent parts will be fixed on the basis of the price of the first part.

Orders should be sent either to the Office for Official Publications of the European Communities, 5 Rue du Commerce, L-2985, Luxembourg, or to one of the addresses given under B1 above.

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

Applications to subscribe to the first three publications listed below may be sent to the Information Office, specifying the language required. They are supplied free of charge (L - 2920, 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 of Justice of the European Communities

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.

All these documents are published in all the official languages of the Community.

III. Visits to the Court of Justice

Visits are organized for groups of judges, lawyers, students etc. Such groups may be present at sittings of the Court if there is enough room.

Applications to make a visit should be addressed to:

The Information Office
Court of Justice of the European Communities
L - 2920 Luxembourg
Grand Duchy of Luxembourg

at least four months in advance.

The Information Office will prepare an appropriate programme for the group.

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 (L - 2920, Luxembourg), by registered post.

Any lawyer who is entitled to practice 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
Carnival Monday	variable
Maundy Thursday	variable
Good Friday	variable
Easter Monday	variable
Extra day in compensation for May Day	3 May
Ascension Day	variable
Whit Monday	variable
Luxembourg National Day	23 June
Assumption	15 August
Schobermesse	30 August
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

73 Rue Archimède
1040 Brussels (Tel. 7350040)

DENMARK

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

FEDERAL REPUBLIC OF GERMANY

22 Zitelmannstrasse
5300 Bonn (Tel. 238041)

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

FRANCE

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

GREECE

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

IRELAND

39, Molesworth Street
Dublin 2 (Tel. 712244)

ITALY

29 Via Poli
00187 Rome (Tel. 6789722)

61 Corso Magenta
20100 Milan (Tel. 803171 ext. 210)

LUXEMBOURG

Jean Monnet Building
Centre Européen
Luxembourg-Kirchberg (Tel. 43011)

NETHERLANDS

29 Lange Voorhout
The Hague (Tel. 469326)

UNITED KINGDOM

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

4, Cathedral Road
P.O. Box 15
Cardiff CF1 9SC (Tel. 371631)

7, Alva Street
Edinburgh EH2 4PH (Tel. 2252058)

Windsor House, Block 2, 20th floor
9/15 Bedford Street,
Belfast

II. NON-MEMBER COUNTRIES

CANADA

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

CHILE

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

JAPAN

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

PORTUGAL

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

SPAIN

Oficina de Prensa e Información CE
Centro Serrano 41, 5° Piso
Madrid 1

SWITZERLAND

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

THAILAND

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

TURKEY

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

USA

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

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

VENEZUELA

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


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