

Important Judgements Delivered by the Court of Justice of the European Communities in the period 1 March to 15 May 1998

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Even though the period considered is relatively short, it has not been difficult to select a number of important judgements to be commented on. The Court of Justice has become even more productive and the issues dealt with continue to be of great and wide-ranging importance. It might be justified to ask whether the Court, facing a still growing number of cases, will be given sufficient time to consider decisive questions in-depth before handing down judgements in landmark cases. It is our impression that many people and institutions (politicians/Council) forget that the Court is also supposed to function as the Supreme Court of the Communities.

I

In its judgement in Case C-170/96, *Commission v Council*, of 12 May 1998, the Court has made it clear that it will not decline **jurisdiction** in cases involving the question as to whether an Act is to be considered a Joint Action within the meaning of the Treaty on the European Union. It is the Court's task to ensure that such Joint Actions do not encroach upon the powers conferred by the EC Treaty. The Court considered the relationship between Articles L and K in greater depth in the judgement, which in its substance concerned the Joint Action on airport transit arrangements (OJ 1996 L 63/8). The Court held that an airport transit visa does not authorize its holder to cross the external borders of Member States in the sense of Article 100c of the EC Treaty, which thus could not, as the Commission had argued, be considered the correct legal base.

With regard to the **supremacy of Community law**, the preliminary ruling in Case C-367/96, *Kefalas*, of 12 May is very interesting. The full Court decided that national courts are entitled to apply domestic rules for the purpose of assessing whether the exercise of a right arising from Community law is abusive. However, the application of such a national 'escape clause' must not prejudice the full effect and uniform application of EC law. The Court did not find that Community law rights had been abused by the Greek shareholder who claimed under Article 25 of the Second Company Directive

that a public company's demand for capital increase was invalid.

In its judgement of 12 May in Case C-366/95, *Steff-Houlberg*, the Court has delivered yet another judgement which contributes to the clarification of the **relationship between national law and Community law**. From this judgement it is clear that Community law does not preclude a national rule from allowing non-recovery of unduly paid Community aid (here export refunds). The question is whether this result takes full account of the interests of the Community and makes it possible for exporters to circumvent rules on refunds. The case started when the Danish Ministry of Agriculture demanded the exporter, Steff-Houlberg, to reimburse approximately ECU 15 million to cover unduly paid export refunds. The exporter had purchased large amounts of beef from an independent Danish slaughterhouse and exported it to Arab countries. It was discovered that the beef content of the product in respect of which the exporter had applied for and received export refunds was in fact only 28% and not the required 60%. The exporter contested the claim for repayment and argued that it could not be held liable for the criminal conduct of the slaughterhouse which sold them the beef. On the basis of these facts, the Court stated that, under Community law, the exporter's right to plead good faith with respect to the conformity of the goods with the description given by him in the declaration submitted to obtain an export refund is not conditional on the exporter supervising the manufacturing process used by the slaughterhouse concerned. Whether or not non-recovery can be accepted is for the national judge to decide on the basis of national law. Does this result ensure uniform application of EC rules on funds?

II

With regard to the **free movement of goods**, we will comment on three judgements, the first of which may well be considered one of the most important judgements delivered by the Court in 1998. The Court had to decide on the question of whether European citizens have the right to purchase medical products (goods) in another Member State without asking for prior authorization for reimbursement of the costs

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incurred. The full Court decided in the *Decker case*, which should be read together with the *Kohll case* (Cases C-120/95 and C-158/95, both of 28 April 1998), that the rules on free movement of goods preclude national rules which refuse to reimburse the cost of a pair of spectacles purchased from an optician established in another Member State to an insured person on the grounds that prior authorization is required for the purchase of a medical product abroad. This decision will force the Luxembourg social security system to reimburse Mr Decker, on a flat-rate basis, for the cost of a pair of spectacles he had bought in Belgium. In the other case, Mr Kohll, also a Luxembourg national insured in Luxembourg, requested authorization for his daughter to be treated in Germany through a Luxembourg doctor. The Luxembourg social security system rejected the request on the grounds that the proposed treatment was not one that could not be provided in Luxembourg. Such request for authorization was considered contrary to Art. 59.

In its preliminary ruling on the ‘mad cow disease’ case C-157/96, *National Farmer’s Union*, which was decided on 5 May 1998, the Court held that the Commission had neither breached the principle of proportionality nor misused its powers by imposing a general ban on exports of bovine animals, meat and derived products. On the same date, the Court decided in the United Kingdom’s direct case C-180/96 against the Commission that the institution in question had not breached the principle of the free movement of goods. Furthermore, the Court stated that the Commission’s numerous decisions had been sufficiently well-reasoned. Finally, the Court did not accept the United Kingdom’s arguments that the Commission had breached the two important principles regarding non-discrimination and proportionality.

