Information on the Court of Justice of the European Communities

1980 — III

I N F O R M A T I O N

on

THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

III

1980

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for the judicial year 1979 to 1980

(from 8 October 1979 until 30 October 1980)

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1 - Following an amendment to the Rules of Procedure which entered into force on 8 October 1979 a third chamber has been created of which the President of the Court, H. KUTSCHER, is President.

COMPOSITION OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

for the judicial year 1979 to 1980

(from 30 October 1980)

Order of precedence

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O. DUE, Judge
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A. VAN HOUTTE, Registrar

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G. BOSCO, Judge	O. DUE, Judge	U. Everling, Judge

J U D G M E N T S

of the

COURT OF JUSTICE

of the

EUROPEAN COMMUNITIES

Judgment of 3 July 1980

Case 157/79

Regina v Stanislaus Pieck

(Opinion delivered by Mr Advocate General Warner on 4 June 1980)

1. Free movement of persons - Right of entry and residence of nationals of Member States - Right directly conferred by the Treaty - Reservation with regard to public policy, public security and public health - Effects

   (EEC Treaty, Art. 48)

2. Free movement of persons - Right of entry of nationals of Member States - Entry visa or equivalent requirement - Concept - Prohibition

   (Council Directive No. 68/360, Art. 3 (2))

3. Free movement of persons - Right of residence of nationals of Member States - Residence document - Declaratory effect - Not assimilable to a residence permit - Absence of discretion of Member States - Residence authorization - Requirement by a Member State - Penalties - Not permissible

   (Council Directive No. 68/360, Art. 4 (2) and Annex)

4. Free movement of persons - Right of residence of nationals of Member States - Failure to obtain the residence document - Penalties - Recommendation for deportation or imprisonment - Not permissible

   (Council Directive No. 68/360, Art. 4)

1. The right of Community workers to enter the territory of a Member State which Community law confers may not be made subject to the issue of a clearance to that effect by the authorities of that Member State.

The restriction which Article 48 of the EEC Treaty lays down concerning freedom of movement in the territory of Member States, namely limitations justified on grounds of public policy, public security or public health, must be regarded not as a condition precedent to the acquisition of the right of entry and residence but as providing the possibility, in individual cases where there is sufficient justification, of imposing restrictions on the exercise of a right derived directly from the Treaty. It does not therefore justify administrative measures requiring in a general way formalities at the frontier other than simply the production of a valid identity card or passport.

2. Article 3 (2) of Council Directive No. 68/360 prohibiting Member States from demanding an entry visa or equivalent requirement for Community workers moving within the Community must be interpreted as meaning that the phrase "entry visa or equivalent requirement" covers any formality for the purpose of granting leave to enter the territory of a Member State which is coupled with a passport or identity card check at the frontier, whatever may be the place or time at which that leave is granted and in whatever form it may be granted.

3. The issue of the special residence document provided for in Article 4 of Directive No. 68/360 has only a declaratory effect and, for aliens to whom Article 48 of the EEC Treaty or parallel provisions give rights, it cannot be assimilated to a residence permit such as is prescribed for aliens in general. A Member State may not therefore require from a person enjoying the protection of Community law that he should possess a general residence permit instead of the document provided for by the combined provisions of Article 4 of and the Annex to Directive No. 68/360, or impose penalties for the failure to obtain such a permit.

4. The failure on the part of a national of a Member State of the Community, to whom the rules on freedom of movement for workers apply, to obtain the special residence permit prescribed in Article 4 of Directive No. 68/360 may not be punished by a recommendation for deportation or by measures which go as far as imprisonment.

NOTE

The Pontypridd Magistrate's Court referred questions to the Court of Justice regarding the rules 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 and on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families.

Criminal proceedings were brought in the national court against a Netherlands national, residing in Cardiff, Wales, and pursuing an activity as an employed person, who, being a person who was not a "patrial" (a United Kingdom national having a right of abode in the United Kingdom) and having only been granted leave to enter the United Kingdom or to remain there for a limited period, was charged with having knowingly stayed for a time longer than authorized.

The accused held no residence permit; when he last entered the territory of the United Kingdom, in July 1979, an endorsement containing the words "given leave to enter the United Kingdom for six months" was stamped on his passport.

The first question

The national court asks what is the meaning of "entry visa or equivalent document" in Article 3 (2) of Council Directive No. 68/360.

The Court repeated again that the right of nationals of a Member State to enter the territory of another Member State and reside there for the purposes intended by the Treaty is a right directly conferred by the Treaty or, as the case may be, by the provisions adopted for its implementation.

It replied to the question referred to it by ruling that Article 3 (2) of Council Directive No. 68/360 of 15 October 1968 prohibiting Member States from demanding an entry visa or equivalent document for Community workers moving within the Community must be interpreted as meaning that the phrase "entry visa or equivalent document" covers any formality for the purpose of granting leave to enter the territory of a Member State which is coupled with a passport or identity card check at the frontier, whatever may be the place or time at which that leave is granted and in whatever form it may be granted.

The second question

The national court sought to ascertain whether, upon entry into a Member State by an EEC national, the granting by that Member State of an initial leave to remain for a period limited to six months is compatible with Articles 7 and 48 of the Treaty and with Council Directives Nos. 64/221 and 68/360.

Re-affirming an earlier authority (Case 8/77, Sagulo [1977] ECR 1495) the Court ruled that:

(a) The issue of a special residence document provided for in Article 4 of Council Directive No. 68/350 of 15 October 1968 has a declaratory effect only and for aliens to whom Article 48 of the Treaty or parallel provisions give rights, it cannot be treated as a residence permit such as is prescribed for aliens in general, in connexion with the issue of which the national authorities have discretion.

(b) A Member State may not require from a person enjoying the protection of Community law that he should possess a general residence permit instead of the document provided by the combined provisions of Article 4 (2) and the Annex to Directive No. 68/360.

The third question

The last question asks whether a national of a Member State of the Community who has overstayed the leave granted in the residence permit may be punished in that Member State by measures which include imprisonment and/or a recommendation for deportation.

The Court ruled that a failure on the part of a national of a Member State of the Community, to whom the rules on freedom of movement for workers apply, to obtain the special residence permit described in Article 4 of Directive No. 68/360 may not be punished by measures which include imprisonment or a recommendation for deportation.

Judgment of 9 July 1980

Case 807/79

Giacomo Gravina and Others v Landesversicherungsanstalt Schwaben

(Opinion delivered by Mr Advocate General Warner on 10 June 1980)

1. Social security for migrant workers - Community rules - Object - Co-ordination of national schemes - Consequences

2. Social security for migrant workers - Orphans' benefits - Benefits payable by the State of residence - Benefits greater in amount previously awarded under the legislation of another Member State alone - Right to supplementary benefits

(Regulation No. 1408/71 of the Council, Art. 78(2)(b)(i))

1. The regulations on social security for migrant workers did not set up a common scheme of social security, but allowed different schemes to exist, creating different claims on different institutions against which the claimant possesses direct rights by virtue either of national law alone or of national law supplemented, where necessary, by Community law relating, in particular, to the lifting of conditions of residence. The Community rules cannot, therefore, in the absence of an express exception consistent with the aims of the Treaty, be applied in such a way as to deprive a migrant worker or his dependants of the benefit of a part of the legislation of a Member State, nor may they bring about a reduction in the benefits awarded by virtue of that legislation.

2. Article 78 (2) (b) (i) of Regulation No. 1408/71 must be interpreted as meaning that the entitlement to benefits payable by the State in whose territory the orphan to whom they have been awarded resides does not remove the entitlement to benefits greater in amount previously acquired under the legislation of another Member State alone. Where the amount of the benefits actually received in the Member State of residence is less than that of the benefits provided for by the legislation of the other Member State alone the orphan is entitled to supplementary benefits, payable by the competent institution of the latter State, equal to the difference between the two amounts.

NOTE

By an order of 25 October 1979 which was received at the Court on 28 November 1979, the Sozialgericht Augsburg referred to the Court for a preliminary ruling two questions concerning the interpretation of Article 78 (2) of Regulation (EEC) No. 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (Official Journal, English Special Edition 1971 (II), p.416).

The questions arose in the course of litigation between the legitimate children of an Italian national who died on 6 July 1973 in the Federal Republic of Germany where he had completed 141 months of payments into the German sickness and old age pension scheme, having previously completed 42 months under the Italian system, and the appropriate German institution which had ceased, when the mother transferred the family residence to Italy in May 1974, to pay the orphans' pensions which had been granted to them exclusively under the German legislation and which were paid to them in the Federal Republic of Germany while they were still residing there following the death of their father.

The defendant institution in the main action refused to continue paying the pensions when they left to live in Italy on the ground that according to Article 78 of Regulation No. 1408/71 the granting of such pensions is the responsibility of the institution of the State in whose territory the orphans are resident.

This led the German court with jurisdiction in social matters to refer the following questions to the Court:

(1) In the event of the residence of orphans being transferred to another Member State does Article 78 (2) of Regulation (EEC) No. 1408/71 of the Council of 14 June 1971 have the effect of enabling the competent institution of a Member State to withdraw benefits, within the meaning of Article 78 (1) of the regulation, which have already been duly awarded in that Member State where, if the benefits were to be awarded for the first time pursuant to Article 78 (2) of the regulation, the institution of that other Member State would be the competent institution?

(2) If such is the case, is withdrawal justified even where entitlement to benefits within the meaning of Article 78 (1) of Regulation No. 1408/71 is conferred by national law alone?

These questions raised the problem of the transference of residence from one Member State to another. In order to resolve that problem it was necessary to consider the text the interpretation of which was sought in the context of Article 51 of the Treaty, which requires the Council to adopt such measures in the field of social security as are necessary to provide freedom of movement for workers. The purpose of Article 51 would not be served if, as a result of exercising their right to freedom of movement, workers were to lose the advantages of social security which have in any case been guaranteed to them exclusively under the legislation of one Member State.

The Court held that Article 78 (2) (i) of Regulation No. 1408/71 of the Council of 14 June 1971 must be interpreted as meaning that entitlement to benefits payable by the State in whose territory the orphans to whom they have been granted reside does not extinguish the right to higher benefits which have previously been earned exclusively under the legislation of another Member State. Where the amount of benefits actually received in the Member State of residence is lower than that of the benefits provided exclusively by the legislation of the other Member State, the orphan is entitled to additional benefits equal to the difference between the two amounts, and these are payable by the responsible institution in the latter State.

Judgment of 10 July 1980

Case 30/78

The Distillers Company Limited v Commission of the European Communities

(Opinion delivered by Mr Advocate General Warner on 12 March 1980)

1. Competition - Agreements - Notification - Lack of formal notification - Exemption - Excluded
(Regulation No. 17 of the Council, Art. 4; Regulation No. 1133/68 of the Commission)

2. Competition - Agreements - Prohibition - Application - Criteria
(EEC Treaty, Art. 85 (1))

1. In the absence of notification in accordance with the requirements of Regulation No. 17 and Regulation No. 1133/68, an agreement may not have exemption under Article 85 (3) of the EEC Treaty, even if the text of the agreement was communicated to the Commission subsequent to a request for information made by the latter.

2. Although an agreement may escape the prohibition in Article 85 (1) of the EEC Treaty when it affects the market only to an insignificant extent, having regard to the weak position which those concerned have in the market in the products in question, the same considerations do not apply in the case of a product the entire production of which is in the hands of a large undertaking.

NOTE

The Distillers Company Ltd. requested the annulment of the decision of the Commission of 20 December 1977 concerning proceedings for the application of Article 85 of the EEC Treaty.

The applicant produces spirits and is the world's largest distiller and seller of Scotch whisky. It has 38 subsidiaries producing spirits in the United Kingdom. 32 of them produce Scotch whisky, 4 produce gin, 1 produces vodka and 1 Pimm's.

The applicant has a large share of the markets in whisky and gin in the United Kingdom and in the other Member States. It has a large share of the market in vodka in the United Kingdom and a very small share in the other Member States. As for Pimm's, the Distillers Company Limited, (hereinafter referred to as "DCL") alone sells it and sales of that product in the Member States other than the United Kingdom are very small.

Prior to the accession of the United Kingdom to the Community the subsidiaries of DCL entered into an agreement with the United Kingdom trade customers according to which the latter and subsequent purchasers from them were prohibited from exporting and reselling in bond.

DCL asked the Commission on 30 June 1973 for exemption under Article 85 (3) of the EEC Treaty. The Commission informed DCL that this exemption could not be granted in respect of the prohibition on export, and DCL told the Commission that it was removing the prohibition.

In 1975, without informing the Commission, DCL sent to its customers a circular letter containing new conditions of sale. Those conditions no longer contained any prohibition on exporting but provided for a different price system according as the products were intended for resale on the home market or were intended for export.

The Commission wrote seeking clarification from the applicant who replied by letter and sent to the Commission a copy of the aforementioned circular letter.

In acknowledging receipt of the letter from DCL the Commission observed that the new provisions of the conditions of sale relating to the grant of allowances, discounts and rebates appeared to be designed to impede parallel exports to other EEC countries and to that extent to be in breach of Article 85 (1) of the Treaty. The Commission asked for further information. The applicant made minor amendments to the conditions of sale; nevertheless, a complaint was sent to the Commission by the interveners (A. Bulloch & Co., John Grant Blenders, Inland Fisheries Ltd. and Classic Wines Ltd.). It was that complaint which led the Commission to take, on 20 December 1977, the decision now in dispute. That decision found that the prohibition to export from the United Kingdom to other EEC countries and the prohibition to resell in bond constituted an infringement of Article 85 (1) of the Treaty from 1 January 1973 to 24 June 1975 and refused the application under Article 85 (3) in respect of the provisions and the period referred to above. It further found that the price terms, which are set out in Appendix II to the circular letters constituted an infringement of Article 85 (1) of the Treaty and that application of Article 85 (3) was not justified. The applicant was required to ensure that the infringement should be brought to an end without delay.

The applicant sought the annulment of the decision. It recognized that the conditions of sale as drafted in 1973 infringed Article 85 of the Treaty and could not be exempted under Article 85 (3), but maintained that the decision must be annulled as a whole because of certain procedural irregularities which were such as to infringe the applicant's right of defence.

As regards the price terms in 1975 and 1977, the applicant recognized that they fell under the prohibition of Article 85 (1), but maintained that the Commission was wrong in refusing to grant an exemption.

The Commission joined issue with the applicant, denying that there were any procedural irregularities.

Failure to notify the price terms

It was agreed that the applicant never notified the price terms in accordance with the Community provisions. The Commission rightly maintained that, in the absence of notification in accordance with the requirements of the regulation the price terms could not have exemption under Article 85 (3).

Procedural irregularities alleged by the applicant

The alleged procedural irregularities were the following:

(1) The Advisory Committee (which must be consulted according to Article 10 of Regulation No. 17) was not in a position to appreciate the arguments put forward by the applicant at the hearing.

(2) Several supplements to the applicant's answer to the Commission's statement of objections were not forwarded to the Advisory Committee.

(3) The Commission supplied the applicant with a copy of the intervener's complaint, a large part of which had been excised, and refused to supply the part excised (in so far as that part did not involve business secrets).

It was unnecessary, the Court said, to consider the procedural irregularities alleged by the applicant. The position would be different only if in the absence of those irregularities the administrative proceedings could have led to a different result. Even in the absence of the procedural irregularities alleged by the applicant the Commission Decision based on the absence of notification could therefore not have been different.

Regarding Pimm's, the applicant maintained that the price terms did not fall within the prohibition of Article 85 (1) because sales of that product in Member countries other than the United Kingdom were low. That argument the Court found unacceptable in the case of a product of a large undertaking responsible for the entire production. There was thus no reason for the purposes of the action to distinguish between Pimm's and the other drinks produced by the applicant.

The Court declared that the action was dismissed and that the costs, including those of the interveners, were to be paid by the applicant.

Judgment of 10 July 1980

Case 152/78

Commission of the European Communities v French Republic

(Opinion delivered by Mr Advocate General Reischl on 2 July 1980)

1. Free movement of goods - Quantitative restrictions - Measures having equivalent effect - Control of advertising in respect of certain products - Indirect restriction on marketing of imported products - Prohibition

(EEC Treaty, Art. 30)

2. Free movement of goods - Derogations - Protection of health of humans - Limits - Control of advertising in respect of alcoholic beverages to the disadvantage of imported products - Arbitrary discrimination

(EEC Treaty, Art. 36)

1. A restriction imposed by national legislation on freedom of advertising for certain products, although it does not directly affect imports, is however capable of restricting their volume owing to the fact that it affects the marketing prospects for the imported products. It may therefore constitute a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty.

2. Legislation restricting advertising in respect of alcoholic beverages, although it may be in principle justified by concern relating to the protection of public health, none the less constitutes arbitrary discrimination in trade between Member States, within the meaning of Article 36 of the EEC Treaty, to the extent to which it authorizes advertising in respect of certain national products whilst advertising in respect of products having comparable characteristics but originating in other Member States is restricted or entirely prohibited.

NOTE

The Commission brought an action for a declaration that the French Republic had failed to fulfil its obligations under Article 30 of the Treaty by subjecting advertising for alcoholic beverages to discriminatory rules and thus maintaining obstacles to free intra-Community trade.

The Commission claimed that the provisions contained in the French code governing premises licensed to sell drinks and measures to combat alcoholism organize advertising in such a manner that certain imported alcoholic products suffer from the effects of a prohibition against, or a restriction on, advertising whereas such advertising is wholly unrestricted for competing national products. This discriminatory effect is the result of dividing alcoholic beverages into categories.

These restrictions on the marketing of the products in question from other Member States must be classified as measures having an effect equivalent to quantitative restrictions and as such they are prohibited under Article 30 of the EEC Treaty.

The Code (Article 1) divides drinks into five groups:

(1) Non-alcoholic beverages;

(2) Beverages which are fermented but not distilled (wine, beer, cider, perry, mead, natural sweet wines to which the tax arrangements for wine apply, blackcurrant liqueur, fermented fruit juices containing 1 to 3% alcohol);

(3) Natural sweet wines other than those in Group (2), dessert wines, wine-based aperitifs and liqueurs made from strawberries, raspberries, blackcurrants or cherries, containing up to 18% pure alcohol;

(4) Rum, tafia, spirits obtained from the distillation of wine, cider, perry, fruit, sweetened liqueurs, including aniseed liqueurs;

(5) All other alcoholic beverages.

As to the rules governing advertising Article L 17 of the Code prohibits the advertising of drinks within Group (5). Taking into account the scheme of Article L 1, it is therefore prohibited to advertise any alcoholic product which is not expressly mentioned as falling within Groups (2), (3) or (4).

According to Article L 18, there is no restriction on advertising for drinks in Group (3), provided that it does no more than name the product and its composition and indicate the manufacturer, representatives and agents. These rules restricting advertising concern natural sweet wines other than those classified in Group (2), dessert wines, and liqueurs made from strawberries, raspberries, blackcurrants or cherries which do not contain more than 18% pure alcohol.

There are no restrictions on advertising alcoholic beverages in Groups (2) and (4) (wine, beer, cider, rum, tafia, and so forth).

The Commission was of the opinion that the classification laid down in Article L 1, taken in conjunction with Articles L 17 and L 18, placed a number of imported products at a disadvantage, as regards advertising, compared with competing national products.

For example, the reference to natural sweet wines to which the tax arrangements for wine apply - an advantage which is conferred only on domestic sweet wines - ensures that advertising in respect of that product is entirely unrestricted, whereas natural sweet wines and imported wine-based liqueurs are subject to advertising restrictions. A further example: rum and spirits distilled from wine, cider or fruit, enjoy complete freedom of advertising whereas competing products, that is to say, spirits made from cereals such as whisky and geneva, almost all of which are imported, are subject to a prohibition on advertising.

Two arguments were put forward by the French Government in its defence:

First, the advertising rules taken as a whole are no more favourable to French products than to imported products and do not therefore infringe Article 30 of the Treaty.

Second, the purpose of the rules is to safeguard public health and to combat alcoholism and therefore they fall within Article 36 of the Treaty.

The application of Article 30 of the Treaty

The point at issue here was whether the prohibitions and restrictions on advertising which have been laid down by the French legislation discourage imports of alcoholic products from other Member States.

The French Government maintained that the prohibitions and restrictions on advertising which have been criticized by the Commission affect equally sizeable French categories of drinks. Thus, for example, advertising is wholly prohibited in the case of aniseed spirits, which are widespread in France, as also in the case of other drinks falling within Group (5).

That argument in the French Government's defence could not be accepted. Although it was true that the effect of the system established by the Code was to impose advertising prohibitions or restrictions on a certain number of domestic products, including products with a high consumption, nevertheless it bore at the same time features which were undeniably discriminatory; for example, distilled spirits traditionally produced at home, such as rum and spirits distilled from wine, cider and fruit, enjoyed complete freedom of advertising, whereas the latter was prohibited in respect of similar imported products, in particular spirits made from cereals such as whisky and geneva.

It was apparent from the classifications that products imported from other Member States were placed at a disadvantage compared with domestic products and as such it constituted a measure having an effect equivalent to a quantitative restriction prohibited under Article 30 of the Treaty.

Application of Article 36 of the Treaty

The French Government emphasized the part played by advertising prohibitions and restrictions in combating alcoholism and in protecting public health. In the French Government's view, the contested legislation was covered on that ground by Article 36 of the EEC Treaty, according to which the provisions concerning the free movement of goods do not exclude prohibitions or restrictions on imports which are justified on the ground that they are for the protection of human health and life. The French Government argued in defence of the disputed legislation that the scheme adopted in the Code distinguished between so-called "aperitifs" (fortified wines, pastis, whisky) which, taken on an empty stomach, constituted a danger to public health and were therefore subject to advertising restrictions, and "digestives", which were less harmful to health and therefore not subject to advertising restrictions.

Naturally, said the Court, recognition should be given to the connexion which the French Government had demonstrated between the rules relating to the advertising of alcoholic beverages and efforts to combat alcoholism. However, it should be observed that the actual wording of Article 36 of the Treaty expressly stipulated that prohibitions or restrictions "shall not ... constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States".

It could not be denied that a number of alcoholic beverages which could be freely advertised under the French legislation had the same harmful effect in relation to public health, if consumed to excess, as similar imported products which, as such, were subject to advertising prohibitions or restrictions. Although it was true that the disputed legislation was motivated to some extent by the safeguard of public health, it was none the less true that the effect of the legislation was to place the burden of efforts to eliminate the excessive consumption of alcohol chiefly on imported products.

That argument in the French Government's defence had therefore also to be rejected.

The Court held that:

1. By subjecting advertising for alcoholic beverages to discriminatory rules and thus maintaining obstacles to free intra-Community trade, the French Republic had failed to fulfil its obligations under Article 30 of the EEC Treaty.
2. The French Republic should pay the costs.

Judgment of 10 July 1980

Joined Cases 253/78 and 1 to 3/79

Procureur de la République and Others v Bruno Giry and Guerlain S.A. and Others

(Opinion delivered by Mr Advocate General Reischl on 22 November 1979)

(Supplementary opinion delivered by Mr Advocate General Reischl on 24 June 1980)

1. Questions referred to the Court for a preliminary ruling - Jurisdiction of the Court - Limits

(EEC Treaty, Art. 177)

2. Competition - Agreements - Notification - Decision by the Commission to close the file on the case - Legal nature - Effects on the finding of national courts as regards the agreement in question

(EEC Treaty, Art. 85)

3. Competition - Community rules - National legislation - Parallel application permissible - Condition - Compliance with Community law

(EEC Treaty, Arts. 85 and 86)

4. Competition - Agreements - Notification - Decision by the Commission to close the file on the case - Community rules not applicable - Permissible to apply national provisions prohibiting a refusal to sell

(EEC Treaty, Art. 85)

Within the framework of the task given it by Article 177 of the EEC Treaty, the Court of Justice has no jurisdiction to decide the application of the Treaty to a given case but the need to reach a useful interpretation of Community law enables it to extract from the facts of the main dispute the details necessary for the understanding of the questions submitted and the formulation of an appropriate reply.

An administrative letter despatched without publication as laid down in Regulation No. 17 informing the undertaking concerned of the Commission's opinion that there is no need for it to take action in respect of the agreements in question and that the file on the case may therefore be closed constitutes neither a decision granting negative clearance nor a decision applying Article 85 (3) of the EEC Treaty within the meaning of Articles 2 and 6 of Regulation No. 17.

Such a letter does not have the result of preventing national courts before which the agreements in question are alleged to be incompatible with Article 85 of the Treaty from reaching a different finding as regards the agreements in question on the basis of the information available to them. Whilst it does not bind the national courts, the opinion transmitted in such a letter nevertheless constitutes a factor which the national courts may take into account in examining whether the agreements or conduct in question are in accordance with the provisions of Article 85.

3. Community law and national law on competition consider restrictive practices from different points of view. Whereas Articles 85 and 86 of the EEC Treaty regard them in the light of the obstacles which may result for trade between Member States, national law proceeds on the basis of the considerations peculiar to it and considers restrictive practices only in that context. It follows that national authorities may also take action in regard to situations which are capable of forming the subject-matter of a decision by the Commission.

However, parallel application of national competition law can only be permitted in so far as it does not prejudice the uniform application, throughout the common market, of the Community rules on cartels or the full effects of the measures adopted in implementation of those rules.

