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COVER NOTE

from :	Mr Bernhard ZEPTER, Deputy Secretary-General of the European Commission
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to :	Mr Javier SOLANA, Secretary-General/High Representative
Subject :	Eighteenth annual report on monitoring the application of Community law (2000)

Delegations will find attached Commission document COM(2001) 309 final.

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 16.7.2001
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VOLUME VI

EIGHTEENTH ANNUAL REPORT ON MONITORING THE APPLICATION OF COMMUNITY LAW (2000)

ANNEX V

JUDGMENTS OF THE COURT OF JUSTICE UP TO 31 DECEMBER 2000 NOT YET IMPLEMENTED

ANNEX VI

APPLICATION OF COMMUNITY LAW BY NATIONAL COURTS: A SURVEY

ANNEX V

Judgments of the Court of Justice up to 31 December 2000 not yet implemented

Belgium

Judgment given on 27/9/88, Case C-42/87
Judgment given on 3/5/94, Case C-47/93
Discrimination in public financing – non-university further education
In March 2000 the French Community adopted a decree amending its legislation to bring it into line with Community law. The Commission is pursuing its contacts with the Belgian authorities concerning the actual reimbursement of entry fees (application of the rules on limitation periods, budgetary measures).

Judgment given on 19/2/91, Case C-375/89
Aid for Idealspun/Beaulieu
In a ruling given on 16 November 2000, Ghent Court of Appeal upheld the judgment of Kortrijk Commercial Court ordering repayment of the aid. The Commission is awaiting official notification from the Belgian authorities.

Judgment given on 21/1/99, Case C-207/97
Failure to notify programmes to reduce pollution caused by certain dangerous substances discharged into the aquatic environment of the Community
The Belgian authorities have submitted information on the implementation of the measures announced by the Flemish and Walloon regions to comply with the judgment. These measures are being examined by the Commission.

Judgment given on 14/9/99, Case C-170/98
Cargo-sharing arrangements in the bilateral agreement between Belgium and Zaire
The Commission considers that the additional protocol concluded with Congo on 8 June 1999 brought an end to the infringement. The case will be formally terminated as soon as the protocol comes into force.

Judgment given on 14/9/99, Case C-171/98
Cargo-sharing arrangements in bilateral agreement between the BLEU and Togo
The Commission considers that the additional protocol concluded with Togo on 27 September 1999 brought an end to the infringement. The case will be formally terminated as soon as the protocol comes into force.

Judgment given on 14/9/99, Case C-201/98
Cargo-sharing arrangements in bilateral agreements between Belgium and the MCWCS countries
The Commission considers that the agreements concluded with Senegal, Côte d'Ivoire and Mali have been properly adapted. The case will be terminated as soon as the additional protocols come into force.

Judgment given on 9/3/00, Case C-355/98
Restrictions in the field of private security firms
Article 228 proceedings have been commenced. In November 2000 the Belgian authorities sent draft amending legislation, which the Commission is now examining.

Judgment given on 18/5/00, Case C-206/98
Insurance scheme for occupational accidents
Article 228 proceedings have been commenced.
The Belgian authorities have submitted a bill designed to adapt their legislation on insurance against occupational accidents to European directives.

Judgment given on 25/5/00, Case C-307/98
Partial compliance with legislation on the quality of bathing water
Article 228 proceedings have been commenced.

Judgment given on 26/9/00, Case C-478/98
Free movement of capital - subscription to a loan denominated in DEM
The Commission will shortly be contacting the Belgian authorities to ascertain what measures are planned to comply with the Court's judgment.

Judgment given on 16/11/00, Case C-217/99
Labelling of foodstuffs
The Commission has contacted the Belgian authorities to ascertain what measures are planned to comply with the Court's judgment.

Judgment given on 30/11/00, Case C-384/99
Universal service
Recent judgment.

Germany

Judgment given on 22/10/98, Case C-301/95
Incorrect transposal of Council Directive 85/337/EEC on the assessment of the effects of certain public or private projects on the environment
The German authorities have submitted draft legislation. The Commission is awaiting its adoption. The case is to be referred to the Court under Article 228(2) of the Treaty, accompanied by a request for imposition of a penalty payment.

Judgment given on 8/6/99, Case C-198/97
Quality of bathing water
Article 228 proceedings have been commenced. The Commission is examining measures notified by the German authorities at the end of December 2000.

Judgment given on 9/9/99, Case C-102/97
Disposal of waste oils, regeneration
Article 228 proceedings have been commenced.
The Commission is examining draft legislation sent by the German authorities at the end of November 2000.

Judgment given on 9/9/99, Case C-217/97
Access to information
Article 228 proceedings have been commenced and are continuing.

Judgment given on 11/11/99, Case C-184/97
Failure to notify programmes to reduce pollution caused by certain dangerous substances discharged into the aquatic environment of the Community
The Commission has contacted the German authorities to ascertain what measures are planned to comply with the Court's judgment.