In the very important decision *Metronome v Music Point Hokamp GmbH* of 28 April 1998 (C-200/96), the Court of Justice interpreted Art. 1(1) of the Directive on rental and lending rights (92/100/EEC) as being in accordance with the fundamental freedom to pursue a trade or profession in the Community. With this judgement, the Court enforced the legal position of copyright owners, stating that the freedom to pursue a trade or profession is a general principle which may be restricted by measures corresponding to objectives of general interest – such as the protection of literary and artistic property – pursued by the European Community, in so far as they do not constitute a disproportionate and intolerable interference in relation to the aim pursued, impairing the very substance of the fundamental right guaranteed. The Court acknowledged that the situation of copyright owners is very weak, since the development of new technologies brings with it an increasing threat of piracy. Therefore,

the position of phonogram producers among the beneficiaries of the exclusive rental right in the aforementioned Directive appears justified to protect the extremely high and risky investment they run. Furthermore the measure taken is not disproportionate or intolerable. The Directive does not entirely exclude hiring out but makes it dependent on negotiations with the copyright holder.

III

As regards **free movement of persons**, the Court determined on 7 May 1998 in Case C-350/96, *Clean Car Autoservice v Prime Minister of Federal State of Vienna*, that the rule of equal treatment in the context of freedom of movement for workers, embodied in Article 48 of the EC Treaty, may also be invoked by an employer in order to employ workers who are nationals of another Member State in the Member State in which he is established. This made it possible for the Austrian company Clean Car to appoint a German, Mr Henssen, who was residing in Berlin, as a manager. The Austrian authorities were not entitled to claim that trade could not be exercised as long as the manager did not have his residence in Austria.

The Commission’s infringement procedure against Germany in Case C-24/97 of 30 April 1998 is in line with the Clean Car-case. The Commission claimed that German legislation treated nationals of other Member States residing in Germany disproportionately differently from German nationals with regard to the degree of fault and scale of fines in connection with comparable infringements of the obligation to possess a valid identity document. It was not difficult for the Court to state that such discrimination infringes Article 48 of the EC Treaty.

The question in case C-160/96, *Manfred and Barbara Molenaar v Allgemeine Ortskrankenkasse Baden-Württemberg*, of 5 March 1998, was whether the new German health insurance scheme is in accordance with Articles 48 and 6 of the Treaty. The couple, working in Germany but resident in France, were both voluntarily insured against sickness in Germany and were required to take out health insurance as of 1 January 1995. However, they were then informed that they were not entitled to health insurance benefits while residing in France. The Court therefore took the view that payment of contributions to a health insurance scheme in principle entitles insured workers to receive the corresponding benefits when they satisfy the conditions laid down by the legislation of the competent State, with the exception of those conditions which are not in accordance with the applicable social security provisions of Community law. Mr and Mrs Molenaar may therefore invoke Regulation 1408/71 for the purpose of obtaining the health benefit allowance,

notwithstanding the conflicting provisions of German social security law, even if Articles 6 and 48 do not preclude a Member State from requiring persons working in its territory but residing in another Member State to contribute to a social security scheme covering health care. But the relevant articles of Regulation 1408/71, Articles 19(1), 25 (1) and 28 (1), do prevent entitlement to such an allowance from being subject to the condition that the insured person resides in the territory of the Member State where he or she is insured.

In the case *Mr and Mrs Robert Gilly*, C-336/96 of 12 May, the Court had to rule on the compatibility of a bilateral tax convention with Art. 48. Mr and Mrs Gilly both live in France and work as teachers, one in a public school in France, the other, of former German nationality, in a public school in Germany. The Court held that the bilateral tax convention between France and Germany, under which the tax regime applicable to cross-border workers differs depending on whether they work in the private sector or the public sector and, if they work in the public sector, on whether or not they have only the nationality of the State authority employing them, and which also stipulates that the regime applicable to teachers differs depending on whether their residence in the State in which they are teaching is for a short or long period, is not precluded by Art. 48, and as Art. 48 is *lex specialis*, also not by Art. 6 of the Treaty. Even if the criterion of nationality appears here, the Court ruled that it flows from the contracting parties' competence to define the criteria for allocating their powers of taxation between themselves, with a view to eliminating double taxation as there are no unifying or harmonizing measures adopted. The fact that the contracting parties have chosen various connecting factors in allocating powers of taxation between them, in particular nationality with regard to public-service remuneration received in the State which is not the State of residence, cannot in itself constitute discrimination prohibited by Community law.