4. The fact that a practice has been held by the Commission not to fall within the ambit of the prohibition contained in Article 85 (1) and (2) of the EEC Treaty, the scope of which is limited to agreements capable of affecting trade between Member States, in no way prevents that practice from being considered by the national authorities from the point of view of the restrictive effects which it may produce nationally.

Accordingly, Community law does not prevent the application of national provisions prohibiting a refusal to sell even where the agreements relied upon for the purpose of justifying that refusal have formed the subject-matter of a decision by the Commission to close the file on the case.

NOTE

The questions referred to the Court for a preliminary ruling by the Tribunal de Grande Instance, Paris, arose in the course of criminal proceedings taken against the managers of Guerlain, Rochas, Lanvin and Ricci on the ground that they had infringed Article 37 (1) (a) of the French order on prices which makes it an offence for any producer, trader, businessman or craftsman "to refuse to fulfil, so far as his resources allow and subject to normal commercial practice, orders from purchasers of products or orders for services when such orders are not in any way irregular ...".

These criminal proceedings were instituted following complaints lodged by perfume retailers to whom the undertakings in question had refused to sell their goods. The defendants maintained that the disputed refusals to sell were justified by the fact that the products concerned were covered by selective distribution systems. They also claimed that those selective distribution systems have been authorized by the Commission of the European Communities, as was shown by the letters which had been sent to them by the Directorate General for Competition.

These letters informed the respective undertakings that in view of the small share of the market in perfumery held by each company and the fairly large number of competing undertakings of comparable size on the market "the Commission considers that there is no longer any need, on the basis of the facts known to it, for it to take action in respect of the above-mentioned agreements under the provisions of Article 85 (1) of the Treaty of Rome. The file on this case may therefore be closed".

The defendants allege that the letters should be considered as decisions applying Article 85 (3) and claim that by applying internal law national authorities may not prohibit measures restricting competition which have been acknowledged by the Commission to be lawful as far as Community law is concerned, because the rule of Community law takes precedence.

That dispute led the national court to ask the Court of Justice to decide whether, as the defendants maintain, the opinion adopted and expressed in the letters which were sent to the relevant companies by the Directorate General for Competition prevents the application of the French legislative provisions prohibiting a refusal to sell.

The legal character of the letters in question

The Council was empowered by Article 87 of the Treaty to adopt any appropriate regulations or directives to give effect to the principles set out in Articles 85 and 86. Regulation No. 17 of 6 February 1962, in particular, was adopted as a result of this, empowering the Commission to adopt various categories of regulations, decisions and recommendations.

The measures placed at the Commission's disposal include decisions giving negative clearance, whereby the Commission may certify, upon application by the undertakings concerned, that on the basis of the facts in its possession, there are no grounds for action on its part in respect of an agreement, decision or practice under the Community rules on competition, and decisions applying Article 85 (3), whereby the Commission may adopt decisions declaring that the provisions of Article 85 (1) do not apply to a particular agreement in so far as it has been notified of the latter.

In both instances the Commission is obliged to publish a summary of the relevant application or notification and invite interested third parties to submit their observations within a time-limit which it shall fix.

It is clear that letters such as those which were sent to the companies in question by the Directorate General for Competition and which were forwarded without the measures of publication provided for having been carried out constitute neither negative clearances nor decisions applying Article 85 (3).

As the Commission itself emphasizes, the letters were purely administrative communications informing the undertaking concerned of the Commission's opinion that there were no grounds for it to take any action in respect of the agreements in question under the provisions contained in Article 85 (1) of the Treaty, and that the file on the case could therefore be closed.

Letters such as these, which are based solely on the information known to the Commission and reflect an opinion of the Commission and terminate an investigation by the competent departments, do not have the effect of preventing national courts, before which the agreements in question are alleged to be incompatible with Article 85, from reaching a different finding as to the agreements in question on the basis of the information available to them.

Whilst it does not bind the national courts, the opinion transmitted in such letters nevertheless constitutes an element of fact which the national courts may take into account in their investigation as to whether the agreements or conduct in question are in conformity with the provisions laid down in Article 85.

The application of internal law on competition

The main question is what effect such letters may have in cases in which the national authorities are concerned with the application, not of Articles 85 and 86 of the Treaty, but solely of their internal law.

As the Court has already decided, Community law and national law on competition consider restrictive practices from different points of view, the former as obstacles to trade between Member States and the latter as restrictive practices purely in the national context. The national authorities may equally, however, take action relating to situations such as may be the subject-matter of a decision by the Commission.

Nevertheless the Court emphasized that the parallel application of national competition law can only be allowed in so far as it does not prejudice the uniform application throughout the common market of the Community rules on cartels and of the full effect of the measures adopted in implementation of those rules.

The agreements concerned have merely been classified by the Commission, which expressed the view that there were no grounds for it to take action with respect to the agreements in question under Article 85 (1). That alone cannot have the effect of preventing the national authorities from applying to those agreements any provisions of internal competition law which may be stricter than Community law on the subject.

In reply to the question, the Court ruled that "Community law does not prevent the application of national provisions prohibiting a refusal to sell even when the agreements put forward to justify the refusal have been classified by the Commission".

Judgment of 10 July 1980

Case 37/79

Anne Marty S.A. v Estée Lauder S.A.

(Opinion delivered by Mr Advocate General Reischl on 22 November 1979)
(Supplementary Opinion delivered by Mr Advocate General Reischl on 24 June 1980)

1. Competition - Agreements - Notification - Decision by the Commission to close the file on the case - Legal nature - Effect on the finding of national courts as regards the agreement in question

(EEC Treaty, Art. 85)

2. Competition - Community rules - Prohibitions laid down in Articles 85 and 86 of the EEC Treaty - Direct effect - Jurisdiction of national courts - Initiation by the Commission of a procedure under Articles 2,3 or 6 of Regulation No. 17 - Effects

(EEC Treaty, Arts. 85 and 86; Regulation No. 17 of the Council, Art. 9 (3))

3. Competition - Initiation of a procedure under Articles 2, 3 or 6 of Regulation No. 17 - Concept - Not a decision to close the file on the case

(Regulation No. 17 of the Council, Art. 9 (3))

1. An administrative letter despatched without publication as laid down in Regulation No. 17 informing the undertaking concerned of the Commission's opinion that there is no need for it to take action in respect of the agreements in question and that the file on the case may therefore be closed constitutes neither a decision granting negative clearance nor a decision applying Article 85 (3) of the EEC Treaty within the meaning of Articles 2 and 6 of Regulation No. 17.

Such a letter does not have the result of preventing national courts before which the agreements in question are alleged to be incompatible with Article 85 of the Treaty from reaching a different finding as regards the agreements in question on the basis of the information available to them. Whilst it does not bind the national courts, the opinion transmitted in such a letter nevertheless constitutes a factor which the national courts may take into account in examining whether the agreements or conduct in question are in accordance with the provisions of Article 85.

2. Since the prohibitions contained in Articles 85 (1) and 86 of the EEC Treaty tend by their very nature to produce direct effects in relations between individuals, those articles create direct rights in respect of the individuals concerned which the national courts must safeguard. To deny, by virtue of Article 9 of Regulation No. 17, the national courts jurisdiction to afford that safeguard would mean depriving the individuals of rights which they hold under the Treaty itself. It follows that the initiation by the Commission of a procedure under Articles 2, 3 or 6 of that regulation cannot exempt a national court before which the direct effect of Article 85 (1) is pleaded from giving judgment.

   Nevertheless, in such a case it is open to the national court, if it considers it necessary for reasons of legal certainty, to stay the proceedings before it while awaiting the outcome of the Commission's action.

3. Article 9 of Regulation No. 17, when referring to the initiation of a procedure under Articles 2, 3 or 6 of that regulation, concerns an authoritative act of the Commission, evidencing its intention of taking a decision under the said articles. Therefore an administrative letter informing the undertaking concerned that the file on its case has been closed does not amount to the initiation of a procedure pursuant to Articles 2, 3 or 6 of Regulation No. 17.

NOTE

Anne Marty, which retails perfumery products, is not part of the selective distribution network set up by Estée Lauder. Having been refused delivery on an order, the retailer brought proceedings against Estée Lauder seeking an order that the consignment ordered should be delivered, and damages.

In its defence Estée Lauder pleaded that the agreements organizing its distribution network, which is based on both quantitative and qualitative selection criteria, had been acknowledged by the Commission as complying with Community competition rules and referred to the letter which had been sent to it by the Directorate General for Competition.

In the first and second questions the Court is asked to specify the legal nature of the letters sent to the defendant in the main action by the Commission's Directorate General for Competition and what effects such letters may have as far as the national courts are concerned.

For those questions reference should be made to the Guerlain and Others cases, the course of which is described above.

The third question seeks a definition of the powers of national courts in applying Article 85 (1), in view of the provisions laid down in Article 9 (3) of Regulation No. 17, which is worded as follows:

> "As long as the Commission has not initiated any procedure under Articles 2, 3 or 6, the authorities of the Member States shall remain competent to apply Article 85 (1) and Article 86 in accordance with Article 88 of the Treaty".

As stated in the judgment in the B.R.T./SABAM case (Case 127/73, 30 January 1974), the Court reiterated that as the prohibitions of Article 85 (1) and Article 86 tend by their very nature to produce direct effects in relations between individuals, these articles create direct rights in respect of individuals which the national courts must safeguard. To deny, by virtue of the aforementioned Article 9 of Regulation No. 17, the national courts' jurisdiction to afford this safeguard would mean depriving individuals of rights which they hold under the Treaty itself. It follows that the initiation by the Commission of a procedure under Articles 2, 3 and 6 of that regulation cannot exempt a national court before which the direct effect of Article 85 (1) is relied upon from giving a ruling.

An administrative letter such as that which was sent to the defendant in the main action indicates that the file has been closed and that it is not intended to adopt any decision.

In the present case concerning Estée Lauder, the Court ruled in reply that:

1. An administrative letter informing the undertaking concerned of the Commission's opinion that there are no grounds for it to take any action in respect of certain agreements under the provisions in Article 85 (1) of the Treaty does not have the effect of preventing national courts, before which the agreements in question are alleged to be incompatible with Article 85, from reaching a different conclusion as to the character of the agreements in question on the basis of the information available to them. Whilst it does not bind the national courts, the opinion transmitted in such letters nevertheless constitutes an element of fact which the national courts may take into account in their investigation as to whether the agreements or conduct in question are in conformity with the provisions in Article 85.

2. The jurisdiction of national courts before which the direct effect of Article 85 (1) is relied upon is not restricted by Article 9 (3) of Regulation No. 17. In any case an administrative letter informing the undertaking concerned that the file on its case has been closed does not amount to the initiation of a procedure in application of Articles 2, 3 or 6 of Regulation No. 17.

Judgment of 10 July 1980

Case 99/79

Lancôme S.A. and Cosparfrance Nederland B.V. v Etos B.V. and Albert Heyn Supermarkt B.V.

(Opinion delivered by Mr Advocate General Reischl on 22 November 1979)
(Supplementary Opinion delivered by Mr Advocate General Reischl on 24 June 1980)

1. Competition - Agreements - Notification - Decision by the Commission to close the file on the case - Legal nature - Effect on the finding of national courts as regards the agreement in question

(EEC Treaty, Art. 85)

2. Competition - Agreements - Notification - Old agreements - Provisional validity - Expiry following a decision by the Commission to close the file on the case - Jurisdiction of the national courts

(EEC Treaty, Art. 85)

3. Competition - Agreements - Selective distribution systems permissible - Conditions - Quantitative selection criteria prohibited

(EEC Treaty, Art. 85)

4. Competition - Agreements - Effect on trade between Member States - Criteria

(EEC Treaty, Art. 85)

5. Competition - Agreements - Adverse effect on competition - Criteria

(EEC Treaty, Art. 85)

1. An administrative letter despatched without publication as laid down in Regulation No. 17 informing the undertaking concerned of the Commission's opinion that there is no need for it to take action in respect of the agreements in question and that the file on the case may therefore be closed constitutes neither a decision granting negative clearance nor a decision applying Article 85 (3) of the EEC Treaty within the meaning of Articles 2 and 6 of Regulation No. 17.

Such a letter does not have the result of preventing national courts before which the agreements in question are alleged to be incompatible with Article 85 of the Treaty from reaching a different finding as regards the agreements in question on the basis of the information available to them. Whilst it does not bind the national courts, the opinion transmitted in such a letter nevertheless constitutes a factor which the national courts may take into account in examining whether the agreements in question are in accordance with the provisions of Article 85.

2. An administrative letter informing the person concerned that the Commission is of the opinion that there are no grounds for it to take action with regard to agreements which have been notified pursuant to the provisions of Article 85 (1) of the EEC Treaty has the effect of terminating the period of provisional validity accorded from the date of notification to agreements made prior to 13 March 1962 notified within the period laid down in Article 5 (1) of Regulation No. 17 or exempted from notification. In fact, the maintenance of the provisional protection from which notified old agreements benefit is no longer justified from the date on which the Commission informs the parties concerned that it has decided to close the file on the case concerning them. There is, therefore, no longer any reason to release national courts, before which the direct effect of the prohibition in Article 85 (1) is relied upon, from the duty of giving judgment.

3. Selective distribution systems constitute an aspect of competition which accords with Article 85 (1) of the EEC Treaty provided that re-sellers are chosen on the basis of objective criteria of a qualitative nature relating to the qualifications of the re-seller, his staff and his trading premises, and that such conditions are laid down uniformly for all potential re-sellers and are not applied in a discriminatory fashion.

   It follows that, in principle, a selective distribution network which relies on tests for admission to the system which go beyond simple, objective qualitative selection falls within the prohibition laid down in Article 85 (1) especially when it is based on quantitative selection criteria.

4. To decide whether an agreement may affect trade between Member States it is necessary to decide whether it is possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.

5. In order to decide whether an agreement is to be considered as prohibited by reason of the distortion of competition which is its object or its effect, it is necessary to examine the competition within the actual context in which it would occur in the absence of the agreement in dispute. To that end, it is appropriate to take into account in particular the nature and quantity, limited or otherwise, of the products covered by the agreement, the position and the importance of the parties on the market for the products concerned, and the isolated nature of the disputed agreement or, alternatively, its position in a series of agreements. Although not necessarily decisive, the existence of similar contracts is a circumstance which, together with others, is capable of being a factor in the economic and legal context within which the contract must be judged.

NOTE

The third decision on this subject involves Lancôme and its subsidiary in the Netherlands and two Netherlands companies, Etos and Albert Heyn, which run a chain of retail shops in the Netherlands. Proceedings were brought against the latter by the plaintiffs before the Arrondissementsrechtbank, Haarlem, in order that the Court should prohibit them from selling Lancôme products in their shops, which are not authorized to sell these products.

The selective distribution network set up by Lancôme is based in particular on exclusive distributorship agreements concluded between it and the general agents which it has appointed in the various Member States of the Community and on sales agreements concluded with retailers in France. The Commission was notified of the agreements concluded.

When the Netherlands retailers claimed in their defence that the sales organization of the plaintiffs was partially void since it infringed Article 85 (1), the latter referred to a letter of 1974 from the Directorate General for Competition of the Commission of the European Communities. That letter, addressed to Lancôme, relates that the latter has amended the agreements which are the outcome of its sales agreement in the EEC in such a way that authorized retailers are henceforth free to resell Lancôme products to, or to buy them from, any general agent or authorized retailer established in the EEC and to fix their selling prices where the products are reimported from or re-exported to other countries of the Common Market. The letter concludes that the file on the case may be "closed".

The Netherlands court referred a series of questions to the Court.

The first question asks the Court, first, to specify the legal nature of the letter addressed to Lancôme by the Director General for Competition and to determine the effect of such letters in relation to third parties.

Second, it asks whether such a letter terminates the "provisional validity" of old agreements duly notified. As to the first point, reference should be made to the commentary on the Guerlain and Others cases, above.

Provisional validity (second point)

In the judgment of 14 February 1977 in De Bloos v Bouyer (Case 59/77) the Court held that "during the period between notification and the date on which the Commission takes a decision, courts before which proceedings are brought relating to an old agreement duly notified or exempted from notification must give such an agreement the legal effects attributed thereto under the law applicable to the contract, and those effects cannot be called in question by any objections which may be raised concerning its compatibility with Article 85 (1)".

The Netherlands court asks whether a letter such as that sent to Lancôme in 1974 by the Commission has the effect of terminating the provisional protection accorded from the date of their notification to old agreements notified in due time under Article 5 of Regulation No. 17 or exempted from notification.

Reference should be made to the considerations underlying the case-law of the Court concerning "provisional validity".

Article 85 of the Treaty is arranged in the form of a rule imposing a prohibition (paragraph (1)) with a statement of its effect (paragraph (2)), mitigated by the exercise of a power to grant exemptions to that rule (paragraph (3)). To treat a given agreement, or certain of its clauses, as automatically void pre-supposes that that agreement falls within the prohibition in paragraph (1) of the said article and that it may not benefit from the provisions of paragraph (3). Since the Commission alone is competent to apply the provisions of Article 85 (3) the Court was led to conclude that as far as the agreements in question are concerned the requirement of legal certainty in contractual matters means that when an agreement has been notified in accordance with the provisions of Regulation No. 17 the national court may not declare it automatically null and void unless the Commission has adopted a decision pursuant to that regulation. In the light of those considerations it is clear that once the Commission notifies the parties concerned that it has proceeded to close the file on their case, there is no longer any reason to maintain the provisional protection accorded to old agreements which have been notified.

There is therefore no longer anything to exempt the national courts before whom the direct effect of the prohibition in Article 85 (1) is relied upon from giving judgment.

Second question

This question asks whether agreements which form the basis of a selective distribution network may escape the prohibition in Article 85 (1) of the Treaty by reason of the fact that the market share held by the undertaking in question is relatively small.

The court making the reference draws attention to the fact that the competitors of the undertaking in question also practise selective distribution and expresses the view that, until now, it considered selective distribution possible only on the basis of an exemption under Article 85 (3).

The Court has already observed that selective distribution systems constitute an aspect of competition which accords with Article 85 (1), provided that resellers are chosen on the basis of objective criteria of a qualitative nature relating to the technical qualifications of the reseller, and that such conditions are laid down uniformly for all potential resellers and are not applied in a discriminatory fashion.

It follows that a selective distribution network, access to which is subject to conditions which go further than mere objective selection on the basis of quality, comes, in principle, within the prohibition in Article 85 (1) especially when it is based on qualitative selection criteria.

To be prohibited, however, an agreement between undertakings must fulfil various conditions relating not so much to its legal nature as to its relationship on the one hand to "trade between Member States", and on the other hand to "competition".

It is for the national court to decide, on the basis of all the relevant factors, whether an agreement does in fact fulfil the conditions which would bring it within the prohibition in Article 85 (1).

The Court ruled in answer to the questions referred to it by the Netherlands court that:

1. An administrative letter informing the persons concerned that the Commission is of the opinion that there are no grounds for it to take action with regard to the agreements which have been notified pursuant to the provisions of Article 85 (1) has the effect of terminating the period of provisional validity accorded from the date of notification to agreements made prior to 13 March 1962 which were notified within the period laid down in Article 5 (1) of Regulation No. 17 or which were exempted from notification. The assessment set out in such a letter is not binding on the national courts but constitutes an element of fact which the latter may take into account in determining whether the agreements are in conformity with the provisions of Article 85.

2. Agreements on which a selective distribution system is based which relies on tests for admission to the system which go beyond simple objective selection based on quality have all the elements constituting incompatibility with Article 85 (1) when those agreements, either in isolation or taken together with others, in the economic and legal circumstances under which they are made and on the basis of the objective elements of law or of fact which are involved, are capable of influencing trade between Member States and have as their object or effect the prevention, restriction or distortion of competition.

Judgment of 10 July 1980

Case 32/79

Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland

(Opinion delivered by Mr Advocate General Reischl on 21 May 1980)

1. Fishing - Conservation of maritime resources - Powers of the EEC not exercised - Provisional powers of the Member States - Duty of co-operation

   (Act of Accession, Art.102; EEC Treaty, Art.5)

2. Fishing - Conservation of maritime resources - Community conservation measures not extended - Effects thereof - Freedom to act at will not restored to the Member States - Duty of Member States to take the necessary conservation measures - Rules

3. Fishing - Conservation of maritime resources - Impossible to adopt necessary measures at Community level - Duty of Member States to act in the interests of the Community

   (Act of Accession, Art.102; Council Regulation No. 101/76, Art.4; Council Resolutions of 3 November 1976, Annex VI; Council Declaration of 31 January 1978)

4. Fishing - Conservation of maritime resources - Provisional powers of the Member States - Conditions for the exercise thereof - Duty of consultation - Scope

   (Council Resolutions of 3 November 1976, Annex VI)

5. Fishing - Conservation of maritime resources - Provisional powers of the Member States - Conditions for the exercise thereof - Duties of consultation and notification - Scope - Application to national measures adopted in implementation of a Community regulation

   (Council Regulation No. 101/76, Arts. 2 and 3; Council Resolutions of 3 November 1976, Annex VI)

6. Fishing - Conservation of maritime resources - Community conservation and management measures - National implementing provisions - Conditions for compatibility with Community law.

   (EEC Treaty, Art.7; Council Regulation No. 101/76, Art.2)

1. Pursuant to the obligations arising both from the EEC Treaty and from the Act of Accession, the Community has power to introduce fishery conservation measures in the waters within the jurisdiction of the Member States. In so far as this power has been exercised by the Community, the provisions adopted by it preclude any conflicting provisions by the Member States. On the other hand, so long as the transitional period laid down in Article 102 of the Act of Accession has not expired and the Community has not yet fully exercised its power in the matter, the Member States are entitled, within their own jurisdiction, to take appropriate conservation measures without prejudice, however, to the obligation to co-operate imposed upon them by the Treaty, in particular Article 5 thereof.

2. The effect of the Council's inability to reach a decision to extend the fishery conservation measures which it had previously adopted has not been to deprive the Community of its powers in this respect and thus to restore to the Member States freedom to act at will in the field in question. In such a situation, it is for the Member States, as regards the maritime zones coming within their jurisdiction, to take the necessary conservation measures in the common interest and in accordance with both the substantive and the procedural rules arising from Community law.

3. Both Article 102 of the Act of Accession and Council Regulation (EEC) No. 101/76, laying down a common structural policy for the fishing industry, in particular Article 4 thereof, in the same way as Annex VI to the Hague Resolutions adopted by the Council on 3 November 1976 and the Council declaration of 31 January 1978 concerning fisheries, are based on the two-fold assumption that measures must be adopted in the maritime waters for which the Community is responsible so as to meet established conservation needs and that if those measures cannot be introduced in good time on a Community basis the Member States not only have the right but are also under a duty to act in the interests of the Community. Although the resolutions and the declaration mentioned above emphasize above all the requirement that national conservation measures should not go beyond what is strictly necessary, at the same time they imply recognition of the need for and the lawfulness of conservation measures justified from the biological point of view and designed so as to be not only to the particular advantage of the Member State concerned but in the collective interests of the Community.

4. The fact that a draft conservation measure is submitted to the Commission at a day's notice after a long period during which a Member State has failed to act cannot be considered as being in accordance with the duties laid down in Annex VI to the Hague Resolutions which requires that the Commission should be consulted at all stages of the drawing-up of proposed measures, allowing for the necessary time to study those measures and to give its opinion in good time.

5. The duty to consult the Commission and to seek its approval, flowing from Annex VI to the Hague Resolutions, is general and applies to any measures of conservation emanating from the Member States and not from the Community authorities. Consequently, the measures adopted by a Member State in implementation of a Community regulation are not exempted from that duty or from the duty of notification laid down in Articles 2 and 3 of Regulation No. 101/76.

6. In order to safeguard the rights and interests protected by Community law for other Member States and their nationals it is necessary to lay down and publish, in a form binding upon the Member State concerned, all the detailed rules of the system chosen by the authorities of that Member State for the implementation of a Community regulation laying down measures for the conservation and management of fisheries, so as to enable all other Member States and all persons concerned, in the same way as the Community authorities, to see whether the system put into operation fulfils both the particular obligations of the Member State in question under the relevant regulation and the general requirements of non-discrimination and equality as regards the conditions of access to the fishing grounds enshrined in Article 2 of Regulation No.101/76 and Article 7 of the EEC Treaty. This obligation to introduce implementing measures which are effective in law and with which those concerned may readily acquaint themselves is particularly necessary where sea fisheries are concerned, which must be planned and organized in advance; the requirement of legal clarity is indeed imperative in a sector in which any uncertainty may well lead to incidents and the application of particularly serious sanctions.

NOTE

By application of 27 February 1979 the Commission brought an action under Article 169 of the Treaty for a declaration that the United Kingdom has failed to fulfil its obligations under the EEC Treaty by applying unilateral sea fisheries measures regarding:

Herring fishing in the Mourne Fishery (east coast of Ireland and Northern Ireland);

Herring fishing in the Isle of Man and Northern Irish Sea Fishery;

Fishing for Norway Pout in the zone known as "the Norway Pout Box" (north-east coast of Scotland).

The background to the disputes

In 1977 the three fishing zones were governed by regulations adopted by the Council. In 1978, the Commission had submitted to the Council proposals to extend the period of validity of those measures, with certain amendments, to 1978. There were differences of opinion and in view of the failure of negotiations, the Council issued the following statement on 31 January 1978:

"The Council failed to reach agreement at this meeting on the definition of a new common fisheries policy but agreed to resume examination of these matters at a later date. Pending the introduction of a common system for the conservation and management of fishery resources, all the delegations undertook to apply national measures only where they were strictly necessary, to seek the approval of the Commission for them and to ensure that they were non-discriminatory and in conformity with the Treaty".

On 2 February 1978, the Government of the United Kingdom informed the Commission that it proposed to maintain on a national basis the conservation measures in force on 31 January 1978 and sent a list of those measures.

On 27 October 1978, the Commission informed the Government of the United Kingdom that it considered that the measures adopted in respect of the three areas were in breach of Community law in various respects. The complaints put forward by the Commission may be summarized as follows:

(a) With regard to the Mourne Fishery, the Commission complains that the United Kingdom left unprotected for most of 1978 a herring stock in danger of extinction, failed in its duties of consultation laid down by Community law in respect of the protective measures adopted, belatedly, in September 1978, and coupled those measures with an exception for coastal fishing in a zone of Northern Ireland which was directly contrary to conservation needs and was, moreover, granted in conditions discriminating against the fishermen of the other Member States;

(b) With regard to the Isle of Man and Northern Irish Sea Fishery, the Commission complains that the United Kingdom applied unilaterally, both in 1977 and 1978, a system of fishing licences with regard to which there was no appropriate consultation and the detailed rules for the application of which were such as to exclude from the fishing zone in question fishermen from the other Member States and, more particularly, Irish fishermen who traditionally fished in those waters;

(c) With regard to the Norway Pout Box, the Commission complains that the United Kingdom unilaterally extended the eastern limits of that box by 2° longitude without having shown the justification for that measure as a necessary and urgent conservation measure, thus causing considerable damage to the industrial fishery traditionally carried on in that zone by the Danish fishing fleet.

The applicable law and the distribution of powers

The common fisheries policy is based on Articles 3 (d) and 38 of the EEC Treaty. Article 102 of the Act of Accession recognized that protection of the fishing grounds and conservation of the biological resources of the sea formed part of that policy by instructing the Council to adopt appropriate measures. The essential guidelines were established by Council Regulation (EEC) No. 101/76 of 19 January 1976 laying down a common structural policy for the fishing industry. In the judgments in the Kramer case, Joined Cases 3, 4 & 6/76 and Case 61/77, Commission of the European Communities v Ireland, the Court emphasized that the Community has the power to take conservation measures and that in so far as this power has been exercised by the Community the provisions adopted by it preclude any conflicting provisions by the Member States.

In view of the difficulties in implementing a common policy for the conservation of fishery resources, the Council adopted on 3 November 1976 a resolution known as "Annex VI to The Hague Resolutions" according to which "the Member States could then adopt, as an interim measure and in a form which avoids discrimination, appropriate measures to ensure the protection of resources situated in the fishing zones off their coasts". The resolution adds that "before adopting such measures the Member States concerned will seek the approval of the Commission, which must be consulted at all stages of the procedures".

Although the right of Member States to take conservation measures is not contested with regard to the period in question, a fundamental difference of opinion between the parties as to the nature and the extent of that power has emerged.

According to the United Kingdom, the Member States have an inherent power of regulating fishing within their fishing jurisdiction, the extent of which at any given time depends on the rules of international

law. The Council has power to take conservation measures but this power of the Council restricts the powers of the Member States only if the Council has exercised its power by adopting conservation measures.

In contrast to this viewpoint, the Commission claims that the Council had exercised its powers with regard to the three fishing zones in question by bringing into force Community regulations and that it had itself taken the initiative of submitting to the Council proposals for defining the fisheries arrangements applicable in 1978.

The French Government develops this point of view by stating that the unilateral British measures which form the subject-matter of the dispute were taken in sectors in which Community regulations had been adopted and in which the Council was considering proposals put forward by the Commission for the adoption of further measures.

It is necessary to emphasize that as early as 1977 the Council had exercised its powers with regard to all the maritime zones affected by the application. The effect of the Council's inability to reach a decision in 1978 has not been to deprive the Community of its powers in this respect and thus to restore to the Member States freedom to act at will in the field in question.

The Mourne Fishery

The Mourne Fishery is situated in a zone 12 miles off the east coast of Ireland and Northern Ireland. It is a joint fishery for the United Kingdom and Ireland. It is not in dispute that the herring stocks in that zone are in direct danger of extinction. Consequently, the Council had prohibited direct fishing for herring in that zone (Regulation No. 1672/77 of 25 July 1977). This prohibition had been extended until 31 January 1978 (Regulation No. 2899/77 of 21 December 1977). The Commission had proposed to extend that prohibition throughout 1978. It is an established fact that Ireland adopted provisions prohibiting all fishing for herring in the part of the Mourne Fishery coming within its jurisdiction. This prohibition was effective as from 6 February 1978.

For its part, the United Kingdom did not adopt measures concerning the part of the Mourne Fishery coming within its jurisdiction until September 1978.

On 18 September 1978 the British Government notified the Commission in order to obtain the Commission's approval for the immediate closure of the part of the Mourne Fishery off the coast of Northern Ireland for the remainder of 1978. In terms of this draft the measure was to take effect at midnight on 19 September but the fishing ban included an exemption for boats of under 35 ft registered length for a catch of 400 tonnes of herring.

The Commission did not give its approval to the measure notified by the United Kingdom. That measure was brought into force by the Herring (Restriction of Fishing) Regulations (Northern Ireland) 1978 S.R. 1978 No. 277.

The Commission's complaints essentially concern the procedure followed by the United Kingdom for the purpose of introducing the measure described above and the provisions of that measure.

The Commission considers that by notifying on 18 September a measure intended to come into operation the following day the Government of the United Kingdom cannot be considered seriously to have sought the Commission's approval in accordance with The Hague Resolutions.

The Commission moreover considers that a herring catch, even if limited to 400 tonnes, was directly contrary to conservation needs and that, moreover, the reference to the maximum length of the fishing boats was manifestly discriminatory and that that exemption was deliberately defined so as to benefit exclusively the small boats characteristic of coastal fishing.

The Commission considers that the United Kingdom had a legal duty under Community law to prohibit all direct fishing for herring in the Mourne Fishery on 6 February 1978 at the latest.

The Government of the United Kingdom does not contest the actual existence of the catches in the Mourne Fishery during 1978 but claims that the figures given by the Commission relate to the whole fishery so that only part of the tonnage given was caught in the Mourne Fishery.

As regards the measure introduced in September 1978, the United Kingdom explains that urgent action was necessary because at that time the British authorities had established that trawlers had entered the fishing zone in question. With regard to the exemption for a quota of 400 tonnes for fishing boats under 35 ft registered length, the British Government claims that this was merely an interim measure intended to protect the interests of small coastal fishermen.

The Court considers that there are several factors which, when taken together, lead to the conclusion that the United Kingdom was under a duty to take conservation measures in the zone in question. A total ban on fishing was required for the conservation of the Mourne stock.

The Hague Resolutions and the Council Declaration of 31 January 1978 are based on the twofold assumption that measures must be adopted in the maritime waters for which the Community is responsible so as to meet established conservation needs and if those measures cannot be introduced in good time on a Community basis the Member States not only have the right but are also under a duty to act in the interests of the Community. The fact that a 400-tonne catch was permitted and that this concession was reserved to fishing boats of under 35 ft registered length cannot be justified as an "interim measure". In fact, it would have been possible to adopt interim measures in favour of the fishermen in question, as for other fishermen in the Community, if the United Kingdom had raised this question in due time within a Community procedure. Finally, it is necessary to observe that the procedure used in this instance by the United Kingdom was not in accordance with the requirements laid down in Annex VI to The Hague Resolutions.

The fact that the draft measure, the details of which clearly raised problems from the point of view of Community law, was submitted to the Commission at a day's notice after a long period during which the United Kingdom had failed to act is not in accordance with The Hague Resolutions which require that the Commission should be consulted at all stages of the drawing-up of proposed measures, allowing for the necessary time to study those measures and to give its opinion in good time. It is therefore necessary to declare that the United Kingdom has failed to fulfil its obligations under the Treaty both because of the procedure used and

because of the exemption attached to the prohibition introduced on 20 September 1978.

The Isle of Man and Northern Irish Sea Fishery

The Isle of Man Fishery, which is subject to special rules, is formed by a 12-mile belt around the island in the Irish Sea. The Council had laid down for 1977 certain conservation and management measures for the herring stocks in the zone in question.

These measures included a seasonal prohibition on fishing from 1 October to 19 November 1977, the fixing of a quota of 13 200 tonnes for the whole of the Irish Sea, divided between France, Ireland, the Netherlands and the United Kingdom, and a provision relating to by-catches of herring.

The Member States were to take "as far as possible, all necessary steps to ensure compliance with the provisions of this regulation".

On 8 August 1977 the United Kingdom introduced two orders, the Herring (Irish Sea) Licensing Order 1977 and the Herring (Isle of Man) Licensing Order 1977 which may be considered as implementing the Council regulation in the United Kingdom. The purpose of the two orders is to prohibit fishing for herring in the maritime zones in question except for fishermen with a licence issued, as regards the Irish Sea, by the Government of the United Kingdom, and, as regards Isle of Man waters, by the Board of Agriculture and Fisheries of that island. The two orders do not contain any conditions in which those licences are issued, or the rights which they confer or the duties linked to their issue. They leave total discretion to the competent authorities. Those licences contained restrictions as to the period of the fishing seasons and indicated a certain number of ports in which the catches were to be landed.

The application of this licensing system was the subject-matter of negotiations between the Irish authorities and those of the United Kingdom and Isle of Man but they were unsuccessful and it has been ascertained that no licence was issued to Irish fishermen in 1977 or 1978.

In its proposals for 1978 the Commission had provided with regard to this zone for a total catch somewhat reduced by comparison with that allowed in 1977 whilst proposing a slight increase in the French, Irish and Netherlands quotas compensated for by an equivalent reduction in the United Kingdom quota.

On 17 August 1978, the Government of the United Kingdom submitted to the Commission a draft measure intended to come into operation on 21 August 1978, reducing the catches to 9 000 tonnes, 8 100 tonnes of which would be reserved to United Kingdom and Isle of Man fishermen.

The application of this restriction was to be controlled by licences, 120 of which would be granted to the United Kingdom. The notification did not contain any information as to the rights of fishermen of other Member States so that the Commission informed the United Kingdom that it was impossible for it to adopt a viewpoint in such a short time and requested that the fishery should not be closed before 1 October. On 20 September 1978, the United Kingdom prohibited fishing for herring from 24 September 1978 throughout the Irish Sea.

The Commission's complaints may be summarized as follows: the result of the licensing system was to oust Irish fishermen from a fishing zone which was traditional for them and the fact that the closure of the fishing season was brought forward caused damage to the fishermen of other Member States, in particular French and Netherlands fishermen.

The Commission's arguments were supported by the French, Irish and Netherlands Government. The French Government emphasizes the discriminatory nature of the measures adopted by the United Kingdom in that it gave its own fishermen an excessive proportion of the total catches. The Irish Government agrees with the analysis made by the Commission. The Government of the Netherlands claims that the interests of Netherlands fishermen were adversely affected by the British measures in two ways - the fishing quotas applied unilaterally by the United Kingdom reduced the proportion reserved to the other Member States and the bringing forward of the date of closure of the fishing season adversely affected primarily Netherlands fishermen whose fishing is concentrated precisely in that season.

In its defence, the United Kingdom claims that the licensing system constitutes a particularly effective means of ensuring that the fishing restrictions existing in the region in question are being observed. With regard to the bringing forward of the date of closure of the fishing season to 24 September 1978, the British Government claims that it was an appropriate conservation measure which was applied without discrimination and that it had been duly notified to the Commission whose approval had been sought.

The arrangements applying in 1977

During 1977, the maritime zone in question was governed by Regulation No. 1779/79 which involved the fixing of catch quotas and a seasonal fishing ban from 1 October to 19 November 1977 in a limited zone covering the Isle of Man waters. Under that regulation, Member States were under a duty to take the measures necessary to ensure that those provisions were complied with. The United Kingdom raised the question whether the duty to consult the Commission and to seek its approval applies to measures of that kind. The Court has already stated this in its judgment in Case 141/78, French Republic v United Kingdom of Great Britain and Northern Ireland. This duty is general and applies to any measures of conservation emanating from the Member States and not from the Community authorities.

The United Kingdom has not, by bringing into force that licensing system, entirely fulfilled its obligations under the Community rules. In fact, the obligation to introduce implementing measures which are effective in law and with which those concerned may readily acquaint themselves is necessary where sea fisheries are concerned which must be planned and organized in advance.

The requirement of legal clarity is indeed imperative in a sector in which any uncertainty may well lead to incidents and the application of particularly serious sanctions.

The United Kingdom was in breach of the rules of Community law as long ago as the 1977 season by not securing the implementation of Regulation No. 1779/77 by means of measures legally determined and published and by failing to communicate information both to the Commission and to the other Member States directly concerned.

The arrangements applicable in 1978

It is necessary to point out first of all that the United Kingdom has allowed complete uncertainty to continue to exist as to the system of conservation measures applied in the zone in question. Nor has the United Kingdom fulfilled the requirements laid down in The Hague Resolutions. In fact, in view of the long period of inactivity before that notification, the fact that the Commission was suddenly consulted on 17 August about measures intended to be brought into force four days later cannot be considered to be a procedure complying with that resolution. It is therefore also necessary to declare that the United Kingdom has failed to fulfil its obligations under the Treaty as regards the arrangements applied in 1978.

The Norway Pout Box

During 1977, the Council had thrice adopted measures prohibiting fishing for Norway pout. The fishing zone adjoins the east and north coasts of Scotland. The common feature of the measures adopted was that they did not extend further east than a line represented by 00° 00' longitude (or the Greenwich meridian). On 31 October 1977, the British Government adopted a provision prohibiting fishing for Norway pout from 1 November 1977 in the same zone bounded to the east by the Greenwich meridian. For its part, the Commission submitted to the Council at the same time a proposal which aimed at maintaining the Norway Pout Box according to its former definition, in other words bounded to the east by 00° 00' longitude.

On 3 and 20 July 1978, the Government of the United Kingdom submitted to the Commission, referring to the procedure laid down in The Hague Resolutions, several draft conservation measures, including a proposal for the seasonal extension during the period every year from 1 October to 31 March of the following year, of the Norway Pout Box, extending the eastern limits of that zone to the dividing line between the United Kingdom fishing zone and the Norwegian fishing zone and, from the points of intersection of that dividing line with 2° longitude East, along that meridian.

The Commission did not give its approval, taking the view that that measure is incompatible with Community law because it is not a true conservation measure but in reality a measure of economic policy whose object is to improve the catches of United Kingdom fishermen, who fish for haddock and whiting in that region, when the existence of those species is not in fact endangered, to the detriment of Danish fishermen who traditionally fish for Norway pout for industrial purposes.

The Danish Government draws attention to the serious damage caused to a considerable proportion of its fishing fleet whose existence is endangered by the measure adopted unilaterally by the United Kingdom. The United Kingdom contends that the measure adopted is a genuine conservation measure.

It follows from the Community provisions that unilateral conservation measures may only be adopted by Member States where there is an established need.

Having introduced the measure complained of unilaterally, without supplying any explanation, the United Kingdom has not been able to show the justification for the measure adopted as a strictly necessary conservation measure.

The Court held as follows:

1. The United Kingdom has failed to fulful its obligations under the EEC Treaty:

   (a) As regards the Mourne Fishery, by failing to fulfil the duties of consultation laid down by Community law in respect of the conservation measures adopted in September 1978 by the Herring (Restriction of Fishing) Regulations (Northern Ireland) 1978, S.R. 1978 No. 277, by coupling those measures with an exception contrary to a recognized conservation need and, moreover, granting that exception in conditions solely favourable to certain United Kingdom fishermen;

   (b) As regards the Isle of Man and Northern Irish Fishery, by applying in 1977, for the purpose of implementing Council Regulation No. 1779/77 of 2 August 1977 and pursuant to the Herring (Irish Sea) Licensing Order 1977, S.I. 1977 No. 1388, and the Herring (Isle of Man) Licensing Order 1977, S.I. 1977 No. 1389, a system of fishing licences which had not formed the subject-matter of an appropriate consultation and the detailed rules for the implementation of which were reserved wholly to the discretion of the United Kingdom authorities, without its being possible for the Community authorities, the other Member States and those concerned to be certain how the system would actually be applied in law; by maintaining in 1978 that state of uncertainly in relation to fishermen of other Member States and by, during the same year, unilaterally amending the existing protective measures to the detriment of fishermen of other Member States by the Irish Sea Herring (Prohibition of Fishing) Order 1978, S.I. 1978 No. 1374, without consulting the Commission in accordance with the rules of Community law and without showing that the detailed rules for the implementation of the measure adopted meet a genuine and urgent conservation need in that form;

   (c) As regards the Norway Pout Box, by extending eastwards to 2° longitude East, or to the boundaries of the United Kingdom fishing zone, the scope of a seasonal prohibition on fishing for Norway pout by the Norway Pout (Prohibition of Fishing) (No. 3)(Variation) Order 1978, S.I. 1978 No. 1379, thus causing considerable damage to the fishing of another Member State, without seeking the Commission's approval for this in satisfactory circumstances and without showing the justification for the measure adopted as a strictly necessary conservation measure;

2. The United Kingdom is ordered to pay the costs of the action including those of the interveners.

Judgment of 10 July 1980

Case 811/79

Amministrazione delle Finanze dello Stato
v Ariete S.p.A.

(Opinion delivered by Mr Advocate General Warner on 5 June 1980)

1. Free movement of goods - Customs duties - Charges having equivalent effect - Prohibition - Direct effect

(EEC Treaty, Art. 13; Regulation No. 13/64 of the Council, Art. 12)

2. Preliminary questions - Interpretation - Temporal effects of interpretative judgments - Retroactive effect - Limits - Legal certainty

(EEC Treaty, Art. 177)

3. Community law - Direct effect - Rights of individuals - Protection by national courts - Principle of co-operation

(EEC Treaty, Art. 5)

4. Community law - Direct effect - National charges incompatible with Community law - Recovery - Detailed rules - Application of national law - Conditions - Taking account of fact that charge may have been passed on - Permissibility

5. Community law - Direct effect - National charges incompatible with Community law - Recovery - Detailed rules - Application of national law - Permissibility having regard to provisions of Treaty relating to competition

(EEC Treaty, Arts. 85 to 92)

1. The prohibition on the levying of charges having an effect equivalent to customs duties, whether it has its origin in the general rule contained in Article 13 of the Treaty with effect from 1 January 1970, at the end of the transitional period, or in the special provision of Article 12 of Regulation No. 13/64 with effect, as regards the

products referred to by the regulation, from 1 November 1964, has a direct effect in the relations between the Member States and their subjects throughout the Community as from the date provided for the implementation of the provisions in question.

2. The interpretation which, in the exercise of the jurisdiction conferred upon it by Article 177 of the EEC Treaty, the Court of Justice gives to a rule of Community law clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force. It follows that the rule as thus interpreted must be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions enabling an action relating to the application of that rule to be brought before the courts having jurisdiction are satisfied.

   It is only exceptionally that the Court may, in application of the general principle of legal certainty inherent in the Community legal order and in taking account of the serious effects which its judgment might have, as regards the past, on legal relationships established in good faith, be moved to restrict for any person concerned the opportunity of relying upon the provision as thus interpreted with a view to calling in question those legal relationships.

3. It is the courts of the Member States, applying the principle of co-operation laid down in Article 5 of the EEC Treaty, which are entrusted with ensuring the legal protection which subjects derive from the direct effect of the provisions of Community law.

4. In the absence of Community rules in the matter it is for the legal order of each Member State to lay down the conditions in which taxpayers may contest taxation wrongly levied because of its incompatibility with Community law or claim repayment thereof, provided that those conditions are no less favourable than the conditions relating to similar applications of a domestic nature and that they do not make it impossible in practice to exercise the rights conferred by the Community legal order.

However, Community law does not require an order for the recovery of charges improperly levied to be granted in conditions such as would involve an unjustified enrichment of those entitled. There is therefore nothing from the point of view of Community law to prevent national courts from taking account, in accordance with their national law, of the fact that it has been possible for charges unduly levied to be incorporated in the prices of the undertaking liable for the charge and to be passed on to purchasers.

5. The system of protection which subjects have as a result of the direct effect of the provisions of Community law in conjunction with the special features of national laws which govern in the various Member States matters of form and substance in relation to recovering national taxes which have been paid in contravention of Community law cannot be regarded as incompatible with the provisions of Community law on the establishment of a system ensuring that competition within the Common Market is not distorted

NOTE This case is broadly similar to Case 826/79, Amministrazione delle Finanze dello Stato v S.a.s. MIRECO (see above).

The Corte di Appello, Turin, put to the Court the following questions:

"Is the repayment of sums levied by a Member State on a private importer by way of certain import charges compatible with the rules of Community law concerned with the implementation of a system of free competition within the EEC, where the original payment was made before the charges were held, pursuant to the direct applicability of Community law prohibiting the levying of charges having an effect equivalent to customs duties, to be charges having the effect of customs duties and consequently unlawful?"

The question arose in a dispute between the Italian finance administration and the Ariete undertaking concerning legal proceedings instituted by the latter for the recovery of statistical and health inspection charges paid in respect of the period from 1 February 1968 to 26 February 1972 on importations of milk from France.

In reply, the Court declared that it is for the legal order in each Member State to decide what are the conditions under which those who pay may contest charges levied in error because they are incompatible with Community law or seek recovery thereof, provided that such conditions may not be less favourable than those governing similar actions in domestic law and that they may not make the exercise of the rights conferred by the Community legal system impossible in practice. As far as Community law is concerned, there is nothing to prevent the national courts from taking into account, in accordance with their national law, the fact that charges which have been wrongly levied may have been included in the prices charged by the undertaking paying the tax and passed on to buyers. Such actions for recovery are not contrary to the provisions of Community law concerning the establishment of a system to ensure that competition is not distorted in the Common Market.

Judgment of 10 July 1980

Case 826/79

Amministrazione delle Finanze dello Stato v S.a.S. Mediterranea Importazione, Rappresentanze, Esportazione, Commercio (MIRECO)

(Opinion delivered by Mr Advocate General J.-P. Warner on 5 June 1980)

1. Free movement of goods - Customs duties - Charges having equivalent effect - Prohibition - Direct effect

(EEC Treaty, Art. 13; Regulation No.14/64 of the Council, Art. 12)

2. Preliminary questions - Interpretation - Temporal effects of interpretative judgments - Retroactive effect - Limits - Legal certainty

(EEC Treaty, Art. 177)

3. Community law - Direct effect - Rights of individuals - Protection by national courts - Principle of co-operation

(EEC Treaty, Art. 5)

4. Community law - Direct effect - National charges incompatible with Community law - Recovery - Detailed rules - Application of national law - Conditions - Taking account of fact that charge may have been passed on - Permissibility

5. Community law - Direct effect - National charges incompatible with Community law - Recovery - Detailed rules - Application of national law - Permissibility having regard to provisions of Treaty relating to free movement of goods, competition and the prohibition of tax discrimination

(EEC Treaty, Arts. 9,12,13,92,93 and 95)

1. The prohibition on the levying of charges having an effect equivalent to customs duties, whether it has its origin in the general rule contained in Article 13 of the Treaty with effect from 1 January 1970, at the end of the transitional period, or in the special provision of Article 12 of Regulation No. 14/64 with effect, as regards the products referred to by the regulation, from 1 November 1964, has a

direct effect in the relations between the Member States and their subjects throughout the Community as from the date provided for the implementation of the provisions in question.

2. The interpretation which, in the exercise of the jurisdiction conferred upon it by Article 177 of the EEC Treaty, the Court of Justice gives to a rule of Community law clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force. It follows that the rule as thus interpreted must be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions enabling an action relating to the application of that rule to be brought before the courts having jurisdiction are satisfied.

It is only exceptionally that the Court may, in application of the general principle of legal certainty inherent in the Community legal order and in taking account of the serious effects which its judgment might have, as regards the past, on legal relationships established in good faith, be moved to restrict for any person concerned the opportunity of relying upon the provision as thus interpreted with a view to calling in question those legal relationships.

3. It is the courts of the Member States, applying the principle of co-operation laid down in Article 5 of the EEC Treaty, which are entrusted with ensuring the legal protection which subjects derive from the direct effect of the provisions of Community law.

4. In the absence of Community rules concerning the contesting or recovery of national charges which have been unlawfully demanded or wrongfully levied by reason of their incompatibility with Community law it is for the domestic legal system of each Member State to designate the courts having jurisdiction and determine the procedural conditions governing actions at law intended to safeguard the rights which subjects derive from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature and that under no circumstances may they be so adapted as to make it impossible in practice to exercise the rights which the national courts have a duty to protect.