The Court continues to expand its case law on the interpretation of the Directive concerning the safeguarding of employees' rights in the event of **transfers of undertakings**. In Case C-319/94, *Jules Dethier Equipment SA v Jules Dassy and Sovam SPRL in liquidation*, of 12 March 1998 the Court first had to decide whether the Directive, which is very important in practice, is to be applied in the event of the transfer of an undertaking which is being liquidated by a national court. Sovam had employed Mr Dassy since 1974. In 1991, the Belgian Commercial Court made an order putting Sovam into liquidation. Subsequently, the liquidator dismissed Mr Dassy. Two weeks after this dismissal, the liquidator transferred the assets of Sovam to Dethier. Mr Dassy brought an action against

Sovam and Dethier, requesting that they be held jointly liable to pay the sums due to him. The Court found the Directive applicable and held that an employee such as Mr Dassy who is unlawfully dismissed by a transferor shortly before the undertaking is transferred and not taken on by the transferee may claim damages against the transferee, here Dethier.

IV

The Court continues to hand down many judgements dealing with **equal treatment** of men and women. On April 30, the Court gave an interpretation on the Directive concerning equal treatment between men and women in matters of social security in the joint cases *August de Vriendt* (C-377/96 to C-384/96). The Court ruled that Art. 7 (1) of the aforementioned Directive had to be interpreted in the sense that, if national legislation has maintained a different pensionable age for male and female workers, the Member State concerned is entitled to calculate the amount of pension depending on the worker's sex. However, the national court has to decide whether the different calculation of retirement pensions is objectively linked to the maintenance of different pensionable ages for men and women.

On the same date, the Court ruled in the case C-136/95, *CNAVTS and Thibault*, that Articles 2(3) and 5(1) of the Directive 76/207/EEC on the principle of equal treatment for men and women in regard to access to employment and working conditions precludes national rules depriving women of the right to assessments of their performance and, consequently, to the possibility of qualifying for promotion because they were absent from the undertaking on maternity leave. In the circumstances of the case, Mrs Thibault would have been deprived of the benefit of working conditions as a result of the employment relationship if the period of pregnancy and maternity leave was not taken into account. While it is true that Member States have discretion with respect to social measures guaranteeing the protection of women in connection with pregnancy and maternity, such discretion cannot be used as a basis for unfavourable treatment of women with regard to working conditions. Such treatment would constitute discrimination based directly on sex within the meaning of the aforementioned directive.

In the case *Maria Martinez Sala*, C-85/96 of 12 May, the Court did not reconsider the interpretation on the child-raising benefit provided for under German law as a family benefit in the meaning of Art. 4 (1) (h) of Regulation 1408/71, as the German government wanted (see case *Hoever and Zachow*, [1996] ECR I-4895). Furthermore, the Court ruled that a Member State may not require nationals of other Member States authorized to reside in its territory to produce a formal residence

permit issued by the national authorities in order to receive child-raising benefits, while that Member State's own nationals are only required to be permanently or ordinarily resident in that Member State.

V

Concerning the **freedom to provide services**, the decision on *Jessica Safir*, C-118/96, of 28 April shows that even though questions on direct taxation are not yet an area of Community legislation, the Member States cannot regulate in this area without taking EC law into consideration. Direct taxation is important for the harmonization process. Several national tax rules, such as the rule in question, do not comply with Art. 59 (see the decisions on *Bachmann* [1992] ECR I-249, *Schumacker*, [1995] ECR I-22, *Asscher*, [1996] ECR I-3113). Here, the Swedish tax rules on taxation of savings in the form of capital life insurance was in question. Life insurance policies taken out with companies not established in Sweden were less favourable than those with companies established in Sweden. Such a rule is obviously an obstacle to the freedom to provide services and the Court had to state that Art. 59 of the Treaty precludes the application of national legislation such as this, which impedes a service provider.

VI

In the area of **consumer protection**, with the decision *Bayerische Hypotheken- und Wechselbank against Dietzinger* of 17 March 1998, C-45/96, the Court put an end to the discussion in Germany as to whether the German law on door-to-door selling would apply to surety or guarantee contracts on the basis of Directive 85/577/EEC on the protection of consumers in respect of contracts negotiated away from business premises. The Court recognized the general applicability of the Directive to such contracts if they are ancillary to a contract whereby, in the context of door-to-door selling, a consumer assumes obligations towards the trader with a view to obtaining goods or services from him. Furthermore, the guarantee will only fall within the scope of the Directive if the guarantor has entered into a commitment for a purpose which can be regarded as unconnected with his trade or profession.

VII

In the area of **State aid**, the Court delivered a judgement on 7 May 1998 which helps clarify the definition of the broad Community law term 'State aid'. In the preliminary case, the question was whether the fact that Italian legislation relieved only the Italian Postal Service of the obligation of complying with the generally applicable legislation concerning fixed-term

contracts could be considered as constituting State aid. The national referring court rightly observed that since the Italian Post, unlike all other undertakings, is under no obligation to conclude employment contracts of indeterminate duration, it enjoys a flexibility not available to other undertakings. However, the Court pointed out that 'only advantages granted directly or indirectly through State resources are to be considered as aid within the meaning of Article 92 of the EC Treaty. Not all advantages granted by a State constitute aid.' The Court did not find that a national provision of the kind at issue could constitute – directly or indirectly – an advantage granted through State resources.