However, Community law does not require an order for the recovery of charges improperly levied to be granted in conditions such as would involve an unjustified enrichment of those entitled. There is therefore nothing from the point of view of Community law to prevent national courts from taking account, in accordance with their national law, of the fact that it has been possible for charges unduly levied to be incorporated in the prices of the undertaking liable for the charge and to be passed on to purchasers.

5. The system of protection which subjects have as a result of the direct effect of the provisions of Community law in conjunction with the special features of national laws which govern in the various Member States matters of form and substance in relation to recovering national taxes which have been paid in contravention of Community law cannot be regarded as incompatible either with Articles 9,12,13,92,93 and 95 of the EEC Treaty or, in a more general way, with the principles of Community law relating to the free movement of goods, the establishment of a system ensuring that competition within the Common Market is not distorted or the prohibition of discrimination in tax matters.

NOTE The Italian Corte Suprema di Cassazione referred the following two questions to the Court of Justice for a preliminary ruling:

"(a) With regard to the basic principles of Community law concerning the free movement of goods, freedom of competition, non-discrimination in tax matters and in particular with regard to the rules laid down in Articles 9, 12, 13, 92, 93 and 95 of the Treaty and, in respect of the system of guarantees provided by the Community system itself and in particular by Articles 171, 177 and 189 of the Treaty for the rights of persons which are safeguarded by those principles and rules, must the right of a person who has paid the charge in question to recover, from the State which has imposed it, with or without additional sums, the amount improperly paid be acknowledged unconditionally or prohibited unconditionally or upheld within specified limits and on given conditions (in which case what are those limits and conditions and which court, the Court of Justice or a national court, has jurisdiction to ascertain their presence in particular cases?) which the national legal systems, which may differ one from another, apply to the collection, provided for by the provisions of such systems, of charges on importation which are prohibited by the Community provisions as they may be interpreted initially by the national court and subsequently by the Court of Justice?

(b) If in the reply to the foregoing question it is ruled that there is a prohibition against such recovery, which alternative measures, capable of securing in practical terms before the national courts the right of the party who has made the undue payment, are compatible with Community law? "

These questions arose in the course of litigation between a trader and the Italian finance administration for the repayment of charges for health inspections on the occasion of imports of bovine animals from non-member countries which were paid by the trader during the period between 12 December 1964 and 31 December 1973; it is not contested that the sums constituted charges having an effect equivalent to customs duties.

The grounds given in the order making the reference revealed that the questions before the court were to be answered on the assumption that the disputed charges were paid over a long period voluntarily and without objection by the traders concerned in the belief, shared by the national administrative authorities, that the compatibility of the charges with Community law was not in doubt. It was only later that the incompatibility became gradually apparent, following the interpretation by the Court of Justice of the concept of charges having an effect equivalent to customs duties, which led the Court to apply that definition to health inspection charges for the first time in its judgment of 14 December 1972 (Case 29/72, Marimex). The Court has consistently held that the prohibition of charges having an effect equivalent to customs duties has direct effect as regards the relations between Member States and individuals throughout the Community as from the date on which the provisions in question are to be implemented.

The rule as so interpreted must be applied by the courts even to legal relationships which originated and were established prior to the decision on the request for an interpretation, provided, however, that the conditions under which a dispute concerning the application of that rule may be brought before the court having jurisdiction therein have been met.

It is merely by way of exception that the Court of Justice is able (Case 43/75, judgment of 8 April 1976, Defrenne v Sabena), by resorting to a general principle of legal certainty inherent in the Community legal order, and taking into consideration the serious difficulties which its decision might create as regards past events in legal relationships which had been established in good faith, to contemplate restricting the right of any person concerned to rely on the provisions thus interpreted to call legal relationships in question.

Such restrictions are only permissible, however, in the actual judgment providing the interpretation which has been sought.

Nevertheless, it should be borne in mind that when the consequence of a Community rule of law is to prohibit the levying of national taxes or charges, the guarantee of rights conferred on individuals by the direct effect of such a prohibition does not necessarily require that there should be a single rule, common to all the Member States, governing the requirements of form and substance to which the contesting or recovery of such national taxes, which vary widely, are subject. It may be seen from the judgments of 16 December 1976 (REWE and COMET, Cases 33 and 45/76) that the principle of co-operation set out in Article 5 of the EEC Treaty makes it the duty of the courts of the Member States to guarantee the legal protection afforded to individuals by the direct effect of the provisions of Community law.

In reply to the questions submitted to it for a preliminary ruling, the Court declared that in the absence of Community rules concerning the contesting or recovery of national taxes which had been unlawfully imposed or paid in error, because they were incompatible with Community law, it was for the internal legal order of each Member State to determine which courts had jurisdiction in the matter and to lay down the conditions governing legal remedies designed to guarantee that the rights conferred on individuals by the direct effect of Community law were safeguarded, provided that such conditions might not be less favourable than those

governing similar domestic legal actions and that in no case might they be constituted in such a manner as to make it impossible in practice to exercise the rights which the national courts are bound to protect.

As far as Community law was concerned, there was nothing to prevent the national courts from taking into account, in accordance with their national law, the fact that charges which had been wrongly levied might have been included in the prices charged by the trader paying the charges and passed on to buyers.

Judgment of 11 July 1980

Case 150/79

Commission of the European Communities v Kingdom of Belgium

(Opinion delivered by Mr Advocate General Capotorti on 26 June 1980)

1. Social security for migrant workers - Legislation of a Member State - Concept - Belgian Law on social security for workers from the former Belgian Congo and Ruanda-Urundi - Inclusion - Application to workers who are nationals of other Member States without conditions of nationality or residence
(Regulation No. 1408/71 of the Council, Arts. 1(j), 2(1), 3(1) and 10(1))

2. Social security for migrant workers - Special application procedures for legislation of certain Member States - Application by analogy - Not permissible
(Regulation No. 1408/71 of the Council, Annex V)

1. The Belgian Law of 16 June 1960 placing under the control and guarantee of the Belgian State the institutions administering social security for workers from the Belgian Congo and Ruanda-Urundi and providing a guarantee by the Belgian State of social security benefits in favour of such persons, constitutes "legislation of a Member State" within the meaning of Regulation No. 1408/71. Accordingly the Belgian State cannot impose conditions of nationality or residence on workers who are nationals of the Member States of the Community and who come within the sphere of application of the said regulation for the grant of the social security benefits provided for by that Law.

2. Annex V to Regulation No. 1408/71 contains a number of provisions containing special application procedures which refer to various special situations. Such procedures may only derive from an express provision in the rules in question and cannot be extended to situations other than those expressly envisaged.

NOTE

The Commission brought an action against the Kingdom of Belgium for a declaration that the latter had failed to fulfil its obligations under Articles 5, 48 and 51 of the Treaty and the Community rules relating to social security for migrant workers.

The Law of 16 June 1960 "placing under the control and guarantee of the Belgian State the institutions administering social security for workers from the Belgian Congo and Ruanda-Urundi and providing a guarantee by the Belgian State of social security benefits in favour of such persons" was adopted when those territories gained independence in order to ensure continuity of the colonial social security system which was based on colonial decrees subsequently repealed by the new independent states. These advantages were granted exclusively to persons holding Belgian nationality or residing in Belgium.

The Belgian Government acknowledged that the conditions concerning nationality and residence were imposed by the Belgian authorities on all recipients of benefits, including nationals of Member States of the Community. However, it maintained that the Law of 16 June 1960 was not covered by the expression "legislation of a ... Member State" which appears in Article 2 (1) of Regulation No. 1408/71.

The Court has already declared in a preliminary ruling (Walter Bozzone v Office de Sécurité Sociale d'Outre-Mer, Case 87/76, /1977/ ECR 687) that the definition of the words "national legislation" is remarkable for its breadth, including as it does all provisions laid down by law, regulation and administrative action by the Member States, and that it must be taken to cover all the national measures applicable in that case.

What had to be examined in the present case, therefore, was whether the arguments put forward by the Belgian Government contributed any new factors to that case-law. The Belgian Government maintained that Articles 48 to 51 of the Treaty had never applied to the former Belgian colonies, which were also excluded from the scope of Regulation No. 3 of the Council of 16 December 1958 concerning social security for migrant workers. It considered it unreasonable for legislation in the social sphere, which was formally excluded from the scope of the Treaty for the whole of the period during which the workers were actually subject thereto, to be subsequently included in its sphere of application. The Law of 16 June 1960 was founded on that legislation and merely guaranteed the right to benefit acquired under the colonial scheme. It was, in reality, a gesture of good-will on the part of the Belgian State towards persons previously employed in the colonies which had become independent.

Commenting on that argument of the defendant the Court stated that it should be noted that the action was not directed against the colonial scheme which was in force in the Belgian colonies prior to their independence. Unquestionably, that scheme, which was repealed by the new independent States, did not fall within the sphere of application of the Treaty and of Regulation No. 3. The action concerned a scheme introduced by a Belgian law administered under the control of the Belgian State by a public body instituted under Belgian law which did not at that time in general produce its effects in the former Belgian colonies but principally on Belgian home territory. As a result the scheme was capable of affecting the

movement of workers within the Community, whose freedom is protected by Articles 48 to 51 of the Treaty and by Community regulations.

Moreover, the independence of the present scheme from the colonial scheme was made clear by the fact that whilst the Belgian legislation referred to decrees passed under colonial regimes it included a large number of amendments relating to both the conditions under which benefits were granted and to the benefits themselves.

In the circumstances the mere fact that all benefits were based on insurance periods completed prior to 1 July 1960 outside the Community territories did not exclude the application of the Community rules on social security.

The Court held that:

By imposing, for the grant of social security benefits provided for by the Law of 16 June 1960 placing under the control and guarantee of the Belgian State the institutions administering social security for workers from the Belgian Congo and Ruanda-Urundi and providing a guarantee by the Belgian State of social security benefits in favour of such persons, conditions of nationality or residence on workers who are nationals of the Member States of the Community coming within the field of application of Regulation (EEC) No. 1408/71, the Kingdom of Belgium has failed to fulfil its obligations under the EEC Treaty.

Judgment of 11 July 1980

Case 798/79

Hauptzollamt Köln-Rheinau v Chem-Tec

(Opinion delivered by Mr Advocate General J.-P. Warner on 19 June 1980)

1. Common Customs Tariff - Tariff headings - Interpretation - Explanatory Notes of the Customs Co-operation Council - Opinions of the Committee on Common Customs Tariff Nomenclature - Authority - Limits

2. Common Customs Tariff - Tariff Headings - "Breathing appliances" within the meaning of heading 90.18 - Concept - Filter masks - Inclusion

1. The Explanatory Notes to the Nomenclature of the Customs Co-operation Council, like the opinions of the Committee on Common Customs Tariff Nomenclature, constitute an important means of ensuring the uniform application of the Common Customs Tariff by the customs authorities of the Member States and as such may be considered as a valid aid to the interpretation of the tariff. However, such notes and opinions do not have legally binding force so that, where appropriate, it is necessary to consider whether their content is in accordance with the actual provisions of the Common Customs Tariff and whether they alter the meaning of such provisions.

2. The expression "breathing appliances (including gas masks and similar respirators)" occurring in tariff heading 90.18 of the Common Customs Tariff must be interpreted as meaning that it also includes simple filter masks which, although covering only the mouth and nose, serve as protection against toxic chemical products, dust, smoke and fog and which are intended to be used once only.

NOTE

The Bundesfinanzhof referred to the Court of Justice for a preliminary ruling a question concerning the interpretation of the expression "breathing appliances (including gas masks and similar respirators)" [in the German: andere Atmungsapparate und -geräte aller Art (einschliesslich Gasmasken)] as used in heading 90.18 of the Common Customs Tariff.

The question arose in the course of litigation concerning the classification of a consignment of 8 500 filter masks from the United States, which were cleared through customs for the Chem-Tec undertaking on 29 June 1972 by the appropriate customs office of Cologne-Rheinauhafen. Previously, the customs office had classified the goods under tariff heading 90.18:

> "Mechano-therapy appliances; massage apparatus; psychological aptitude testing apparatus; artificial respiration, ozone-therapy, oxygen-therapy, aerosol-therapy or similar apparatus; breathing appliances (including gas masks and similar respirators)".

Subsequently, in a ruling modifying that on 8 August 1973 the customs office classified the masks in question under tariff heading 59.03:

> "Bonded fibre fabrics... and articles of such fabrics, whether or not impregnated or coated"

and claimed customs duty from Chem-Tec in the amount of DM 1 517.20, the duty being higher for goods under heading 59.03 than for those under heading 90.18. Its complaint against the amended classification was rejected and Chem-Tec then brought an action in the Finanzgericht Düsseldorf, which held in its favour, considering that the tariff classification of the masks should be determined by reference to their function, so that the correct heading was tariff heading 90.18. The principal customs office of Cologne-Rheinau brought an action for the revision of the judgment of the Finanzgericht in the Bundesfinanzhof.

The question referred to the Court by the Bundesfinanzhof for a preliminary ruling is worded as follows:

> Must the concept of "breathing appliances (including gas masks and similar respirators)" within the meaning of tariff heading 90.18 of the Common Customs Tariff be interpreted as meaning that it also includes simple filter masks which cover only nose and mouth, provide protection from poisonous chemicals, dust, smoke and fog, and are intended to be used once?

The Court decided on the question which had been referred to it by the Bundesfinanzhof by declaring that the expression "breathing appliances (including gas masks and similar respirators)" as used in tariff heading No. 90.18 of the Common Customs Tariff was to be interpreted as including simple filter masks which cover only nose and mouth, provide protection from poisonous chemicals, dust, smoke and fog, and are intended to be used only once.

Judgment of 17 September 1980

Case 730/79

Philip Morris Holland B.V. v Commission of the European Communities

(Opinion delivered by Mr Advocate General Capotorti on 18 June 1980)

1. Aids granted by States - Effect on trade between Member States - Criteria

   (EEC Treaty, Art. 92)

2. Aids granted by States - Prohibition - Derogations - Aids which may be considered as compatible with the Common Market - Commission's discretion - Reference to the Community context

   (EEC Treaty, Art. 92 (3))

1. When State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade the latter must be regarded as affected by that aid.

2. In the application of Article 92 (3) of the EEC Treaty the Commission has a discretion the exercise of which involves economic and social assessments which must be made in a Community context.

   The Commission is entitled to regard an aid project as not meeting the requirements of Article 92 (3) (b) if such an aid would have permitted the transfer of an investment which could be effected in other Member States in a less favourable economic situation than that of the Member State in which the recipient undertaking is located.

NOTE

The applicant, the subsidiary in the Netherlands of a large tobacco manufacturer, brought an application seeking the annulment of a decision of the Commission of 27 July 1979 relating to an aid which the Government of the Netherlands proposed to grant towards the increasing of the production capacity of a cigarette manufacturer.

By letter of 7 October 1978 the Government of the Netherlands had informed the Commission of its intention to grant the applicant an "additional premium for major schemes". That premium, which is for investment projects the value of which exceeds Hfl 30 million, varies according to the number of jobs created and may amount to 4% of the value of the investment in question. The premium is not granted where the grant would be, in the opinion of the Commission, incompatible with the Common Market by virtue of Articles 92 to 94 of the Treaty.

The aid in question was intended to assist the applicant to concentrate and develop its production of cigarettes by increasing the production capacity of its factory in Bergen-op-Zoom, in the south of the Netherlands, to 16 000 million cigarettes per year thereby increasing by 40% the company's production capacity and by about 13% the total production in the Netherlands.

After having reviewed the proposed aid in accordance with the provisions of Article 93 of the Treaty, the Commission adopted the decision in dispute which provides that the Kingdom of the Netherlands shall refrain from implementing its proposal to grant the "additional premium for major schemes" in respect of the investment made at Bergen-op-Zoom.

The applicant put forward two grounds for annulling the decision.

First, it was said that the Commission's decision infringes Article 92 (1) of the Treaty, one or more general principles of Community law (good administration, protection of legitimate expectation, proportionality, competition) and also Article 190 of the Treaty in respect that the reasons which the Commission gave for its decision were incomprehensible or contradictory.

Article 92 (1) of the Treaty provides that "Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the Common Market."

The applicant submitted that the criteria used for determining the existence of restrictions on competition in the context of Articles 85 and 86 of the Treaty should be applied in the first place. The Commission must therefore determine the "relevant market" and examine its structure in order to be able to assess in a given case the extent to which the aid in question affects relations between competitors. However, those essential matters are lacking in the decision in dispute.

It was common ground that after the proposed investment had been made the applicant would account for almost 50% of cigarette production in the Netherlands and that it expected to export more than 80% of its production to other Member States.

Where a financial aid granted by a State improves the position of one undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid. In this case the aid which the Government of the Netherlands proposed to grant was to an enterprise directed towards international trade, as was shown by the high percentage of its production which it intends to export to other Member States. The aid in question was to assist in enlarging its production capacity and consequently to increasing its capacity to contribute to the flow of trade, including that between Member States.

Those facts, which were mentioned in the recitals of the preamble to the contested decision and which were not disputed by the applicant, provided sufficient grounds for the Commission to decide that the proposed aid would be likely to affect trade between Member States and would threaten to distort competition between undertakings. The first submission was therefore rejected both as regards its substance and as regards the inadequacy of the statement of reasons.

In its second submission the applicant criticized the Commission's decision in so far as it proceeded upon the exceptions provided for in Article 92 (3) of the Treaty being inapplicable in the present case. That article provides that the following may be considered to be compatible with the Common Market:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious under-employment;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas ...

According to the applicant, the only condition for an aid to be permitted under Article 92 (3) is that the proposed investment under consideration be in conformity with the objectives mentioned in subparagraphs (a), (b) or (c).

That argument could not be upheld. On the one hand, it disregards the fact that Article 92 (3) gives the Commission discretionary powers by providing that the aids which it specifies "may be considered to be compatible with the Common Market". It must also not be overlooked that the Commission enjoys a discretionary power the exercise of which involves economic and social assessments which must be made in a Community context.

The compatibility of the aid in question with the Treaty must be assessed in a Community context and not in that of a single Member State.

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

Judgment of 18 September 1980

Case 795/79

Handelmaatschappij Pesch & Co. B.V. v Hoofdproduktschap voor Akkerbouwprodukten

(Opinion delivered by Mr Advocate General Mayras on 8 July 1980)

1. Agriculture - Monetary compensatory amounts - Charging and granting - Powers of a Member State whose currency fluctuates upwards or downwards - Payment by the exporting Member State of compensatory amounts which should be granted on importation by another Member State - Permissibility.

   (Regulation No. 974/71 of the Council, Art. 2a)

2. Agriculture - Monetary compensatory amounts - Payment by the exporting Member State of compensatory amounts which should be granted on importation by another Member State - Tariff classification of goods decided by the importing Member State - Binding on the exporting Member State.

   (Regulation No. 974/71 of the Council, Art. 2a; Regulation No. 1380/75 of the Commission, Art. 11(2))

3. Common Customs Tariff - Tariff headings - Classification of goods - Absence of uniform criteria - Procedures for resolving disputes - Reference for a preliminary ruling - Application to the Committee on Common Customs Tariff Nomenclature.

   (EEC Treaty, Art. 177; Regulation No. 97/69 of the Council, Art. 2).

4. Common Customs Tariff - Tariff headings - Forage and other preparations used in animal feeding within the meaning of subheading 23.07 B 1 (c) 1 - Specific case

1. In providing that where a product imported into a Member State which "has to grant" a compensatory amount upon importation the exporting Member State may, "by agreement with the Member State", pay the compensatory amount which "should be granted" by the latter, the provisions of Article 2a of Regulation No. 974/71 show that that regulation did not intend to transfer to the exporting Member State responsibility for "granting" monetary compensatory amounts on importation into another Member State but only to allow the exporting Member State the opportunity to "pay", by agreement with the importing Member State and on its behalf, the monetary compensatory amount on importation which the importing Member State itself is required to grant.

2. Article 2a of Regulation No. 974/71 of the Council and Article 11 (2) of Regulation No. 1380/75 of the Commission must be interpreted as meaning that for the purposes of determining the monetary compensatory amount on import into another Member State the exporting Member State is bound by the tariff classification given to the goods in question by the importing Member State. If therefore the tariff classification given by the importing Member State involves no monetary compensatory amount or involves a lower monetary compensatory amount than that resulting from the tariff classification given by the exporting Member State, the exporting Member State is obliged to pay no monetary compensatory amount on import or must pay a lower compensatory amount corresponding to the tariff classification given by the importing Member State.

3. Since the application of the Common Customs Tariff is a matter for the national authorities of each Member State there can be no guarantee of a uniform tariff classification for the same product so long as the classification has not been defined for the whole of the Community by means of the procedures laid down for that purpose by Community law. In the present state of Community law, apart from the procedure referred to in Article 177 of the EEC Treaty which is available to national courts to which the importers and exporters concerned may apply, the only procedure provided for by Community law to ensure uniform tariff classification of goods where the importing Member State classifies the same product differently from the exporting Member State is the possibility which the Member States concerned, have in accordance with Article 2 of Regulation No. 97/69, of submitting the problem of tariff classification of the product in question to the Committee on Common Customs Tariff Nomenclature established by Article 1 of that regulation.

4. A product intended for animal feed and composed of 90% maize starch which has been treated otherwise than by chemical means, 5% calcium chloride and 5% magnesium chloride comes under subheading 23.07 B I (c) 1 of the Common Customs Tariff.

NOTE

The College van Beroep voor het Bedrijfsleven /Administrative court of last instance in matters of trade and industry/ submitted certain questions on the interpretation of various provisions of the Community rules relating to monetary compensatory amounts and the Common Customs Tariff.

The dispute giving rise to the main proceedings is concerned with the export from the Netherlands to the United Kingdom of a number of consignments of maize intended for animal feeding-stuffs.

The first question is worded as follows:

1. Are Article 2a of Regulation (EEC) No. 974/71 of the Council and Article 11 (2) of Regulation (EEC) No. 1380/75 of the Commission to be interpreted as meaning that if the Court of Justice has not yet ruled on the classification of a product in the Common Customs Tariff, the exporting Member State is wholly bound by the opinion of the importing Member State as notified to the exporting Member State as regards the determining of the monetary compensatory amount to be paid by that State in respect of the import of the product concerned into the importing Member State so that if, pursuant to that opinion on the basis of the composition of the product and its classification in the Common Customs Tariff, no monetary compensatory amount or a lower monetary compensatory amount than that paid in respect of export were payable, the exporting Member State is accordingly obliged to pay no monetary compensatory amount in respect of the import of that product into the importing Member State or to pay a lower monetary compensatory amount;

   or

   Are the Community provisions to be interpreted as meaning that the exporting Member State alone also decides as to the grant of monetary compensatory amounts in respect of import into another Member State as regards the payment and fixing of the amounts to be paid?

The Court replied by ruling that:

Article 2a of Regulation (EEC) No. 974/71 of the Council and Article 11 (2) of Regulation (EEC) No. 1380/75 of the Commission must be interpreted as meaning that for the purposes of determining the monetary compensatory amount on import into another Member State the exporting Member State is bound by the tariff classification given to the goods in question by the importing Member State. If therefore the tariff classification given by the importing Member State involves no monetary compensatory amount or involves a lower

monetary compensatory amount than that resulting from the tariff classification given by the exporting Member State, the exporting Member State is obliged to pay no monetary compensatory amount on import or must pay a lower compensatory amount corresponding to the tariff classification given by the importing Member State.

In its second question the national court asks whether a product consisting of 90% maize starch, 5% calcium chloride and 5% magnesium chloride comes under subheading 35.05 A or under subheading 23.07 B I (c) 1 or under another heading of the Common Customs Tariff.

The Court ruled that a product intended for animal feed and composed of 90% maize starch which has been treated otherwise than by chemical means, 5% calcium chloride and 5% magnesium chloride comes under subheading 23.07 B I (c) 1 of the Common Customs Tariff.

Judgment of 18 September 1980

Case 818/79

Allgemeine Ortskrankenkasse Mittelfranken v Landesvericherungsanstalt Ober- und Mittelfranken

(Opinion delivered by Mr Advocate General Reischl on 3 July 1980)

1. Social security for migrant workers - Sickness insurance - Sickness benefits - Concept - Tuberculosis benefits within the meaning of the German State Insurance Regulation (the Reichsversicherungsordnung) - Inclusion

   (Regulation No. 3 of the Council, Art. 2 (1)(a) and Art. 16 et seq.)

2. Social security for migrant workers - Sickness insurance - Benefits in kind provided in another Member State - Reimbursement of expenditure by the competent institution - Allocation of the cost amongst several competent institutions of the same Member State - Application of national law

   (Regulation No. 3 of the Council, Arts. 20(1) and 23 (1) and (3))

1. Social security benefits of the kind with which Article 1244 a of the Reichsversicherungsordnung [State Insurance Regulation] are concerned must be regarded as sickness benefits within the meaning of Article 2 (1)(a) of Regulation No. 3. It follows that the provisions of the regulation relating to sickness benefits, and in particular Article 20 (1) and Article 23 (1) and (3) thereof, apply to such benefits irrespective of the fact that a worker who is affiliated to the pension insurance scheme is at the same time insured under the official German sickness insurance scheme and may claim an entitlement to benefits under that scheme regardless of the place of treatment.

2. Where several institutions of the same Member State are competent institutions for the purposes of Article 20 (1) and Article 23 (1) and (3) of Regulation No. 3 it is for the national law to determine how, in the context of relations between the institutions concerned, the allocation of the cost of the reimbursement provided for by Article 23 (1) and (3) of that regulation is to be regulated.

NOTE

The Bundessozialgericht /Federal Social Court/ submitted to the Court two questions which are raised in the context of a dispute between two German insurance institutions, one, the Allgemeine Ortskrankenkasse Mittelfranken, being competent for sickness insurance and the other, the Landesversicherungsanstalt Ober- und Mittelfranken, being competent for pension insurance, on the question which of them must assume responsibility for the expenditure incurred in the treatment for tuberculosis administered to the son of one of their insured in an Italian hospital during 1964 and 1965.

The Allgemeine Ortskrankenkasse Mittelfranken, the plaintiff in the main proceedings, which is bound by virtue of Article 205 of the Reichsversicherungsordnung /German Law on Social Insurance/ to provide benefits for medical treatment, agreed to assume provisional responsibility for the expenditure in question. It subsequently brought proceedings for reimbursement against the Landesversicherungsanstalt Ober- und Mittelfranken, the defendant in the main proceedings. That action is based on Article 1244a of the Reichsversicherungsordnung which, in the case of active tuberculosis requiring treatment, places a primary obligation on the competent pension insurance institution. Since, by virtue of Article 1244a (9), that obligation is restricted to the territory of the Federal Republic of Germany the defendant institution refused to assume responsibility for that expenditure.

The plaintiff in the main proceedings thereupon countered that that territorial restriction is incompatible with Article 20 (1) and Article 23 (1) and (3) of Regulation No. 3 of the Council of 25 September 1958 on social security for migrant workers and accordingly cannot be pleaded in defence to its claim for reimbursement.

To the questions which the Bundessozialgericht submitted to the Court in order to decide the dispute the following answers were given:

1. Article 20 (1) and Article 23 (1) and (3) of Regulation No. 3 apply to social security benefits of the kind with which Article 1244a of the German Law on social insurance (the Reichsversicherungsordnung) is concerned, irrespective of the fact that a worker affiliated to the pension insurance scheme is at the same time insured under the official German sickness insurance scheme and may claim an entitlement to benefits under that scheme regardless of the place of treatment.

2. Where several institutions of the same Member State are competent institutions for the purposes of Article 20 (1) and Article 23 (1) and (3) of Regulation No. 3 it is for the national law to determine how, in the context of relations between the institutions concerned, the allocation of the cost of the reimbursement provided for by Article 23 (1) and (3) of that regulation is to be regulated.

Judgment of 8 October 1980

Case 810/79

Peter Überschär v Bundesversicherungsanstalt für Angestellte

(Opinion delivered by Mr Advocate General Mayras on 9 July 1980)

1. Social security for migrant workers - Voluntary insurance - Special ways of giving effect to certain laws - Federal Republic of Germany - Paragraphs 8 and 9 of Part C of Annex V to Regulation No. 1408/71 - Condition of retrogressive buying-in laid down by national legislation - Scope - German national who has paid contributions to old-age pension insurance in another Member State

   (Paragraphs 8 and 9 of Part C of Annex V to Regulation No. 1408/71 of the Council, as amended by Regulation No. 1392/74)

2. Social security for migrant workers - Voluntary insurance - Special ways of giving effect to certain laws - Federal Republic of Germany - Paragraphs 8 and 9 of Part C of Annex V to Regulation No. 1408/71 - Condition of retrogressive buying-in laid down by national legislation - Discrimination against German workers and foreigners residing in the Federal Republic of Germany - None

   (Paragraphs 8 and 9 of Part C of Annex V to Regulation No. 1408/71 of the Council, as amended by Regulation No. 1392/74)

3. Community law - Principles - Equal treatment - Concept

1. It follows from the objects and the wording of paragraphs 8 and 9 of Part C of Annex V to Regulation No. 1408/71 (as amended by Regulation No. 1392/74) that those provisions and in particular the first sentence of paragraph 9 are intended to enable the requirement of retrogressive buying-in set forth in Article 49a (2) of the Angestelltenversicherungs- Neuregelungsgesetz /Clerical Staff Pension Reform Law/, as amended by the Rentenreformgesetz /Pension Reform Law/ of 16 October 1972, to continue to exist in the legislation of the Federal Republic of Germany even though the most recent periods correspond to periods in which contributions were compulsory in another Member State. Whenever a German national or a national of another Member State residing in the Federal Republic of Germany claims the benefit of Article 49a (2) the contribution periods in other Member States are not therefore regarded as "covered" but must be bought in first if they are more recent than national periods which are in fact not covered. On the other hand, that requirement may not be applied against the persons referred to in paragraph 8 (b) and (c) who, moreover, are not in any event allowed to buy in periods completed in other Member States.

Consequently a German national who has paid contributions to old-age pension insurance in another Member State and who subsequently wishes to pay a posteriori, but with retroactive effect within the meaning of Article 49a (2) of the Clerical Staff Pension Reform Law German pension contributions in respect of previous periods, may be required to pay German contributions in respect of periods covered by contributions in another Member State.

2. The difference in treatment which is indisputably applied by paragraphs 8 and 9 of Part C of Annex V to Regulation No. 1408/71 (as amended by Regulation No. 1392/74) between, on the one hand, German workers and foreigners residing in the Federal Republic of Germany - referred to in the first sentence of paragraph 9 - and, on the other hand, workers from other Member States - referred to in the second sentence of paragraph 9 - does not constitute discrimination against the former.

   An examination of the advantages and drawbacks of the two legal situations which have to be compared shows in fact that they cannot be regarded as being more favourable to one than to the other category of workers concerned.

3. The general principle of equality, of which the prohibition of discrimination on grounds of nationality is merely a specific enunciation, is one of the fundamental principles of Community law. This principle requires that similar situations shall not be treated differently unless differentiation is objectively justified.

NOTE

The Bundessozialgericht /Federal Social Court/ referred to the Court for a preliminary ruling a question framed as follows:

"Must the first sentence of paragraph 9 of Point C of Annex V to Regulation No. 1408/71, as amended by Regulation No. 1392/74, be interpreted to mean that a German national who has paid contributions to the pension insurance of another Member State and who now wishes to buy-in German contributions for earlier periods in respect of which contributions have not yet been paid, (Article 49 (a) (2) of Part 2 of the Clerical Staff Pension Reform Law /Angestelltenversicherungs-Neuregelungsgesetz/, as amended by the Pension Reform Law /Rentenreformgesetz/ of 16 October 1972), must first pay German contributions for the periods covered by contributions in another Member State or is this unnecessary under Community law?"

That question was raised in the context of a dispute between a German national, the applicant in the main action, and the Federal Insurance Institution for Clerical Staff. The person concerned paid contributions to German insurance for clerical staff from April 1948 to June 1969, and then from 1973 to 1974. In the intervening period (1969 to 1973) he had been employed in Belgium and had been compulsorily insured under the Belgian insurance scheme for clerical staff. In his first German insurance period there were some interruptions, namely four months in 1956 and 41 months between 1964 and 1967, during which he was not insured either in another Member State or under any other old-age pension insurance scheme in the Federal Republic of Germany.

The applicant expressed the desire to make use of the advantages offered to persons in his situation by the German law which provides that "persons who are entitled to insure themselves voluntarily pursuant to Article 10 of the Clerical Staff Pension Law may, at their request by way of exception to the provisions of Article 40, voluntarily buy in contributions in respect of periods from 1 January 1956 to 31 December 1973 which are not yet covered by contributions to statutory pension insurance provided that a contribution relating to any month may not be paid unless the contributions covering all the subsequent months have first been paid. A contribution relating to any month may not exceed the smallest contribution paid in respect of the later month".

Mr Überschär applied to pay the contributions which he would have paid had he been insured in the Federal Republic of Germany between 1948 and 1969 (45 months in all).

The defendant contended that the applicant must start by paying the German contributions in respect of the period corresponding to that in which he was compulsorily insured and in which he had paid contributions in Belgium relying on a provision of German law which provides that the option of making back-payments shall be made available "provided that a contribution relating to any month may not be paid unless the contributions covering all the subsequent months have first been paid". It was that requirement which was the subject-matter of the main action. The applicant had an interest in challenging it owing to the fact that the "buying-in" of recent missing periods, in this case from 1969 to 1973, was more expensive than for periods further back - to be precise, 45 months between 1956 and 1967.

According to the defendant institution the conformity of that requirement with Community law is apparent from the text of paragraphs 8 and 9 of Point C of Annex V to Regulation No. 1408/71. On the other hand the applicant in the main action contested such an interpretation. He maintained that if the interpretation put forward were correct, the disputed provisions would consequently be tainted with discrimination and would therefore be illegal.

The texts requiring consideration are Article 89 of Regulation No. 1408/71 and paragraphs 8 and 9 of Point C of Annex V to the same regulation.

Article 89:

"Special procedures for implementing the legislations of certain Member States are set out in Annex V".

Paragraph 8 of Point C of Annex V:

"Article 1233 of the insurance code (RVO) and Article 10 of the clerical staff insurance law (AVG), as amended by the pension reform law of 16 October 1972, which govern voluntary insurance under German pension insurance schemes, shall apply to nationals of the other Member States and to stateless persons and refugees residing in the territory of the other Member States, according to the following rules;

Where the general conditions are fulfilled voluntary contributions to the German pension insurance scheme may be paid:

(a) if the person concerned has his domicile or residence in the territory of the Federal Republic of Germany;

(b) if the person concerned has his domicile or residence in the territory of another Member State and at any time previously belonged compulsorily or voluntarily to a German pension insurance scheme;

(c) if the person concerned is a national of another Member State, has his domicile or residence in the territory of a third State and has paid contributions for German pension insurance for at least 60 months, or was eligible for voluntary insurance under the transitional provisions previously in force and is not compulsorily or voluntarily insured under the legislation of another Member State".

Paragraph 9 of Point C of Annex V:

" ... The persons who, under paragraph 8 (b) and (c), may join voluntary insurance, may pay contributions only in respect of periods for which they have not yet paid contributions under the legislation of another Member State".

The construction of paragraphs 8 and 9 of Point C of Annex V to Regulation No. 1408/71

Originally the German law restricted the option to "buy-in" to German nationals and to foreigners residing in the Federal Republic of Germany, provided certain conditions were fulfilled.

Following the intervention of the Commission the Federal Republic of Germany accepted that the benefit of that provision should be extended to the nationals of other Member States who did not reside in the Federal Republic of Germany provided that they had previously been compulsorily or voluntarily insured under German old-age pension insurance. That is the object of paragraphs 8 and 9 of Point C of Annex V to Regulation No. 1408/71.

Those provisions distinguish between, on the one hand, workers who derive their right directly from the German legislation, namely German nationals whatever their place of residence and nationals of other Member States residing in Germany and, on the other hand, workers entitled to "buy-in" only by virtue of Community law who are referred to in paragraph 8 (a) and (b) and in the second sentence of paragraph 9.

Persons in the second category may "pay contributions only in respect of periods for which they have not yet paid contributions under the legislation of another Member State". In other words, they are barred from "buying-in" periods which, from the point of view of the German legislation, are actually missing, whilst they correspond to contribution periods in another Member State, even though it is in their interests to do so because, for instance, they do not have any other periods to be bought-in.

On the other hand, workers in the first category, who derive their right to buy-in directly from the German legislation, may buy-in periods which are even covered by contributions in another Member State. The clear difference in treatment existing between German workers and foreign workers residing in Germany and workers from other Member States had to be examined to determine whether it was discriminatory. The Court held that it is not since the differences in that financial burden from one individual case to another are exclusively the result of the objectively different factual situations in which the insured persons concerned may find themselves depending on the vicissitudes of their working life.

The Court ruled on the question referred to it that paragraphs 8 and 9 of Point C of Council Regulation No. 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, as amended by Council Regulation No. 1392/74 of 4 June 1974, must be interpreted to mean that a German national who has paid contributions to old-age pension insurance in another Member State and who subsequently wishes to pay a posteriori, but with retroactive effect within the meaning of Article 49 (a) (2) added to the Angestelltenversicherungs-Neuregelungsgesetz by the Rentenreformgesetz of 16 October 1972, German pension contributions in respect of previous periods, may be made to pay German contributions in respect of periods covered by contributions in another Member State. An examination of the said paragraphs 8 and 9, as thus construed, has disclosed no factor capable of putting their validity in question.

Judgment of 9 October 1980

Case 823/79

Criminal proceedings against Giovanni Carciati

(Opinion delivered by Mr Advocate General Capotorti on 10 July 1980)

Free movement of goods - National rules prohibiting residents from using vehicles admitted under a scheme for temporary importation - Compatibility with the EEC Treaty

The rules of the EEC Treaty relating to the free movement of goods do not preclude the imposition by national rules on persons residing in the territory of a Member State of a prohibition, subject to criminal penalties, on the use of motor vehicles admitted under a scheme for temporary importation and thus exempt from payment of value added tax.

NOTE

The Tribunale Civile e Penale di Ravenna referred a question to the Court on the compatibility of certain provisions of Italian legislation with Community rules on the freedom of movement of goods.

The background to the dispute was as follows. Mr Carciati, an Italian national living at Ravenna, drove a car registered in Germany in Italian territory and was challenged by the Guardia di Finanza. He stated that a national of the Federal Republic of Germany had entrusted the car to him so that it would be available in Italy during his frequent business trips.

Proceedings were brought against Mr Carciati for evasion of customs and excise duties for possessing and using, as an Italian resident, within the national customs territory a motor car registered abroad contrary to the provisions governing temporary importation.

The Ravenna court referred a question to the Court for a preliminary ruling which basically sought to determine whether the principles of the Treaty on the freedom of movement of goods preclude national rules which, making normal importation of vehicles subject to the payment of value-added tax, prohibit, upon penalty of penal sanctions, residents of the State in question from making use of vehicles which have been imported under temporary importation arrangements and which have therefore escaped that tax.

The Court concluded from its analysis of the Community rules in force that the Member States retain a wide power of intervention in the matter of temporary importation precisely for the purpose of preventing fiscal fraud. It followed that provided that the measures taken to that end are not excessive they are compatible with the principle of the freedom of movement of goods.

The Court ruled that the rules of the EEC Treaty on the freedom of movement of goods do not prevent national rules imposing upon residents in the territory of a Member State a prohibition carrying penal sanctions on using motor vehicles imported under temporary importation arrangements and which are therefore exempt from the payment of value-added tax.

Judgment of 14 October 1980

Case 812/79

Attorney General v Juan C. Burgoa

(Opinion delivered by Mr Advocate General Capotorti on 10 July 1980)

1. International agreements - Agreements of Member States - Agreements prior to EEC Treaty - Relations with the EEC Treaty - Art. 234 of Treaty - Sphere of application

(EEC Treaty, Art. 234)

2. International agreements - Agreements of Member States - Agreements prior to EEC Treaty - Prior obligations of the Member State concerned not affected - Duties of Community institutions - Scope and limits

(EEC Treaty, Art. 234)

3. International agreements - Agreements of Member States - Agreements prior to EEC Treaty - Art. 234 of Treaty - Effects - Modification of rights which individuals may derive from prior agreements - None

(EEC Treaty, Art. 234, first para.)

4. Fisheries - Conservation of resources of sea - Community rules applicable to Spanish vessels - Interim régime within framework of relations between Community and Spain - Substitution for previous régime

(Council Regulations Nos. 341/78 and 1376/78)

5. Fisheries - Conservation of resources of sea - Community rules applicable to Spanish vessels - National legislation prescribing penalties for contravention of such rules - Compatibility with Community law

(Council Regulation No. 1376/78)

1. Article 234 of the EEC Treaty is of general scope and applies to any international agreement, irrespective of subject-matter, which is capable of affecting the application of the Treaty.

2. The purpose of Article 234 is to lay down, in accordance with the principles of international law, that the application of the Treaty does not affect the duty of the Member State concerned to respect the rights of non-member countries under an agreement concluded prior to the entry into force of the Treaty or, as the case may be,the accession of the Member State concerned, and to perform its obligations thereunder.

   It would not achieve its purpose if it did not imply a duty on the part of the institutions of the Community not to impede the performance of the obligations of Member States which stem from a prior agreement. However, that duty of the Community institutions is directed only to permitting the Member State concerned to perform its obligations under the prior agreement and does not bind the Community as regards the non-member country in question.

3. The first paragraph of Article 234 cannot have the effect of altering the nature of the rights which may flow from agreements previously concluded with non-member countries. From that it follows that that provision does not have the effect of conferring upon individuals who rely upon such an agreement rights which the national courts of the Member States must uphold. Nor does it adversely affect the rights which individuals may derive from such an agreement.

4. The interim régime brought into force by Regulations Nos. 341/78 and 1376/78, which the Community set up under its own rules, falls within the framework of the relations established between the Community and Spain in order to resolve the problems inherent in conservation measures and the management of fishery resources and the extension of exclusive fishery limits and in order to ensure reciprocal access by fishermen to the waters subject to such measures. Those relations were superimposed on the régime which previously applied in those zones in order to take account of the general development of international law in the field of fishing on the high seas.

5. Legislation of a Member State which prescribes penalties for a contravention of the prohibition against fishing without authorization in its fishery limits, which is imposed on Spanish-registered fishing vessels by Council Regulation No. 1376/78 of 21 June 1978 extending certain interim measures for the conservation and management of fishery resources applicable to vessels flying the flag of Spain to 31 July 1978, is not incompatible with Community law.

NOTE

On 30 October 1979 Juan C. Burgoa, the master of a fisheries vessel registered in Spain, appeared before the Circuit Court, Cork, (Ireland) charged with three offences alleged to have been committed against Irish fisheries legislation. The accused is charged with fishing illegally, and with having on board nets with undersized mesh within the exclusive fisheries limits of Ireland.

In the context of those proceedings the Irish court referred to the Court for a preliminary ruling on four questions concerning the interpretation of Article 234 of the Treaty and the régime applicable to the fishery limits of Ireland.

The charges against the accused allege that he committed those acts on 10 July 1978 when the vessel which he commanded was positioned 20 nautical miles off the base-line, whereas the Irish State had extended its fishery limits to 200 nautical miles from the base-lines as from 1 January 1977.

The accused submitted that the London Fisheries Convention of 9 March 1964 (U.N. Treaty Series 581, No. 8432), to which Spain and Ireland are parties, created for him antecedent rights which are maintained or preserved by, inter alia, Article 234 of the Treaty of Rome.

That Article provides that the rights and obligations arising from agreements concluded before the entry into force of the Treaty between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaty, without prejudice to the obligation on the Member State concerned to take all appropriate steps to eliminate any incompatibilities between such an agreement and the Treaty. Article 234 is of general scope and it applies to any international agreement, irrespective of subject-matter, which is capable of affecting the application of the Treaty.

The Court ruled that:

1. Article 234 of the Treaty must be interpreted as meaning that the application of the Treaty does not affect either the duty to observe the rights of non-member countries under an agreement concluded with a Member State prior to the entry into force of the Treaty or, as the case may be, the accession of a Member State, or the observance by that Member State of its obligations under the agreement and that, consequently, the institutions of the Community are bound not to impede the performance of those obligations by the Member State concerned.

2. By itself, Article 234 does not have the effect either of conferring upon individuals who rely upon one of the agreements to which the preceding paragraph refers rights which the national courts of the Member States must protect or of adversely affecting the rights which individuals may derive from such an agreement

3. The first paragraph of Article 234 of the Treaty applies to the rights and obligations created between Ireland and Spain by the London Fisheries Convention of 9 March 1964.

The fisheries régime applicable to the exclusive fishery limits of Ireland

In its last question the national court asks whether a conviction of the accused under Irish legislation in the criminal proceedings pending before it would be contrary to Community law. It appears from the file on the case that the doubts felt by the Circuit Court of Cork are concerned with the question whether Spanish-registered fishing vessels may be made subject to a régime requiring them to obtain an authorization for the Irish fishery zone lying between 12 and 200 nautical miles from the base-lines, it being accepted that the text of the London Convention refers only to the zone extending up to 12 miles.

The Attorney General contended that such an authorization was required on the basis of Irish legislation. Such a requirement is not in conflict with Community law. In fact, as the Commission correctly submitted, the fishery zones which extend to 200 nautical miles off the North Sea and Atlantic coasts are the subject of Community fishery rules.

At the time of the events in this case, 10 July 1978, the rights of of Spanish fishing vessels to fish in the 200-mile zone off the west coast of Ireland were governed by Council Regulation No. 1376/78 extending certain interim measures for the conservation and management of fishery resources applicable to vessels flying the flag of Spain to 31 July 1978.

Amongst the provisions thus extended was that which provides that fishing shall be subject to the grant of a licence, issued by the Commission on behalf of the Community, and to compliance with other conservation and supervisory measures. From all of those provisions it appears that, at the time in question, the prohibition preventing Spanish-registered vessels from fishing without authorization in the Irish fishery limits bordering the west coast stemmed from Community legislation, in particular, Regulation No. 1376/78.

Since that regulation did not provide for any penalties for contravening that prohibition the Irish authorities are bound to take all appropriate measures to ensure its implementation.

Moreover, recognition of the ever more pressing need for conservation of the resources of the sea, which had already prompted Article 5 of the 1964 London Fisheries Convention and which found expression in Article 102 of the Act of Accession, led the Community, at the time when fishing zones were extended to 200 miles, to start negotiations with non-member countries, including Spain, in order to reach long-term agreements based upon reciprocity. Those agreements provide, inter alia that each of the parties may require vessels of the other party fishing in its waters to hold a licence.

It follows that the interim régime [in the implementation of which Spain co-operated] which the Community set up under its own rules falls within the framework of the relations established between the Community and Spain in order to resolve the problems inherent in conservation measures and the extension of exclusive fishery limits and in order to ensure reciprocal access by fishermen to the waters subject to such measures. Those relations were superimposed on the régime which previously applied in those zones in order to take account of the general development of international law in the field of fishing on the high seas.

The Court ruled that:

Legislation of a Member State which prescribes penalties for a contravention of the prohibition against fishing without authorization in its fishery limits which is imposed on Spanish-registered fishing vessels by Council Regulation No. 1376/78 of 21 June 1978 extending certain interim measures for the conservation and management of fishery resources applicable to vessels flying the flag of Spain to 31 July 1978, is not incompatible with Community law.

Judgment of 15 October 1980

Case 4/79

Société Coopérative Providence Agricole de la Champagne v Office National Interprofessionnel des Céréales (ONIC)

(Opinion delivered by Mr Advocate General Mayras on 11 March and 17 June 1980)

1. Preliminary questions - Court of Justice - National courts - Jurisdiction of each

(EEC Treaty, Art. 177)

2. Agriculture - Monetary compensatory amounts - Objective - Maintenance of the system of single prices within the common organization of agricultural markets - Additional protection for national markets - Exclusion

(Regulation No. 974/71 of the Council)

3. Agriculture - Monetary compensatory amounts - Objective - Specific relationship to levies and refunds

4. Agriculture - Monetary compensatory amounts - Fixing - Derived products - Calculation of incidence of monetary compensatory amount applicable to basic product - Discretion of Commission - Limits

(Regulation No. 974/71 of the Council, Art. 2 (2))

5. Agriculture - Monetary compensatory amounts - Fixing - Derived products - Calculation of incidence of monetary compensatory amount applicable to basic product - Rule as to ceiling - Sum of monetary compensatory amounts on derived products in excess of compensatory amount on basic product - Not permissible

(Regulation No. 974/71 of the Council, Art. 2 (2); Commission Regulations Nos. 1910/76, 2466/76 and 938/77)

6. Preliminary questions - Appraisal of validity - Declaration that a regulation is void - Effects - Application by analogy of second paragraph of Article 174 of the Treaty

(EEC Treaty, second paragraph of Art. 174 and Art. 177)

1. Although, within the framework of the distribution of tasks between the national courts and the Court of Justice for the implementation of Article 177 of the Treaty, it is for the national courts to decide the relevance of the questions which are referred to the Court of Justice, it is however reserved to the Court of Justice to extract from all the information provided by the national court those points of Community law which, having regard to the subject-matter of the dispute, require interpretation, or whose validity requires appraisal.

2. The introduction of monetary compensatory amounts is essentially intended to maintain the system of single prices within the common organization of agricultural markets, since that system of single prices, having regard to the objectives of such organizations, that is, to maintain the standard of living of agricultural producers and to stabilize the markets, constitutes the foundation of the free movement of agricultural products within the Community. Its objective is not and cannot be to provide additional protection for the markets in respect of the level of agricultural prices of one particular State in relation to the others, which would be incompatible with the uniformity sought.

3. Monetary compensatory amounts are not intended to supplement the protection provided by levies and refunds in trade with non-member countries, but to maintain, to the exclusion of any protective element, the system of single agricultural prices within the Common Market by neutralizing distortion arising between one Member State and another from the fact that the common prices are calculated on the basis of a rate of conversion of currencies (the green rate) which does not correspond to those currencies' true rate of exchange.