The Court of First Instance (extended composition) upheld in the judgement of 30 April 1998 in Case T-21/95, *Het Vlaamse Gewest v Commission*, the Commission's decision to the effect that an interest-free loan constitutes unlawful State aid. Vlaamse Gewest (VLM) is a private airline company, which, inter alia, provides flights between Antwerp and London. The British company Cityflyer serves the same route. In 1993, without prior notification to the Commission, the Flemish Region granted VLM a repayable but interest-free loan of BEF 20 million. In response to Cityflyer's complaint, the Commission decided that the loan constituted unlawful State aid.

VIII

In the field of **competition law**, the Court had yet another opportunity to interpret Article 85(1) of the EC Treaty in a case concerning luxury cosmetic products. In its preliminary ruling of 28 April in Case C-306/97, *Yves Saint Laurent Parfums*, the decisive question was whether YSL was entitled to terminate two contracts with the exporter Javico AG and obtain damages. The contracts were for distribution of YSL's products in Russia/Ukraine and Slovenia. Javico, which does not form part of YSL's distribution network within the EC, had accepted that the YSL products could only be sold in the territories mentioned and that the products could under no circumstances leave the territories of the countries in question. Shortly after the conclusion of the two contracts, YSL found products sold to Javico which should have been but were not distributed to the territories mentioned in the contracts. YSL terminated the contracts and claimed damages. Javico, on its side, argued that the contractual obligation to sell only to certain territories was contrary to Article 85(1) and consequently void. The Court referred to existing case law and stated that an agreement which deprives a reseller (here Javico) from its freedom to choose its customers by requiring it to sell and/or resell only to customers established in the contractual territory is in infringement of Article 85. The decisive question for the Court was whether YSL's potential anti-

competitive conduct was capable of affecting trade between Member States, which is required if it is to be held contrary to the Treaty. The full Court found that YSL's conduct *might* affect trade between Member States. The Court relied on the fact that the luxury market for perfume is characterized by an oligopolistic structure and an appreciable difference between the prices charged for these products within the EC and those charged outside the EC.

IX

Dealing with **procedural rules**, the Court of Justice in the case *Stichting Greenpeace Council and Others*, C-321/95 P, of 2 April, confirmed the judgement of the Court of First Instance in stating that Greenpeace did not have *locus standi* to ask for the annulment of a decision of the Commission disbursing an additional ECU 12,000,000 to the Spanish government in reimbursement of expenses incurred in the construction of two power stations on the Canary islands. In appraising the appellants' arguments purporting to demonstrate that the case law on the *locus standi* does not take account of the nature and specific characteristics of environmental interests, the Court did not want to create a new *locus standi* for environmental organizations or private individuals whose situation does not differ from all other persons and therefore does not distinguish them individually from all other persons addressed. The Court followed the opinion of the Advocate-General that there should be no *locus standi extra legem* giving environmental associations the right to ask for annulment of a decision whenever the contested measure concerns the environment or any impact on it. The Court therefore missed an opportunity to enforce environmental law in the Community, here Directive 85/337/EEC, in stating

that the association in any case may ask the national judge to start a 177 procedure at the Court.

Another procedural question was raised in one of the *Banana cases* (C-122/95, Germany v Council of 10 March). Before the Court could declare void the first indent of Art. 1(1) of Council Directive 94/800/EEC concerning the conclusion on behalf of the Community of the agreements reached in the Uruguay Round multilateral negotiations, it first had to rule on the admissibility of the annulment action. The question was raised as to when the period of two months following the day on which the contested decision came to the applicant's knowledge would start. The Court took the view that it is the date of the publication in the Official Journal, not the date of adoption by the Council, which marks the starting point, as it is consistent practice to publish such measures. The second question was whether an international agreement could be challenged by an action of annulment. Here, the Court cited its Opinion 3/94 in which it stated that a Member State or a Community institution would be entitled to bring such an action. This very brief statement by the Court is unfortunate, as it would have been quite interesting to know where the Court derives its competence to annul parts of an international agreement. In another case on the same day, *T.Port GmbH*, C-364/95 and C-365/95, the Court declared void Commission Regulation 478/95 regarding the tariff quota arrangements for imports of bananas into the Community to the extent to which Art. 3(2) thereof imposes the obligation to obtain export licences for bananas from Columbia, Costa Rica or Nicaragua only on category A and C operators. In the next EIPASCOPE, you will be informed about the German Constitutional Court's decisions concerning bananas. □