4. It is for the Commission to resolve the technical and economic problems caused by the calculation of the incidence - within the meaning of Article 2 (2) of Regulation No. 974/71 - on the prices of dependent products of the monetary compensatory amount fixed for a basic product. In doing so it must maintain a degree of consistency and clarity in the system of monetary compensatory amounts which it is required to establish in that sector. Although for this purpose it has a wide margin of discretion which may even extend to general assessments, that discretion nevertheless has limits. Thus if the result of the method of calculation employed is persistently to apply to processed products compensatory amounts the burden or, as the case may be, the benefit of which continually exceeds the amount necessary to take account of the incidence of the compensatory amount applicable to the basic product, the objective of the provisions establishing these amounts may no longer be deemed to be to neutralize the effects of the currency fluctuations between the Member States. In that case the Commission no longer acts within its powers under Regulation No. 974/71.

5. The Commission may not adopt, with regard to products processed from the basic product the price of which depends on that of the latter product, a system for calculating monetary compensatory amounts which results in establishing for the various products obtained by processing a given quantity of the basic product in a specific manufacturing process monetary compensatory amounts the sum of which amounts to a figure clearly in excess of that of the monetary compensatory amount fixed for that given quantity of the basic product.

6. The second paragraph of Article 174 of the EEC Treaty, whereby the Court of Justice may state which of the effects of a regulation which it has declared void shall be considered as definitive, is applicable by analogy, for the same reasons of legal certainty as those which form the basis of that provision, to the judgments whereby the Court, in giving a ruling under Article 177, declares that a regulation is void.

NOTE

The Coopérative "Providence Agricole de la Champagne" brought an action before the Tribunal Administratif, Châlons-sur-Marne, in April 1978 to obtain an order that the Office National Interprofessionnel des Céréales [National Cereal Trades Board] repay it the sum of FF 20 863.57, the portion of monetary compensatory amounts improperly paid in respect of maize groats and maize meal exported between 10 August 1976 and 28 July 1977.

In the context of those proceedings the national court referred to the Court of Justice for a preliminary ruling a number of questions on the validity of Regulation No. 2744/75 of the Council on the import and export system for products processed from cereals and from rice, and of Commission Regulations Nos. 1910/76 and 2455/76 altering the monetary compensatory amounts to be levied or granted, depending on the case, for the importation or exportation of certain products in the cereals sector, and of those which subsequently amended the said amounts in the circumstances explained hereafter.

The first question is whether Regulation No. 2744/75 of the Council is invalid, on the ground that it offends against "the principle of open competition and of equality of treatment between business enterprises within the Community".

It is then asked whether these Commission regulations, in fixing the level of compensatory amounts for maize groats and maize meal on the basis of the coefficient of 1.8 envisaged by Regulation No. 2733/75 of the Council in respect of levies and refunds, violated Regulation No. 974/71 of the Council and the principle that there must be no discrimination between producers.

For the period in question the monetary compensatory amount in respect of 1 tonne of maize meal was determined as follows:

> The monetary compensatory amount per tonne of maize, to which the coefficient of 1.8 is applied. That is in implementation of Articles 1 and 2 of Regulation No. 974/71 of the Council.

It is the incidence on the price of meal (the derived product) of the application of the monetary compensatory amount on maize (the basic product), that the coefficient 1.8 is intended to represent in the regulations at issue, on the principle that 1.8 tonnes of maize are required to produce 1 tonne of maize meal and that, consequently, in order to avoid distortion in competition and deflection of trade, as much in trade between Member States as in that with non-member countries, the tonne of meal must bear, or, as the case may be, qualify for, a monetary compensatory amount equivalent to that imposed on, or granted in respect of, 1.8 tonnes of maize.

Disputing that method of calculation, the plaintiff in the main action maintains that although it is true that to process maize into groats or meal (principal derived products) 1.8 tonnes of maize is needed in order to obtain one tonne of meal, other secondary derived products are obtained in addition to that same quantity of maize, which will also be subject to, or qualify for, as the case may be, monetary compensatory amounts.

Disputing the method adopted by the Commission leads to over-compensation for the incidence of the monetary compensatory amount of the basic product on the price of the principal derived product. The result is that exporters of meal from Member States with a weak currency will pay monetary compensatory amounts (charges) which are too high, whereas those from Member States with a strong currency will receive monetary compensatory amounts (subsidies) which, likewise, are too high. Such over-compensation amounts to an obstacle to the free movement of the goods in question within the Common Market and discrimination between producers, because it contains both a protective element in favour of exporters from certain Member States and an obstacle to the detriment of exporters from other Member States.

According to the plaintiff in the main action the sum of the monetary compensatory amounts which he was charged should be reduced in such a manner that the total of the various monetary compensatory amounts fixed in respect of the various products derived from a certain quantity of maize does not exceed the monetary compenastory amounts in respect of the same quantity of maize.

The questions which were asked then, have essentially to dc with the question whether the total of the monetary compensatory amounts applied to various products or derived products obtained by processing a given quantity of a basic product may exceed the monetary compensatory amount applicable to that basic product.

First question: Validity of Regulation No. 2744/75 of the Council

No specific reply is required to the group of questions concerning the validity of applying the processing coefficient of 1.8 in calculating the monetary compensatory amount in respect of meal and groats.

Second question: Validity of Commission Regulation No. 1910/76, No. 2466/76 and No. 938/77 in so far as they determined the monetary compensatory amounts in respect of maize meal by applying the processing coefficient of 1.8

A. General

Monetary compensatory amounts were introduced by Regulation No. 974/71 in order to prevent, in the context of the common organizations of the markets, disruption of the intervention system established by the Community rules and abnormal price movements occasioned by fluctuations in the currencies of certain Member States. In the preamble to Regulation No. 974/71 it is stated that the amounts to be introduced should be limited to the amounts strictly necessary to compensate the incidence of the monetary measures on the prices of basic products covered by intervention arrangements and that it is appropriate to apply them only in cases where this incidence would lead to difficulties. Thus the introduction of monetary compensatory amounts is intended primarily to preserve the uniform price system in a common organization of the markets. It should not attempt to provide an additional protective measure for the markets at the level of agricultural prices in any one Member State as opposed to the others, a purpose which is incompatible with the uniformity to be achieved.

More particularly, as regards derived products, the word "incidence" in Article 2 (2) of Regulation No. 974/71 merely allows the Commission to take into account, in determining the monetary compensatory amounts, the effect of the monetary compensatory amounts applied to the basic product on the price of the dependent product.

The scheme of monetary compensatory amounts which is intended to compensate, temporarily and as far as possible, the ill-effects on the uniform price system of short-time fluctuations in the exchange rates of the currencies of various Member States in relation to the representative rates for these currencies expressed in "green" units of account is, consequently, fundamentally different from the system of levies and refunds in agricultural trade with non-member countries. The latter system contains elements for protecting Community agricultural production as a whole. It must be admitted that monetary compensatory amounts are levied or granted not merely in intra-Community trade, but also in trade with non-member countries.

Nevertheless, that circumstance does not justify the incorporation in their rate of a protective element borrowed from the levy system, especially as that protective element extends automatically to intra-Community trade owing to the contrived nature of the rate of the monetary compensatory amounts within the Community and with third countries. It is that difference between the system of levies and refunds on the one hand, and that of monetary compensatory amounts on the other hand, wihch requires the latter to be strictly neutral.

The Court accepts that the calculation of the incidence of the monetary compensatory amount which has been established in respect of a basic product on the price of dependent products raises in the case of a large number of products, whose manufacture and composition may vary according to the different regions in the Community, difficult problems from the technical and economic points of view. It is the Commission's task to resolve those problems and it has for that purpose a wide margin of discretion. That discretion does, however, have limits. If the method of calculation results in subjecting processed products systematically to monetary compensatory amounts the burden - or, as the case may be, the benefit - of which consistently exceeds that which is necessary in order to balance the incidence of the compensatory amounts applicable to the basic products, the provisions fixing those amounts can no longer be considered as having as their purpose the neutralization of the effects of currency fluctuations between the Member States. In such a case the Commission is no longer acting within the powers conferred on it under Regulation No. 974/71.

B. The disputed processing coefficient

The Commission does not contest that the application of the processing coefficients which have been established for calculating monetary compensatory amounts in the production chain in question in the present proceedings (maize (basic product),meal and groats (principal derived products),germ, quality flour and flour for fodder (secondary derived products)) has the result that the monetary compensatory amounts fixed for the quantities of the various derived products, principal or secondary, to be obtained from a given quantity of maize, when added together, considerably exceed the monetary compensatory amounts laid down for the quantity of maize from which they are obtained.

The result is that during the period in which the exports in question occurred, there was over-valuation of the incidence of the monetary compensatory amount laid down for the basic product on the price of the derived products. That incidence cannot, in fact, for reasons inherent in the system of monetary compensatory amounts, be higher than the compensatory amount on the basic product.

The Commission advanced other arguments: the purely mathematical approach which would be required to keep within the "ceiling" described above fails to take account of economic realities; "the unavoidable interplay between monetary compensatory amounts and levies" cannot be ignored.

That reasoning cannot be accepted.

In sacrificing the greatest neutrality possible in monetary compensatory amounts in intra-Community trade - the fundamental purpose of this system - to protectionist objectives supposedly implicit in those same monetary compensatory amounts in certain lines of trade with third countries, the Commission has exceeded

the margin of discretion accorded to it in such matters and has failed to observe not merely the principles on which Regulation No. 974/71 is founded, but also the rule expressed in Article 43 (3) of the Treaty according to which the common organizations of markets must ensure conditions for trade within the Community similar to those existing in a national market.

C. Consequences of the finding of invalidity

Nevertheless, it should be observed that the finding of invalidity does not justify the conclusions which the plaintiff in the main action seeks to infer from it as regards reducing the monetary compensatory amounts on the meal exported by it during the relevant period.

Although the Treaty does not expressly lay down the consequences attaching to a declaration of invalidity in the context of a reference for a preliminary ruling, Articles 174 and 176 contain precise rules as to the effects of the annulment of a regulation in the context of a direct action.

Thus Article 176 provides that the institution whose acts have been declared void is required to take the necessary measures to comply with the judgment of the Court of Justice. In the present case, application by analogy of the second paragraph of Article 174 of the Treaty, which allows the Court to state which of the effects of the regulation which it has declared void shall be considered as definitive, must be made, on the same grounds of legal certainty as those on which that provision is based. In the first place, the nullity of the act concerned in this instance might give rise to repayment of sums improperly paid by the undertakings concerned in countries with a depreciated currency, and by the national administrations concerned in countries with a strong currency, which, given the disparity between the national laws applicable, is liable to bring about considerable differences in treatment and, hence, to cause fresh distortions in competition.

On the other hand, the economic disadvantages occasioned by the nullity of the procedure fixing the monetary compensatory amounts owing to the method of calculation adopted by the Commission cannot be assessed without having recourse to value judgments which that institution alone has the capacity to make by virtue of Regulation No. 974/71, taking into account the various factors, such as, for instance, the way in which the maximum amount is to be spread over the various derived or dependent products.

The Court ruled that:

1. By adopting in a series of different implementing regulations, in particular in Regulation No. 1910/76 of 30 July 1976, No. 2466/76 of 8 October 1976 and No. 938/77 of 29 April 1977, a method of calculating the monetary compensatory amounts on products processed from maize, the price of which depends on that of maize, which results in the fixing of monetary compensatory amounts on various products obtained by processing a given quantity of maize in a particular production process, which, when added together, amount to a figure appreciably

in excess of the monetary compensatory amount which has been fixed for that given quantity of maize, the Commission has infringed Basic Regulation No. 974/71 of the Council of 12 May 1971 and Article 43 (3) of the Treaty.

2. The nullity affecting the fixing of the monetary compensatory amounts as a result of the method adopted for calculating those compensatory amounts on products processed from maize in Commission Regulations No. 1910/76, No. 2466/76 and No. 938/77, does not call in question the collection or payment of monetary compensatory amounts by the national authorities on the basis of those regulations for the period prior to the date of this judgment.

Judgment of 15 October 1980

Case 109/79

S.à.r.l. Maïseries de Beauce v Office National Interprofessionnel des Céréales (ONIC)

(Opinion delivered by Mr Advocate General Mayras on 11 March and 17 June 1980)

1. Preliminary questions - Court of Justice - National courts - Jurisdiction of each

(EEC Treaty, Art. 177)

2. Agriculture - Monetary compensatory amounts - Objective - Maintenance of the system of single prices within the common organization of agricultural markets - Additional protection for national markets - Exclusion

(Regulation No. 974/71 of the Council)

3. Agriculture - Monetary compensatory amounts - Objective - Specific relationship to levies and refunds

4. Agriculture - Monetary compensatory amounts - Fixing - Derived products - Calculation of incidence of monetary compensatory amount applicable to basic product - Discretion of Commission - Limits

(Regulation No. 974/71 of the Council, Art. 2 (2))

5. Agriculture - Monetary compensatory amounts - Fixing - Derived products - Calculation of incidence of monetary compensatory amount applicable to basic product - Rule as to ceiling - Sum of monetary compensatory amounts on derived products in excess of compensatory amount on basic product - Not permissible

(Regulation No. 974/71 of the Council, Art. 2 (2); Commission Regulation No. 938/77)

6. Preliminary questions - Appraisal of validity - Declaration that a regulation is void - Effects - Application by analogy of second paragraph of Article 174 of the Treaty

(EEC Treaty, second paragraph of Art. 174 and Art. 177)

1. Although, within the framework of the distribution of tasks between the national courts and the Court of Justice for the implementation of Article 177 of the Treaty, it is for the national courts to decide the relevance of the questions which are referred to the Court of Justice, it is however reserved to the Court of Justice to extract from all the information provided by the national court those points of Community law which, having regard to the subject-matter of the dispute, require interpretation, or whose validity requires appraisal.

2. The introduction of monetary compensatory amounts is essentially intended to maintain the system of single prices within the common organization of agricultural markets, since that system of single prices, having regard to the objectives of such organizations, that is, to maintain the standard of living of agricultural producers and to stabilize the markets, constitutes the foundation of the free movement of agricultural products within the Community. Its objective is not and cannot be to provide additional protection for the markets in respect of the level of agricultural prices of one particular State in relation to the others, which would be incompatible with the uniformity sought.

3. Monetary compensatory amounts are not intended to supplement the protection provided by levies and refunds in trade with non-member countries, but to maintain, to the exclusion of any protective element, the system of single agricultural prices within the Common Market by neutralizing distortion arising between one Member State and another from the fact that the common prices are calculated on the basis of a rate of conversion of currencies (the green rate) which does not correspond to those currencies' true rate of exchange.

4. It is for the Commission to resolve the technical and economic problems caused by the calculation of the incidence - within the meaning of Article 2 (2) of Regulation No. 974/71 - on the prices of dependent products of the monetary compensatory amount fixed for a basic product. In doing so it must maintain a degree of consistency and clarity in the system of monetary compensatory amounts which it is required to establish in that sector. Although for this purpose it has a wide margin of discretion which may even extend to general assessments, that discretion nevertheless has limits. Thus if the result of the method of calculation employed is persistently to apply to processed products compensatory amounts the burden or, as the case may be, the benefit of which continually exceeds the amount necessary to take account of the incidence of the compensatory amount applicable to the basic product, the objective of the provisions establishing these amounts may no longer be deemed to be to neutralize the effects of the currency fluctuations between the Member States. In that case the Commission no longer acts within its powers under Regulation No. 974/71.

5. The Commission may not adopt, with regard to products processed from the basic product the price of which depends on that of the latter product, a system for calculating monetary compensatory amounts which results in establishing for the various products obtained by processing a given quantity of the basic product in a specific manufacturing process monetary compensatory amounts the sum of which amounts to a figure clearly in excess of that of the monetary compensatory amount fixed for that given quantity of the basic product.

6. The second paragraph of Article 174 of the EEC Treaty, whereby the Court of Justice may state which of the effects of a regulation which it has declared void shall be considered as definitive, is applicable by analogy, for the same reasons of legal certainty as those which form the basis of that provision, to the judgments whereby the Court, in giving a ruling under Article 177, declares that a regulation is void.

NOTE This case is identical to Case 4/79 (supra)

Judgment of 15 October 1980

Case 145/79

Roquette Frères S.A. v The French State

(Opinion delivered by Mr Advocate General Mayras on 11 March and 17 June 1980)

1. Preliminary questions - Court of Justice - National courts - Jurisdiction of each

(EEC Treaty, Art. 177)

2. Agriculture - Monetary compensatory amounts - Objective - Maintenance of the system of single prices within the common organization of agricultural markets - Additional protection for national markets - Exclusion

(Regulation No. 974/71 of the Council)

3. Agriculture - Monetary compensatory amounts - Fixing - Derived products - Calculation of incidence of monetary compensatory amount applicable to basic product - Discretion of Commission - Limits

(Regulation No. 974/71 of the Council, Art. 2 (2))

4. Agriculture - Monetary compensatory amounts - Fixing - Derived products - Calculation of incidence of monetary compensatory amount applicable to basic product - Basis of calculation - Choice of price to be taken into consideration - Discretion of Commission - Limits

(Regulation No. 974/71 of the Council, Art. 2 (2); Commission Regulation No. 652/76)

5. Agriculture - Monetary compensatory amounts - Fixing - Derived products - Calculation of incidence of monetary compensatory amount applicable to basic product - Rule as to ceiling - Sum of monetary compensatory amounts on derived products in excess of compensatory amount on basic product - Not permissible

(Regulation No. 974/71 of the Council, Art. 2 (2); Commission Regulation No. 652/76)

6. Preliminary questions - Appraisal of validity - Declaration that a regulation is void - Effects - Application by analogy of second paragraph of Article 174 of the Treaty

(EEC Treaty, second paragraph of Art. 174 and Art. 177)

1. Although, within the framework of the distribution of tasks between the national courts and the Court of Justice for the implementation of Article 177 of the Treaty, it is for the national courts to decide the relevance of the questions which are referred to the Court of Justice, it is however reserved to the Court of Justice to extract from all the information provided by the national court those points of Community law which, having regard to the subject-matter of the dispute, require interpretation, or whose validity requires appraisal.

2. The introduction of monetary compensatory amounts is essentially intended to maintain the system of single prices within the common organization of agricultural markets, since that system of single prices, having regard to the objectives of such organizations, that is, to maintain the standard of living of agricultural producers and to stabilize the markets, constitutes the foundation of the free movement of agricultural products within the Community. Its objective is not and cannot be to provide additional protection for the markets in respect of the level of agricultural prices of one particular State in relation to the others, which would be incompatible with the uniformity sought.

3. It is for the Commission to resolve the technical and economic problems caused by the calculation of the incidence - within the meaning of Article 2 (2) of Regulation No. 974/71 - on the prices of dependent products of the monetary compensatory amount fixed for a basic product. In doing so it must maintain a degree of consistency and clarity in the system of monetary compensatory amounts which it is required to establish in that sector. Although for this purpose it has a wide margin of discretion which may even extend to general assessments, that discretion nevertheless has limits. Thus if the result of the method of calculation employed is persistently to apply to processed products compensatory amounts the burden or, as the case may be, the benefit of which continually exceeds the amount necessary to take account of the incidence of the compensatory amount applicable to the basic product, the objective of the provisions establishing these amounts may no longer be deemed to be to neutralize the effects of the currency fluctuations between the Member States. In that case the Commission no longer acts within its powers under Regulation No. 974/71.

4. The discretion conferred upon the Commission concerning the method of calculating the compensatory amounts applicable to processed products is not intended to enable it to take account of the economic situation in a certain sector of production but to appraise, within the limits laid down by Regulation No. 974/71, the incidence on the price of processed products of the compensatory amounts applicable to the basic products.

Thus by taking into consideration factors which are extraneous to that situation and thereby fixing the compensatory amounts on a processed product on the basis of the intervention price thereof without deducting the production refund, when the compensatory amounts on other products processed from the same basic product in respect of which no production refund is provided for are also calculated on the basis of the intervention price of the basic product, the Commission exceeds the limits placed upon it by the said regulation. This also applies when it adopts, in order to establish the compensatory amount applicable to a dependent product, a price different from that which it adopts for calculating the compensatory amount on the basic product.

5. The Commission may not adopt, with regard to products processed from the basic product the price of which depends on that of the latter product, a system for calculating monetary compensatory amounts which results in establishing for the various products obtained by processing a given quantity of the basic product in a specific manufacturing process monetary compensatory amounts the sum of which amounts to a figure clearly in excess of that of the monetary compensatory amount fixed for that given quantity of the basic product.

6. The second paragraph of Article 174 of the EEC Treaty, whereby the Court of Justice may state which of the effects of a regulation which it has declared void shall be considered as definitive, is applicable by analogy, for the same reasons of legal certainty as those which form the basis of that provision, to the judgments whereby the Court, in giving a ruling under Article 177, declares that a regulation is void.

NOTE

The Tribunal d'Instance [District Court], Lille, referred seven questions to the Court of Justice concerning the interpretation of Article 40 of the Treaty and of Articles 1 and 2 of Regulation No. 974/71 of the Council on certain measures of conjunctural policy to be taken in agriculture following the temporary widening of the margins of fluctuation for the currencies of certain Member States.

The Tribunal was hearing an action brought by Roquette S.A. against the French State for the reimbursement of sums improperly charged by the customs authorities in the form of monetary compensatory amounts since 25 March 1976, the date of the entry into force of Commission Regulation No. 652/76 changing the monetary compensatory amounts following changes in exchange rates for the French franc.

The plaintiff in the main action, Roquette, challenged the method of calculation used by the Commission to fix the monetary compensatory amounts applicable to products processed from maize starch, products processed from wheat starch, potato starch, sorbitol and isoglucose.

It maintained that those methods run counter to the rules laid down by the Council relating to the method of calculating the monetary compensatory amounts applicable to products derived from products in respect of which intervention measures have been provided for.

Moreover, the effect of such measures is to create distortion in competition between producers in the Common Market.

The defendant in the main action maintained that the French State merely applied the Community regulations,and was not competent to assess the legality of the method of calculating the monetary compensatory amounts. It collected such amounts and transferred them to the European Agricultural Guidance and Guarantee Fund.

In the six questions which were referred to it the Court was asked to give a ruling on the method of calculation used by the Commission in determining the amounts which it had fixed. Indirectly, a ruling was thus being sought as to the validity of the provisions of the regulations whereby the Commission determined the compensatory amounts applicable to the products in question.

General

As to the aims which inspired the introduction, by means of Regulation No. 974/71, of monetary compensatory amounts within the framework of the Common Agricultural Policy, reference should be made to the general commentary in Case 4/79 (supra, p.3).

The questions asked by the national court

1. Maize starch

The court asked whether the production refund, which is payable in "green currency", must be taken into account in calculating the monetary compensatory amounts applicable to maize starch and to products derived therefrom.

Those compensatory amounts were calculated on the basis of the intervention price for maize, but is not such a calculation false in that it fails to take into account the production refund accorded in respect of maize used within the Community for manufacturing starch?

The Court did not accept the Commission's argument in justification of its method of calculation, and ruled in reply to the first question that the monetary compensatory amounts applicable to maize starch must, pursuant to Regulation No. 974/71, be calculated on the basis of the intervention price for maize, less the production refund for maize starch.

2. Wheat starch

The question asks whether, in calculating the monetary compensatory amount applicable for wheat starch, the price of the basic product, before deduction of the amount of the production refund, must be the same as that taken into account for calculating the compensatory amount for wheat.

The court held that the Commission appeared to have exceeded its powers by adopting as the basis for calculating the compensatory amounts applicable to wheat starch a price other than the reference price less the production refund. Consequently, the reply to the second question must be in the affirmative.

3. All the products derived from a single basic product

The question asks whether the sum of the compensatory amounts applied to all the products and secondary products processed from the same basic product might exceed the compensatory amount applicable to the basic product.

That question had already been considered in Cases 4/79 and 109/79 (see Proceedings No. 22/80 a) and brought the following reply: The Commission has infringed Regulation No. 974/71 and Article 43 (3) of the Treaty.

4. Potato starch

The question was whether the compensatory amount applicable to potato starch should be identical to that applied to maize starch.

The reply, said the Court, is that the compensatory amount applicable to potato starch may not exceed that applicable to maize starch.

5. Sorbitol

The national court asked whether sorbitol containing more than 2% mannitol, processed from maize, the price of which is related to that product, "must ... be subject to a monetary compensatory amount based on that for maize".

The Court's reply was that that product does not necessarily have to be subject to a monetary compensatory amount based on that for maize.

6. Isoglucose

The question asks whether isoglucose processed from maize, the price of which is related to the price of that product, must be subject to a monetary compensatory amount based on that for maize.

The reply to that question was in the negative. Isoglucose is the subject of a group of Community measures establishing rules which apply specifically to that product, but which are similar to the rules applicable to liquid sugar, a product with which isoglucose is deemed to be in direct competition. In those circumstances the Commission was correct in calculating the compensatory amounts applicable to isoglucose on the basis of those applied to white sugar.

The validity of Regulation No. 652/76 and of the regulations amending that regulation

The result of the replies given to the first, second, third and fourth questions is that Regulation No. 652/76 is invalid. As the finding of such invalidity was made in the course of a reference for a preliminary ruling, consideration must be given by the Court to its consequences. Reference should be made on that point, also, to the comments in the judgment in Case 4/79 (see Proceedings No. 22/80 a).

In reply to the questions which were referred to it by the Tribunal d'Instance, Lille, the Court ruled that:

1. Commission Regulation No. 652/76 of 24 March 1976 is void:

   In so far as the basis on which it fixes the compensatory amounts applicable to maize starch is not the intervention price for maize, less the production refund on starch;

   In so far as the basis on which it fixes the compensatory amounts applicable to wheat starch is not the reference price for wheat, less the production refund for starch;

   In so far as it fixes the compensatory amounts applicable to all the various products processed from a given quantity of the same basic product, such as maize or wheat, in a specific production process, at a figure which is considerably greater than the compensatory amount established for that given quantity of the basic product;

   In so far as it fixes compensatory amounts applicable to potato starch which exceed those applicable to maize starch.

2. That invalidity renders void the provisions in subsequent regulations of the Commission the object of which is to alter the monetary compensatory amounts applicable to the products referred to in the preceding paragraph.

3. The invalidity of the provisions of regulations referred to above does not call in question the collection or payment of monetary compensatory amounts by the national authorities on the basis of such provisions for the period prior to the date of this judgment.

4. In fixing the monetary compensatory amounts applicable to sorbitol containing more than 2% mannitol, processed from maize, the Commission was not bound to apply to that product a monetary compensatory amount based on that applicable to maize.

5. Isoglucose processed from maize need not be subject to a monetary compensatory amount based on that for maize.

Judgment of 15 October 1980

Case 4/80

Remo d'Amico v Office National des Pensions pour Travailleurs Salariés

(Opinion delivered by Mr Advocate General Warner on 16 September 1980)

Social security for migrant workers - Benefits - National rules against overlapping benefits - Non-applicability to recipients of similar kinds of benefits awarded in accordance with the provisions of Chapter 3 of Regulation No. 1408/71 - Invalidity benefits converted into old-age pensions and unconverted invalidity benefits - Assimilation to benefits of the same kind

(Regulation No. 1408/71 of the Council, Art. 12 (2) and Chapter 3)

Where a worker is in receipt of invalidity benefits converted into an old-age pension by virtue of the legislation of a Member State and of invalidity benefits not yet converted into an old-age pension under the legislation of another Member State, the old-age pension and the invalidity benefits are to be regarded as being of the same kind. In such a case the provisions of Chapter 3 of Regulation No. 1408/71 are applicable for the purpose of determining the rights of the worker, and, by virtue of the last sentence of Article 12 (2) of the regulation, the application of national rules against overlapping is precluded.

NOTE

The Tribunal de Travail [Labour Court], Charleroi, refer ed the following question to the Court of Justice:

If a former worker of Italian nationality who is less than 60 years old is resident in Belgium;

And if he has been found to be entitled to a full insurance record in Belgium as an underground miner of 30/30ths, on the basis of having worked for 25 years as an underground miner;

And if he has been awarded an invalidity pension in Italy on the basis of employment there:

1. Is Article 25 of Arrêté Royal No. 50 of 24 October 1967 (as amended by Article 10 of the Law of 27 July 1971) relating to the retirement and surviror's pension of employed persons compatible with the object of Articles 12, 46 and 50 of Regulation (EEC) No. 1408/71 of the Council?

2. Is Article 25 of the Arrêté Royal of 24 October 1967 (as amended by Article 10 of the Law of 27 July 1971) compatible with Article 48 to 51 of the Treaty of Rome?

3. Are Articles 12, 46 and 50 of Regulation (EEC) No. 1408/71 of the Council compatible with Articles 48 to 51 of the Treaty of Rome?

The question arose in the course of proceedings disputing the calculation by the competent Belgian institution of an old-age pension payable to an Italian employee who, having worked in Italy from 1948 to 1952, settled in Belgium where he was employed as an underground miner from 1952 to 1972. From 1973 to 1977 he was in receipt of a Belgian invalidity pension. In addition to that, he has been drawing an Italian invalidity pension since 1973. The National Pensions Office for Employed Persons decided that in determining the amount of his retirement pension the number of years he was deemed to have worked would have to be reduced owing to his Italian pension.

It seemed that the national court wished to know whether in circumstances such as those described above the application of a national rule excluding the overlapping of benefits was compatible with Community law.

The Court examined the relevant Community provisions and ruled that:

When a worker is entitled to invalidity benefits converted into an old-age pension under the legislation of a Member State and invalidity benefits not yet converted into an old-age pension under the legislation of another Member State, the old-age pension and the invalidity benefits are to be considered as being of the same kind, the provisions in Chapter 3 of Regulation No. 1408/71 are to be applied in determining the worker's entitlement and, by virtue of the last sentence in Article 12 (2) of that regulation, the application of national rules preventing the overlapping of benefits is excluded.

Judgment of 16 October 1980

Case 816/79

Klaus Mecke & Co. v Hauptzollamt Bremen-Ost

(Opinion delivered by Mr Advocate General Mayras on 18 September 1980)

1. Common Customs Tariff - Tariff headings - Interpretation - Consideration of the various language versions - Reference to the Explanatory Notes of the Customs Co-operation Council.

2. Common Customs Tariff - Tariff subheadings - "Synthetic textile fibres" within the meaning of subheading 56.01 A - Concept - Exclusion of fibres not suitable for spinning - Impermissible

3. Common Customs Tariff - Tariff headings - "flock and dust of man-made fibres" within the meaning of subheading 59.01 B I - Criteria - Reference to the Explanatory Notes of the Customs Co-operation Council

4. Common Customs Tariff - Tariff subheadings - "Flock and dust of man-made fibres" within the meaning of subheading 59.01 B I - Concept - Cuttings of synthetic textile fibres having a length of between 6 and 7 mm. - Inclusion

1. When a comparison of the various language versions of any subheadings in the Common Customs Tariff reveals that the difficulties in interpretation raised before a national court result mainly from the peculiarities of one of the language versions, those subheadings are to be considered in all the official language versions simultaneously, using in addition the information to be found in the Explanatory Notes of the Customs Co-operation Council.

2. A general consideration of all the official language versions of the Common Customs Tariff shows clearly that subheading 56.01 A represents an open-ended category including all types of fibre irrespective of their method of manufacture and their subsequent use. Consequently an interpretation of that subheading which has the effect of arbitrarily restricting its scope by excluding from it all fibres which are not suitable for use later in spinning is unacceptable.

3. It is apparent from the Explanatory Notes of the Customs Co-operation Council that the scope of heading 59.01 of the Common Customs Tariff cannot be restricted to waste produced by shearing and that there cannot be a requirement that in every case the product has the appearance of dust. The notes make it clear that subheading 59.01 B I can apply equally to textile cuttings of a regular length.

4. Cuttings of synthetic textile fibres having a length of between 6 and 7 mm fall within subheading 59.01 B I of the Common Customs Tariff as flock and dust of man-made fibres.

NOTE

The Finanzgericht [Finance Court] Bremen referred to the Court for a preliminary ruling a question concerning the interpretation of subheading 56.01 A and 59.01 B I of the Common Customs Tariff with reference to the tariff classification of cuttings of synthetic textile fibres in polyester, cut to a length of between 6 and 7 mm.

The importer had declared the goods to be "flock and dust of man-made fibres" as described in subheading 59.01 B I (conventional customs duty at 4%). The Customs office, however, was of the opinion that the goods were "synthetic textile fibres" falling within subheading 56.01 A (conventional customs duty at 9%).

The Court considered the above-mentioned subheadings simultaneously in all the official languages, together with the information contained in the Explanatory Notes of the Customs Co-operation Council devoted to each of the relevant subheadings. As a result it held that the goods in question had a greater affinity with those of subheading 59.01 B I, and ruled that cuttings of synthetic textile fibres having a length of between 6 and 7 mm fall within subheading 59.01 B I of the Common Customs Tariff as flock and dust of man-made fibres.

Judgment of 16 October 1980

Joined Cases 824 and 825/79

S.a.S. Prodotti Alimentari Folci v Amministrazione delle Finanze

(Opinion delivered by Mr Advocate General Warner on 18 September 1980)

Common Customs Tariff - Scheme of generalized preferences in favour of developing countries - Cut mushrooms coming under sub-heading 07.04 B - Exclusion

(Regulations Nos. 3055/74 and 3011/75 of the Council, Annex A)

Tariff heading 07.04 "ex B. Other" set out in Annex A to Regulations (EEC) No. 3055/74 and (EEC) No. 3011/75 of the Council establishing in respect of certain products falling within Chapters 1 to 24 of the Common Customs Tariff a scheme of generalized preferences in favour of developing countries for the years 1975 and 1976 must be interpreted as meaning that the reduced rate does not apply to cut or sliced mushrooms even if all the parts are present.

NOTE

The Italian Corte Suprema di Cassazione referred to the Court of Justice for a preliminary ruling a question concerning the interpretation of tariff subheading 07.04 "Ex B. Others" referred to in two Council regulations establishing, for certain products of Chapters 1 to 24 of the Common Customs Tariff, a scheme of generalized preferences in favour of developing countries.

It asks whether that subheading, which fixes the customs duty at a rate of 10% (instead of the conventional rate of 16%) and which reads "Whole mushrooms, dried, dehydrated or evaporated, excluding cultivated mushrooms" is to be interpreted as meaning that the lower rate applied to mushrooms, excluding cultivated, dried, dehydrated or evaporated mushrooms, even when they are cut or sliced (provided that all their constituent parts are present: stalk, cap etc.), or whether that rate applies solely to dried, dehydrated or evaporated mushrooms which are not cut or sliced, excluding cultivated mushrooms.

The Court held that the reply was to be found in the express wording of the English version of the text, which is in no way contradicted by the other language versions and which, moreover, perfectly answers the need to ensure that preserved mushrooms do not also include cultivated mushrooms.

On those grounds the Court ruled that:

Subheading 07.04 "EX B. Others", which is referred to in Annex A to Regulation No. 3055/74 of the Council of 2 December 1974 and Regulation No. 3011/75 of the Council of 17 November 1975 establishing, for certain products of Chapters 1 to 24 of the Common Customs Tariff, a scheme of generalized preferences in favour of developing countries for 1975 and 1976, is to be interpreted as meaning that the lower rate does not apply to cut or sliced mushrooms, even if all their constituent parts are present.

Judgment of 29 October 1980

Joined Cases 209 to 215 and 218/78

Heintz van Landewyck and Others v Commission of the European Communities

(Opinion delivered by Mr Advocate General Reischl on 3 July 1980)

1. Competition - Administrative proceedings - Complaints successively lodged against one and the same infringement - Single decision - Permissibility - Condition - Respect for rights of defence

(Regulation No. 99/63 of the Commission, Arts. 2 and 4)

2. Competition - Administrative proceedings - Respect for rights of defence - Notification of objections - Duties of Commission

(Regulation No. 99/63 of the Commission, Art. 4)

3. Competition - Administrative proceedings - Preservation of trade secret - Confidential information - Passing on to third parties making complaints - Not permissible

(Regulation No. 17 of the Council, Arts. 19 and 20)

4. Competition - Agreements, decisions and concerted practices - Notification - Exemption - Conditions

(Regulation No. 17 of the Council, Art. 4 (2)

5. Competition - Agreements, decisions and concerted practices - Notification - Detailed rules - Use of Form A/B - Condition for validity of notification

(EEC Treaty, Arts. 85 (3) and 87 (2) (b); Regulation No. 17 of the Council, Art. 4; Regulation No. 27 of the Commission, Art. 4 as amended by Regulation No. 1133/68)

6. Measures adopted by an institution - Duty to state reasons whereon based - Extent - Decision finding an infringement of rules on competition

(EEC Treaty, Art. 190)

7. Competition - Administrative proceedings - Single decision covering several infringements - Permissibility

8. Competition - Administrative proceedings - Inapplicability of Art. 6 of European Convention for Protection of Human Rights

9. Competition - Agreements, decisions and concerted practices - Recommendation of an association of undertakings - Binding nature - Application of Art. 85 (1) of the Treaty

(EEC Treaty, Art. 85 (1))

10. Competition - Agreements, decisions and concerted practices - Prohibition - Application to non-profit-making associations - Conditions

(EEC Treaty, Art. 85 (1))

11. Competition - Agreements, decisions and concerted practices - Influence on trade between Member States - Criteria

(EEC Treaty, Art. 85 (1))

1. There is nothing to prevent the Commission from ruling in a single decision on one and the same infringement of the rules on competition which is the subject of several successive complaints lodged during one and the same proceeding and it is not necessary to give separate notices of objections so long as the undertakings or associations concerned have had the opportunity to make known their views regarding the various complaints.

2. Respect for the rights of the defence requires the notification of complaints to set forth clearly, albeit succinctly, the essential facts upon which the Commission relies provided that in the course of the administrative procedure it supplies the details necessary to the defence of those concerned.

3. Information in the nature of a trade secret given to a trade or professional association by its members and thus having lost its confidential nature vis-à-vis them does not lose it with regard to third parties. Where such an association forwards such information to the Commission in proceedings for the finding of an infringement of the rules on competition commenced under Regulation No. 17, the Commission cannot rely on the provisions of Articles 19 and 20 of that regulation to justify passing on the information to third parties who are making complaints. Article 19 (2) gives the latter a right to be heard and not a right to receive confidential information.

4. Measures adopted by an association of undertakings acting in fact in the name of its members cannot be exempted from notification under Article 4 (2) of Regulation No. 17 where the parties include manufacturers of two Member States, and more than two undertakings.

5. It follows from the actual terms of Article 4 of Regulation No. 27 as amended by Regulation No. 1133/68 that notifications must be submitted on a Form A/B and must contain the information asked for therein. The use of that form is therefore mandatory and is an essential prior condition for the validity of the notification.

It takes account, for the purpose of laying down detailed rules for the application of Article 85 (3), of the need, expressed in Article 87 (2) (b) of the Treaty, to ensure effective supervision and to simplify administration to the greatest possible extent.

6. Although pursuant to Article 190 of the EEC Treaty the Commission is bound to state the reasons on which its decisions are based, mentioning the facts, law and considerations which have led it to adopt a decision finding an infringement of the rules on competition it is not required to discuss all the issues of fact and law which have been raised by every party during the administrative proceedings.

7. There is no reason why the Commission should not make a single decision covering several infringements of Article 85 of the EEC Treaty provided that the decision permits each addressee to obtain a clear picture of the complaints made against it.

8. The Commission is bound to respect the procedural guarantees provided for by Community law on competition; it cannot however be classed as a tribunal within the meaning of Article 6 of the European Convention for the Protection of Human Rights, under which everyone is entitled to a fair hearing by an independent and impartial tribunal.

9. A recommendation made by an association of undertakings and constituting a faithful expression of the members' intention to conduct themselves compulsorily on the market in conformity with the terms of the recommendation fulfils the necessary conditions for the application of Article 85 (1) of the EEC Treaty.

10. Article 85 (1) of the EEC Treaty also applies to non-profit-making associations in so far as their own activities or those of the undertakings belonging to them are calculated to produce the results which it aims to suppress.

11. In order that an agreement, decision or concerted practice may affect trade between Member States it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement, decision or concerted practice in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.

NOTE These actions seek a declaration that Commission Decision No. 78/670/EEC of 20 July 1978 relating to a proceeding under Article 85 of the EEC Treaty, which found that the applicants had committed various infringements of the said article, is void.

The applicants are:

The Fédération Belgo-Luxembourgeoise des Industries du Tabac (FEDETAB), a non-profit-making association, and separately, seven large members thereof:

CINTA S.A.
Ets. Gosset, S.A.
JUBILE S.A.
Van der Elst S.A.
WELTAB
BAT Bénélux S.A.
Heintz van Landewyck S.à r.l. (HVL)

The measures at issue in the contested decision relate to the distribution of tobacco and fall into two groups:

(1) Certain decisions taken by FEDETAB and certain agreements made by it with other business associations in the sector for the said products between 1 February 1962 and 1 December 1975.

(2) Provisions of a "recommendation" adopted by FEDETAB relating to the sale of cigarettes on the Belgian market and notified by it to the Commission on 1 December 1975.

The Commission adopted a decision on 20 July 1978 in relation to the applicants.

According to Article 1 of the decision the agreements between those to whom the decision was addressed and the decisions by an association of undertakings taken by FEDETAB concerning the organization of the distribution and sale of tobacco products in Belgium and having as their object:

The approval by FEDETAB of wholesalers and retailers;
The maintenance of retail prices set by the manufacturers;
The restriction imposed by FEDETAB on the approval of certain categories of wholesalers;
The ban on resale to other wholesalers;
The application to wholesalers and retailers of standard terms of payment;
The obligation on retailers to stock a minimum number of brands;

"constituted from 12 March 1962 to 1 December 1975, infringements of Article 85 (1) of the Treaty establishing the European Economic Community"

According to Article 2 of the decision the FEDETAB recommendation which took effect on 1 December 1975 and has as its object:

The division of Belgian wholesalers and retailers into categories;
The application to wholesalers and retailers of standard terms of payment;
The granting to wholesalers and retailers of end-of-year rebates;

"constitutes an infringement of Article 85 (1) of the Treaty establishing the European Economic Community and does not qualify for exemption under Article 85 (3) thereof"

Article 3 of the decision provides that the addressees thereof are required to terminate the infringement referred to in Article 2 and that FEDETAB is required forthwith to inform its members of the contents of the Commission decision.

A. SUBMISSIONS OF SUBSTANCE RELATING TO ARTICLE 85 (1) OF THE TREATY

Submissions relating to the effect on competition

The applicants claim that by its decision the Commission infringed Article 85 (1) of the Treaty in that it wrongly considered that the measures in question had as their object or effect a restriction, at the very least appreciable on competition.

1. Introductory observations

Nature and scope of the contested measures for the purpose of their consideration in the light of Article 85 of the Treaty.

Summary of the contested measures

(a) The period prior to 1 December 1975

In the first place there is the approval by FEDETAB of wholesalers and retailers, their classification into different categories and the granting to those categories of different fixed profit margins, namely a direct rebate. That rebate was kept, according to the Commission, only by co-operatives and large stores which acted also as retailers, since wholesalers, properly so-called, had to give up a part to the retailers to whom they re-sold their goods.

The retailers (80 000 in Belgium) were divided into "approved retailers" (2 000) and "non-approved retailers" who received less rebate than those approved.

The Commission indicates a series of measures adopted by FEDETAB relating to resale prices.

The Commission also refers to the refusal by FEDETAB to approve new wholesalers except in the categories of "specialist itinerant wholesalers" or "hotels, restaurants, cafés", nor to approve new co-operatives or supermarkets except in the categories of large department stores" and "popular department stores".

The Commission complains of the collective measures taken by the members of FEDETAB in relation to terms of payment.

By letter dated December 1971 nine manufacturing members of FEDETAB informed those who enjoyed the wholesale price terms that credit would be cut back to a maximum of a fortnight and that deliveries would be suspended if the terms were not observed.

Finally the Commission complains that certain categories of retailers were required to stock a minimum range of brands decided by FEDETAB.

(b) The FEDETAB Recommendation of 1 December 1975

This recommendation, notified by FEDETAB to the Commission on 1 December 1975, concerns only the cigarette market.

According to the Commission the firms in FEDETAB exercised a large influence on other manufacturers and on wholesalers and retailers.

The recommendation constitutes both a decision by associations of undertakings and agreements between undertakings having as their object and effect the appreciable restriction of competition between manufacturers and, alternatively, wholesalers within the Common Market.

The measures taken by the recommendation have objects largely similar to the previous measures regarding the profit margins which wholesalers and retailers enjoyed ("profit margins"), end-of-year rebates and terms of payment.

2. Measures relating to profit margins, end-of-year rebate and maximum terms of payment

(a) Profit margins

The manufacturers of tobacco products agree to divide wholesalers and retailers into various categories and to specify the profit margin accordingly.

The Commission finds that the classification of Belgian wholesalers and retailers into categories and the allocation to them of different margins constitutes an infringement of Article 85 (1) of the Treaty on the ground that such system constitutes a restriction on competition both for manufacturers and wholesalers. It deprives the manufacturers of the opportunity to compete in respect of profit margins and wholesalers in the services they render manufacturers.

According to the Commission there is a price agreement between manufacturers and importers governing the price to be paid for the service of intermediaries. Such system is a serious infringement of the competition intended by the Treaty.

The Court must consider whether the contested measures have as their object or effect the prevention, restriction or distortion of competition in the products in question within the Common Market.

The applicants maintain that the national administrative rules and practices in Belgium have such an influence on the products that the contested measures cannot affect competition.

The Belgian tax system on tobacco is characterized by the application of ad valorem excise duty calculated on the retail price "including VAT". The aggregate amount of those two levies must be paid by the manufacturer or importer when buying tax bands to be placed on the tobacco products before they are marketed.

Retailers must strictly observe that the tax on the sale price represents some 70% thereof. It follows that the trade margins, the manufacturer's or importers or importer's share represents some 30%.

It must also be observed that the price control measures in Belgium and the tax policy have a real effect upon the tobacco market. The Government takes care that the tax returns are not reduced because a too sharp increase in the retail price could cause a reduction in consumption.

The Commission has described the terms for fixing prices and the levying of duty on tobacco products manufactured. It considers the claim of FEDETAB cannot be sustained, that the measures prior to the recommendation and the measures contained in the said recommendation are not significant because the Belgian Government levies heavy taxes and requires notification of the resale prices for tobacco prices so that competition is already substantially restricted.

It may be said that in the manufactured tobacco sector the Belgian rules in relation to consumer taxes and price controls and the application thereof under the tax policy pursued by the State has the effect of leaving almost no possibility of competition on the part of manufacturers and importers that might have an effect upon the retail sale price.

On the other hand it has nowhere been established thaat the said rules prevent the manufacturer or importer individually allotting out of his return a larger margin to certain wholesalers. In agreeing to the maximum margins to be granted to wholesalers the applicants prevent themselves collectively from competing in such a way.

It is necessary to point out that Article 85 (1) of the Treaty prohibits any restriction on competition at any level of trade between the manufacturer and ultimate consumer.

In the present case even if the tax proportion is large the manufacturer or importer is still left a sufficient margin to allow effective competition and that is so as regards products of current consumption which are part of mass production in respect of which a very small price reduction at the manufacturing or importation stage may have a very appreciable effect at the consumption level.

The agreement of the applicants regarding the size of the margins to be allowed to retailers so preventing market forces from determining the size of such benefits, in particular services which intermediaries could render individually, constitutes a restriction on competition prohibited by Article 85 (1), assuming that it is also capable of appreciably affecting trade between Member States.

(b) Profit margins

From 1 January 1971 the manufacturing members of FEDETAB paid the wholesalers and retailers via FEDETAB an end-of-year rebate, the amount of which varied between 20 and 200 centimes per 1 000 cigarettes according to the cigarette sales during the year.

In the Commission's view, that end-of-year rebate system restricted competition between manufacturers who adhered thereto by making any additional effort of no attraction, which fact is denied by the applicants.

(c) The rules relating to terms of payment

The recommendation of 1 December 1975 stipulates cash payment subject to the manufacturer being allowed in special cases to grant credit to one or more of his customers for not more than a fortnight from the invoice date.

Consideration of this issue has shown that the existence of the possibility of competition between the applicants regarding such terms must be regarded as established and that the above-mentioned provisions have as their object the appreciable restriction of it by stipulating a maximum period of a fortnight which in the case of the recommendation may not be allowed save in special cases. It is not necessary to consider whether those measures have been put into effect by the applicants.

3. The previous measures relating to the observation by wholesalers and certain retailers of sale prices fixed by the manufacturers, the restriction on the approval of wholesalers in certain categories, the prohibition on approved wholesalers from supplying certain other wholesalers and the requirement that a minimum range of brands be offered for sale.

These are rules having as their object a general and systematic restriction on competition falling undoubtedly within the prohibition of Article 85 (1) of the Treaty.

4. Effect on trade between Member States

It remains to be considered whether the restrictions which have been found above are also likely appreciably to affect trade between Member States. Only if that is so do they fall within the prohibition of Article 85 (1).

The Commission alleges that the measures prior to the recommendation were likely to affect trade between Member States because certain manufacturing members of FEDETAB imported a very large part of the manufactured tobacco arriving in Belgium and distributed such imports under the same conditions as their own products. The same applies to the measures in the recommendation.

The applicants maintain that trade between Member States is not affected by the market position of the manufacturing and importer members of FEDETAB for the simple reason that as a result of the differences in the taxation of manufactured tobacco in the Member States the measures in question govern only a national situation.

It is common ground that a large part of the manufactured tobacco products sold in Belgium are imported through manufacturing members of FEDETAB who market them through the same distribution networks as for the products which they manufacture themselves.

Although by reason of taxation and technical difficulties parallel imports into Belgium of manufactured tobacco are no doubt largely excluded, it must nevertheless be observed that the influence on the trade in question in the present cases is, as appears clearly from the grounds of the contested decision, at the level of the large importations by the manufacturing members of FEDETAB.

In that regard the restrictions on competition pointed out above were likely to distort trade in manufactured tobacco from the course which it would otherwise have taken.

In taking concerted action on terms of sale (strict observation of the prices fixed by the manufacturers and importers before the recommendation of 1971) to be allowed intermediaries the applicants were appreciably reducing any inducement the latter might have of encouraging, as consideration for individual pecuniary benefits, the sale, as regards imported products, of certain products in relation to others.

The Commission decision is right in finding that such restrictions on competition by the applicants are likely to affect trade between Member States.

B. SUBSTANTIVE SUBMISSIONS RELATING TO ARTICLE 85 (3) OF THE TREATY

The applicants claim in substance that the Commission disregarded the provisions of Article 85 (3) of the Treaty and the applicants' rights in that it wrongly refused to exempt the recommendation, did not take into account the submissions made by the applicant and committed errors of fact in that respect.

The Court states that an agreement contrary to the provisions of Article 85 (1) may have exemption under Article 85 (3) only if it satisfies a number of conditions:

Improves production or distribution;

Allows consumers a fair share of the resulting benefit;

Does not impose restrictions which are not indispensable;

Does not afford the undertakings the possibility of eliminating competition.

The examination by the Commission and by the Court leads the Court to find that the provisions of the recommendation, which the applicant companies have approved, have, by means of a collective agreement, as their object the restriction on competition which the traders could individually engage in. There must be a finding that in this sector having regard to the very large share of the market of cigarettes in Belgium held by members of FEDETAB and in particular the applicant companies that the effect of the recommendation is to give the applicants the possibility of eliminating competition in respect of a substantial part of the products in question. It follows that the recommendation cannot in any event have exemption under Article 85 (3).

The Court orders the applications to be dismissed.

Judgment of 29 October 1980

Case 138/79

Roquette Frères S.A. v Council of the European Communities

(Opinion delivered by Mr Advocate General Reischl on 18 September 1980)

1. Application for a declaration of nullity - Natural or legal persons - Measures of direct and individual concern to them - Admissibility

   (EEC Treaty, Art. 173, second paragraph; Council Regulation No.1111/77, Art. 9 (as amended by Regulation No. 1293/79) and Annex II)

2. Procedure - Intervention - Right which all institutions of the Community have - Conditions for its exercise - Interest in taking proceedings - Unnecessary condition

   (Statute of the Court of Justice of the EEC, Art. 37, first paragraph)

3. Agriculture - Common Agricultural Policy - Evaluation of a complex economic situation - Discretion of the Council - General findings of the basic facts - Legality - Review by the Court - Limits

4. Measures adopted by the institutions - Procedure for working them out - Due consultation of the Parliament - Essential formality - Scope

   (EEC Treaty, Art 43(2), third subparagraph, and Art. 173)

1. Since Article 9 (4) of Regulation No 1111/77 (as amended by Article 3 of Regulation No. 1293/79), itself applies the criteria laid down in Article 9 (1) to (3) to each of the undertakings set out in Annex II to the said regulaton, the latter are the addressees and are thus directly and individually concerned.

2. The first paragraph of Article 37 of the Statute of the Court of Justice provides that all the institutions of the Community have the same right to intervene. It is not possible to restrict the exercise of that right by any one of them without adversely affecting its institutional position as intended by the Treaty and in particular Article 4 (1).

   The right to intervene which the institutions have is not subject to the condition that they have an interest in taking proceedings.

3. When the implementation by the Council of the agricultural policy of the Community involves the need to evaluate a complex economic situation the discretion which it has does not apply exclusively to the nature and scope of the measures to be taken but also to some extent to the finding of the basic facts inasmuch as, in particular, it is open to the Council to rely if necessary on general findings. In reviewing the exercise of such a power the Court must confine itself to considering whether it is not vitiated for obvious error or for misuse of power or whether the authority in question has not obviously exceeded the limits of its discretion.

4. The consultation provided for in the third subparagraph of Article 43(2) as in other similar provisions of the EEC Treaty, is the means which allows the Parliament to play an actual part in the legislative process of the Community. Such power represents an essential factor in the institutional balance intended by the Treaty. Although limited, it reflects at Community level, the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly.

   Due consultation of the Parliament in the cases provided for by the Treaty therefore constitutes an essential formality disregard of which means that the measure concerned is void. Observance of that requirement implies that the Parliament has expressed its opinion. It is impossible to take the view that the requirement is satisfied by the Council's simply asking for the opinion, if no opinion is afterwards given by the Parliament.

NOTE Roquette Frères S.A. brought an action against the Council similar to the one in the following case, Maizena GmbH v Council of the European Communities (Case 139/79).

The note is common to the two cases.

Judgment of 29 October 1980

Case 139/79

Maïzena GmbH v Council of the European Communities

(Opinion delivered by Mr Advocate General Reischl on 18 September 1980)

1. Application for a declaration of nullity - Natural or legal persons - Measures of direct and individual concern to them - Admissibility

(EEC Treaty, Art. 173, second paragraph; Council Regulation No.1111/77, Art. 9 (as amended by Regulation No. 1293/79) and Annex II)

2. Procedure - Intervention - Right which all institutions of the Community have - Conditions for its exercise - Interest in taking proceedings - Unnecessary condition

(Statute of the Court of Justice of the EEC, Art. 37, first paragraph)

3. Agriculture - Rules on competition - Conditions of application - Discretion of the Council

(EEC Treaty, Art. 42)

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

(EEC Treaty, Art. 40 (3))

5. Measures adopted by the institutions - Procedure for working them out - Due consultation of the Parliament - Essential formality - Scope

(EEC Treaty, Art 43(2), third subparagraph, and Art. 173)

1. Since Article 9 (4) of Regulation No 1111/77 (as amended by Article 3 of Regulation No. 1293/79), itself applies the criteria laid down in Article 9 (1) to (3) to each of the undertakings set out in Annex II to the said regulaton, the latter are the addressees and are thus directly and individually concerned.

2. The first paragraph of Article 37 of the Statute of the Court of Justice provides that all the institutions of the Community have the same right to intervene. It is not possible to restrict the exercise of that right by any one of them without adversely affecting its institutional position as intended by the Treaty and in particular Article 4 (1).

The right to intervene which the institutions have is not subject to the condition that they have an interest in taking proceedings.

3. In the exercise of the power conferred on it by the first paragraph of Article 42 of the EEC Treaty to determine to what extent the rules on competition are to be applied in the agricultural sector, as in all implementation of the Common Agricultural Policy the Council has a wide measure of discretion.

4. Different treatment of industries which is to be explained by objective differences between the situations of those industries cannot constitute discrimination within the meaning of Article 40(3) of the EEC Treaty.

Nor is there discrimination within the meaning of that provision when in adopting measures of general interest the Council does not take account of the different situations between those industries due to their commercial choices and internal policy.

5. The consultation provided for in the third subparagraph of Article 43(2) as in other similar provisions of the EEC Treaty, is the means which allows the Parliament to play an actual part in the legislative process of the Community. Such power represents an essential factor in the institutional balance intended by the Treaty. Although limited, it reflects at Community level, the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly.

Due consultation of the Parliament in the cases provided for by the Treaty therefore constitutes an essential formality disregard of which means that the measure concerned is void. Observance of that requirement implies that the Parliament has expressed its opinion. It is impossible to take the view that the requirement is satisfied by the Council's simply asking for the opinion, if no opinion is afterwards given by the Parliament.

NOTE The German company Maizena which manufactures inter alia isoglucose (a new sweetener extracted from maize) asked the Court for a declaration that Council Regulation No. 1111/77 of 17 May 1977 is void in so far as it imposes a production quota on it.

In support of its action the applicant alleges inter alia that the production quota fixed by the said regulation should be declared void on the ground that the Council adopted the regulation without having received the opinion of the European Parliament as required by Article 43 (2) of the Treaty and that constituted a substantial formal defect.

The Council contended that the action and the intervention of the Parliament in favour of the applicant were both inadmissible. On that ground it contended that the action should be dismissed as unfounded.

Brief background to the adoption of the contested regulation and the substance thereof

By judgment dated 25 October 1978 (Joined Cases 103 and 145/77) the Court ruled that Regulation No. 1111/77 laying down common provisions for isoglucose was invalid to the extent to which Articles 8 and 9 thereof imposed a production levy on isoglucose of 5 units of account per 100 kg. of dry matter for the period corresponding to the sugar marketing year 1977/78. The Court found the system established by the above-mentioned articles offended the general principles of equality (in that case between sugar and isoglucose manufacturers). The Court left it to the Council to take all necessary measures to ensure the proper functioning of the market in sweetners.

On 7 March 1979 the Commission submitted a proposal for the amendment of Regulation No. 1111/77 to the Council and on 19 March 1979 the Council sought the opinion of the European Parliament thereon. The Parliament's opinion was urgent for it was a question of fixing a production quota system for isoglucose applying from 1 July 1979, the date of the beginning of the new sugar marketing year.

The parliamentary session of 7 to 11 May 1979 was to be the last before the meeting of the Parliament elected directly by universal vote which was to take place on 17 July 1979.

At its meeting on 14 May 1979 the Parliament rejected the proposal for a resolution and referred it back for reconsideration to the Agricultural Committee; the enlarged Bureau had taken account fo the fact that the Council or Commission could ask for Parliament to be summoned in the event of emergency.

On 25 June 1979 without having obtained the opinion it had sought, the Council adopted the proposal for a regulation made by the Commission which thus became Regulation No. 1293/79 amending Regulation No. 1111/77. The Council nevertheless observed in that regulation that "the European Parliament which was consulted on 16 March 1979 on the Commission proposal did not deliver its opinion at its May part-session; whereas it had referred the matter to the Assembly for its opinion".

Admissibility of the action

In the view of the Council the action is inadmissible as brought by an individual against a regulation. The contested measure is not a decision taken in the form of a regulation and is not of direct and individual concern to the applicant. The Court however held the action to be admissible.

The admissibility of the intervention by the Parliament

The Council challenges the power of the Parliament to intervene voluntarily in the proceedings pending before the Court. It likens such intervention to a right of action which the Parliament does not have under the Treaty.

The submission must be rejected as incompatible with Article 37 of the Statute of the Court which gives the institutions and thus Parliament, the right to intervene in cases before the Court.

Disregard of the principles of the Law on Competition

In the view of the applicant Article 42 of the Treaty, according to which it is for the Council to determine how far the rules on competition are applicable to agriculture, does not authorize the Council to restrict competition more than necessary. The Council's measures in relation to isoglucose go beyond what is necessary.

The fact must not be lost sight of that the establishment of a common agricultural policy is also an objective of the Treaty.

It is apparent from a consideration of the contested measures that the effect they are likely to have on competition is inevitably caused by the legitimate intention of the Council to subject isoglucose production to restrictive measures. Those measures moreover allow a not insignificant opportunity for competition as regards prices, terms of sale and the quality of the isoglucose.

Disregard of the principle of proportionality

The applicant argues that in establishing a quota system for isoglucose the Council has chosen the most restricted means which would mean preventing all rational use of the applicant's production capacity. On the other hand no measure has been taken in respect of the sugar industry.

The Court does not accept that argument: among other things the Council certainly does not exceed the discretion which it has.

The alleged discrimination between sugar and isoglucose manufacturers

Although in a similar situation to that of sugar manufacturers isoglucose manufacturers are subject to a different system of quotas. The answer to that argument is to be found in the answer given to the alleged disregard of the principles of the law on competition. That submission must therefore be rejected as unfounded.

The discrimination between isoglucose manufacturers

Certain undertakings have voluntarily reduced their investments in anticipation of the regulation which was to amend the isoglucose system. The Council cannot be blamed for not taking account of commercial options and the internal policy of each individual undertaking when the Council adopts measures of general interest to prevent the uncontrolled production of isoglucose from endangering the sugar policy of the Community.

Disregard of essential formalities

The applicant and the Parliament maintain that since Regulation No. 1111/77, as amended, was adopted by the Council without the procedure of consultation provided for in Article 43 of the Treaty being observed it must be regarded as void for disregard of essential formalities.

Consultation is a means enabling the Parliament to participate effectively in the legislative process of the Community. That power is an essential factor in the equilibrium between institutions intended by the Treaty. Due consultation of the Parliament in the cases provided for by the Treaty constitutes therefore an essential formality disregard of which means that the measure concerned is void.

Observation of that requirement implies that the Parliament gives its opinion and a simple request by the Council for an opinion cannot be regarded as sufficient.

The Council maintains that the Parliament by its own conduct made fulfilment of that formality impossible and therefore it is not reasonable to allege disregard thereof, but the Council had not exhausted all the possibilities of obtaining the prior opinion of the Parliament. It asked neither for the application of the emergency procedure nor for an extraordinary session of the Assembly, although the Bureau of the Parliament had drawn its attention to that possibility.

The Court therefore:

(1) Declared that Regulation No. 1293/79 amending Regulation No. 1111/77 was void;

(2) Ordered the Council to pay the costs of the applicant;

(3) Ordered the Parliament to bear its own costs.

Judgment of 29 October 1980

Case 22/80

Boussac Saint Frères S.A. v Brigitte Gerstenmeier

(Opinion delivered by Mr Advocate General Mayras on 17 September 1980)

1. Reference for a preliminary ruling - Jurisdiction of the Court - Limits

   (EEC Treaty, Art. 177)

2. Community law - Principles - Equal treatment - Discrimination on grounds of nationality - Prohibition - Covert discrimination - Inclusion

   (EEC Treaty, Art. 7)

3. Community law - Principles - Equal treatment - Discrimination on grounds of nationality - Simplified procedure for recovery of debts drawing a distinction based on currency in which expressed - Permissibility

   (EEC Treaty, Art. 7)

1. Although the Court may not express an opinion in the context of Article 177 of the Treaty on the validity of a national law, it is nevertheless competent, for the purposes of co-operation with the national courts, to extract from the question those aspects of Community law the interpretation of which will enable the national court to resolve the problems with which it is concerned.

2. Article 7 of the Treaty prohibits any discrimination on grounds of nationality within the field of application of the Treaty. That article forbids not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.

NOTE 3. Article 7 of the EEC Treaty does not preclude a national rule of civil procedure which, whilst affording any creditor established in the territory of a Member State the opportunity to sue for payment of a debt in whatever currency it is expressed by taking ordinary legal proceedings before the courts, provides for a simplified procedure for recovery which is not available to a creditor prosecuting a claim for payment of a debt expressed in a foreign currency against a debtor established on national territory.

An action had been brought before the German court by a firm established in France which had sold and delivered textiles to a trader resident in the Federal Republic of Germany. The action sought the recovery of the balance of an invoice by means of the so-called "Mahnverfahren" (a simplified and speedier procedure).

The German court considered that the simplified procedure no longer allowed the recovery of a debt from a debtor established in the German territory if that debt is expressed in foreign currency whereas the procedure remains available for the recovery of debts expressed in foreign currency if the debtor is established abroad.

That led the national court to ask the Court whether that amendment of the German procedural law in relation to creditors from other Member States of the Community was a discriminatory measure and thus ineffective in relation to such applicants as being contrary to Article 7 of the Treaty.

The Court held that Article 7 of the EEC Treaty did not preclude a national rule of civil procedure which, while affording any creditor resident in territory of a Member State the opportunity to sue for payment of a debt in whatever currency it is expressed in ordinary legal proceedings before the courts, provided for a simplified procedure for recovery which was not available to creditors prosecuting a claim for payment of a debt expressed in a foreign currency against debtors resident on national territory.

Judgment of 30 October 1980

Case 3/80

Milchfutter GmbH & Co. KG v Hauptzollamt Gronau

(Opinion delivered by Mr Advocate General Reischl on 2 October 1980)

Agriculture - Monetary compensatory amounts - Calculation - Compound products - Constituents which do not satisfy the condition of dependence contained in Article 1 (2)(b) of Regulation No. 974/71 - Taking into consideration - Permissibility - Discretionary power of the Commission

(Regulation No. 974/71 of the Council, Article 1 (2)(b); Regulations Nos. 2547/74 and 539/75 of the Commission)

The implementation by the Commission of Article 1 of Regulation No. 974/71 implies a wide discretionary power as respects the dependence of the price of the products in question on the price of one or more agricultural products covered by intervention arrangements in the context of the common organization of the market and as respects the ascertainment or anticipation of disturbances in trade in the products or products concerned.

The fact that a particular compound product contains a more or less substantial percentage of a product which does not satisfy the condition of dependence contained in Article 1 (2)(b) of Regulation No. 974/71 does not have the result of imposing on the Commission an automatic duty to exclude that element from the calculation of monetary compensatory amounts. In fact, the determination of those amounts is subject to a complex assessment made up of various factors related to the nature of the feeding-stuffs and the relationship, in terms of volume and value, of their various constituents.

NOTE

The Finanzgericht Münster put the following question to the Court:

"In so far as they include in the basis of assessment for monetary compensation the weight of any whey ingredient in a compound feeding-stuff under tariff subheadings 23.07 B I (a) 3 and 4 of the Common Customs Tariff, are Article 1 of Regulation No. 2547/74 of the Commission of 4 October 1974 and Article 1 of Regulation (EEC) No. 539/75 of the Commission of 28 February 1975 invalid in that they infringe higher ranking Community law, in particular Article 2 (2) of Regulation (EEC) No. 974/71 of the Council of 12 May 1971?"

That question was raised in proceedings concerned with the determination of the monetary compensatory amounts applicable to the importation into Germany of a consignment of compound feeding-stuff originating from the Netherlands and containing 65.2% of skimmed-milk powder and 9.5% of powdered whey ingredient.

The plaintiff in the main action contends that the whey ingredient should not be taken into account and cites in support the judgment of the Court of 3 May 1978 in Case 131/77 (MILAC), which held a regulation of the Commission to be void in so far as it fixed compensatory amounts in respect of trade in pure powdered whey.

The Court states that the application of monetary compensatory amounts is subject to a double condition: on the one hand it must be a product subject to a common organization of the agricultural markets in respect of which intervention measures are provided or the price of which is dependent on that of such a product and on the other hand it must be shown that monetary fluctuations are likely to involve disturbances in trade in the agricultural product concerned.

Because of the compound nature of the feeding-stuff in question, the Commission, which has a wide discretion in assessing the facts, has particular difficulty from the point of view not only of assessing the economic factors but also the possibilities of the practical application and checking. The fact that a specific feeding-stuff contains a greater or lesser percentage of a product which does not satisfy the condition of dependence does not in the Commission's view thereby create an automatic obligation to eliminate such a factor in calculating the monetary compensatory amounts.

The Court held that consideration of the provisions of Commission Regulations Nos. 2547/74 of 4 October 1974 and 539/75 of 28 February 1975 fixing the monetary compensatory amounts and certain rates for their application has disclosed no factor of such a kind as to affect the validity of those provisions in so far as, in the calculation of the monetary compensatory amounts, they do not make it possible to eliminate the content by weight of any whey in compound feeding-stuffs within tariff subheadings 23.07 B I (a) 3 and 4 of the Common Customs Tariff.

Judgment of 30 October 1980

Case 26/80

Schneider-Import GmbH & Co. KG v Hauptzollamt Mainz

(Opinion delivered by Mr Advocate General Reischl on 2 October 1980)

1. Tax provisions - Internal taxation - Grant of tax advantages to domestic products permissible - Conditions - Extension to products imported from other Member States

   (EEC Treaty, Art. 95)

2. Tax provisions - Internal taxation - Grant of tax advantages to domestic products - Extension to products imported from other Member States - Difficulties owing to methods of taxation - Criteria of equal treatment - Advantages reserved to small-scale producers of spirits - Condition for qualifying therefor - Upper limit for production - Compliance with same limit for imported products

   (EEC Treaty, Art. 95)

1. In the absence of any unification or harmonization of the relevant provisions, Community law does not prohibit Member States from granting tax advantages for legitimate social or economic purposes, in the form of exemption from or reduction of duties, to certain products or to certain classes of producers. However, according to the requirements of Article 95 of the EEC Treaty, such preferential systems must be extended without discrimination to products coming from other Member States satisfying the same conditions.

2. Where it is impossible to transfer to imported products tax advantages the grant of which is linked to special methods of taxation and of supervision laid down by the legislation of the importing State, it is necessary to consider that the requirements of Article 95 of the Treaty are fulfilled where the legislation of a Member State makes it possible to apply to imports of products from other Member States arrangements the practical effect of which may be considered as equivalent to the arrangements applied to domestic products so that imported products may in fact enjoy the same advantages as comparable national products.

As regards, in particular, the tax advantages reserved by national legislation to certain categories of small-scale producers of spirits, the fixing by the legislation of a Member State of an upper limit for production which is imposed upon producers of other Member States as a condition for qualifying for a reduction in the rate of tax conforms to the requirements of Article 95 where that limit corresponds in general to the upper limit to which national producers are subject in order to qualify for the same tax advantage. Article 95 does not require the Member States to extend the same advantage to imported products coming from undertakings whose production exceeds the production limit thus fixed.

NOTE The Finanzgericht Rheinland-Rfalz referred to the Court two questions on the interpretation of Article 95 of the EEC Treaty for a preliminary ruling to enable it to assess the compatibility with the Treaty of certain provisions of the national legislation concerning the duty on alcohol, namely reduced rates of duty for different categories of distillers.

It appears from the order for reference that the plaintiff in the main action imported and marketed in 1978 a consignment of cognac purchased from a large French distillery and that it paid the normal rate of duty applicable at the time. The plaintiff brought an action against the decision of the customs and alleged that there was discrimination against the imported alcohol contrary to Article 95 of the EEC Treaty by reason of the fact that certain categories of domestic brandies enjoyed a more advantageous rate of duty.

The legal provisions cited by the plaintiff are contained in the second paragraph of Article 97 of the Branntweinmonopolgesetz. That article provides for a reduction in the rate of duty for three categories of distillers, namely:

Distillers subject to the flat rate system

Proprietors of the raw materials (fruit)

Small bonded distilleries.

On the other hand the imported cognac in question originates from a distiller whose production greatly exceeds the production limits imposed on the said categories. The questions put by the national court raise in substance the problem of whether the provisions of the Branntweinmonopolgesetz (Article 151 in conjunction with Article 79) are compatible with the requirements of Article 95 of the Treaty.

The Court answered to the effect that:

1. Article 95 of the EEC Treaty, in its application to the tax advantages reserved by national legislation to certain categories of small-scale producers of spirits, must be interpreted as meaning that the requirement of non-discrimination laid down in that provision of the Treaty is fulfilled where the arrangements applicable to spirits imported from other Member States may be considered as equivalent to the arrangements applicable to national production so that imported products may in fact enjoy the same advantages as comparable national products.

2. The fixing by the legislation of a Member State of an upper limit for production which is imposed upon producers of other Member States as a condition for qualifying for a reduction in the rate of tax conforms to the requirements of Article 95 of the EEC Treaty where that limit corresponds in general to the upper limit to which national producers are subject in order to qualify for the same tax advantage. Article 95 does not require the Member States to extend the same advantage to imported products coming from undertakings whose production exceeds the production limit thus fixed.

ANALYTICAL TABLE

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GENERAL INFORMATION ON THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

A. TEXTS OF JUDGMENTS AND OPINIONS AND GENERAL 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 Internal Services Branch of the Court of Justice of the European Communities, Boîte Postale 1406, Luxembourg, on payment of a fixed charge of Bfr 100 for each document. Copies may no longer be available once the issue of the European Court Reports containing the required judgment or opinion of an Advocate General has been published.

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

The annual subscription will be the same as that for European Court Reports, namely Bfr 2 250 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
FEDERAL REPUBLIC OF GERMANY	Carl Heymann's Verlag, 18-32 Gereonstrasse, 5000 Köln 1
FRANCE	Editions A. Pedone, 13 Rue Soufflot, 75005 Paris
IRELAND	Stationery Office, Beggar's Bush, Dublin 4
ITALY	CEDAM - Casa Editrice Dott. A. Milani, 5 Via Jappelli, 35100 Padova (M 64194)
LUXEMBOURG	Office for Official Publications of the European Communities, Boîte Postale 1003, 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, Boîte Postale 1003, 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, Boîte Postale 1003, Luxembourg.

C. GENERAL LEGAL INFORMATION AND DOCUMENTATION

I. 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 (Boîte Postale 1406, Luxembourg, Grand Duchy of Luxembourg).

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

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

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

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

3. Annual Synopsis of the work of the Court 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.

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

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

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

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

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

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

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

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

Compendium of Case-law relating to the European Communities (published by H.J. Eversen, H. Sperl and J. Usher), has been discontinued.
In addition to the complete collection in French and German (1954 to 1976) an English version is now available for 1973 to 1976. The volume of the English series are on sale at: Elsevier - North Holland - Excerpta Medica, P.O. Box 211, Amsterdam (Netherlands).

3. Bibliographical Bulletin of Community case-law

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

It has been on sale since 1977 at the address shown at B 1 above (Reports of Cases Before the Court).

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

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

(a) References for preliminary rulings

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

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

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

(b) Direct actions

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

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

The application must contain:

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

The application should also be accompanied by the following documents:

The decision the annulment of which is sought, or, in the case of proceedings against an implied decision, by documentary evidence of the date on which the request to the institution in question was lodged;
A certificate that the lawyer is entitled to practise before a court of a Member State;
Where an applicant is a legal person governed by private law, the instrument or instruments constituting and regulating it, and proof that the authority granted to the applicant's lawyer has been properly conferred on him by someone authorized for the purpose.

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

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

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

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

E. ORGANIZATION OF PUBLIC SITTINGS OF THE COURT

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

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

Public holidays in Luxembourg

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

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

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