Judgment given on 15/6/00, Case C-348/97
Failure to collect and pay own resources in respect of butter from the Netherlands
The Commission has contacted the German authorities to ascertain what measures are planned to comply with the Court's judgment.

Greece

Judgment given on 7/4/92, Case C-45/91
Village waste in Crete
Greece has not implemented all the measures set out in the Court judgment. The Commission is continuing to press for payment of the fine, the first instalment of which has been paid (covering the period between 4 July and 30 September 2000).

Judgment given on 22/10/97, Case C-375/95
Taxes on second-hand cars
Article 228 proceedings are continuing.
The Greek authorities have submitted a bill, which the Commission is now examining.

Judgment given on 11/6/98, Case C-232/95
Pollution of Lake Vegoritis - dangerous substances in the aquatic environment
Article 228 proceedings are continuing.
The Greek authorities have presented draft programmes designed to comply with the Court's judgment. The Commission is awaiting adoption of these measures.

Judgment given on 15/10/98, Case C-385/97
Failure to notify national measures transposing Council Directive 93/118/EC on the financing of health inspections and controls of fresh meat and poultrymeat
Article 228 proceedings are continuing.

Judgment given on 28/10/99, Case C-187/98
Equal treatment of men and women in matters of social security
Article 228 proceedings have been commenced.

Judgment given on 16/12/99, Case C-137/99
Failure to notify measures transposing Directive 96/43/EEC amending Council Directive 91/496/EEC laying down the principles governing the organisation of veterinary checks on animals entering the Community from third countries

Article 228 proceedings have been commenced and are continuing.

Judgment given on 13/4/00, Case C-123/99
Failure to notify national measures implementing Directive 94/62/EC of the European Parliament and of the Council on packaging and packaging waste
Article 228 proceedings have been commenced.

Judgment given on 25/5/00, Case C-384/97
Failure to notify programmes to reduce pollution caused by certain dangerous substances discharged into the aquatic environment of the Community
The Commission has contacted the Greek authorities to ascertain what measures are planned to comply with the Court's judgment.

Judgment given on 15/6/00, Case C-470/98
Veterinary fees for products of agricultural origin from non-Community countries
The Commission will shortly be contacting the Greek authorities to ascertain what measures are planned to comply with the Court's judgment.

Judgment given on 19/10/00, Case C-216/98
Price of manufactured tobacco
The Commission has contacted the Greek authorities to ascertain what measures are planned to comply with the Court's judgment.

Judgment given on 16/11/00, Case C-214/98
Fees charged for health inspections and checks on fresh meat
Recent judgment.

Judgment given on 14/12/00, Case C-457/98
Failure to notify national measures implementing Directive 96/97/EC amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes
Recent judgment.

Spain

Judgment given on 22/3/94, Case C-375/92
Restrictions on the freedom to provide services as tourist guides
The Spanish authorities have notified the amendments to their legislation. The Commission is awaiting final adoption of these amendments.

Judgment given on 12/2/98, Case C-92/96
Incorrect application of Council Directive 76/160/EEC concerning the quality of bathing water as regards inland waters
Article 228 proceedings are continuing.
The Spanish authorities have sent a reply on the substance of the reasoned opinion, which is being examined by the Commission.

Judgment given on 25/11/98, Case C-214/96
Incorrect application of Council Directive 76/464/EEC on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community (Article 7: pollution reduction programmes)
The Commission has had to study the documents sent by the Spanish authorities and conduct additional enquiries.

Judgment given on 13/4/00, Case C-274/98
Failure to draw up the programmes provided for in Council Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources
The Commission asked the Spanish authorities what measures were planned to comply with the Court's judgment. It is now examining their reply.

Judgment given on 23/11/00, Case C-421/98
Non-conformity of Spanish legislation on the mutual recognition of architectural qualifications (restrictions on activities)
Recent judgment.

France

Judgment given on 11/6/91, Case C-64/88
Fisheries: failure to monitor compliance with technical conservation measures
Article 228 proceedings are continuing.
The French authorities' reply to the additional reasoned opinion is being examined by the Commission.

Judgment given on 13/3/97, Case C-197/96
Night work by women
By Order dated 7 December 2000, the Court decided to extend the suspension of the proceedings until 30 April 2001 to enable France to bring its legislation into line with the Directive and thus comply with the judgment.

Judgment given on 9/12/97, Case C-265/95
Barriers to imports of Spanish strawberries
The Commission is examining the whole case file to check whether the Court's judgment requires further implementing measures.

Judgment given on 15/10/98, Case C-284/97
Failure to notify national measures transposing Council Directive 93/40/EEC amending Directive 81/852/EEC on the approximation of the laws of the Member States relating to analytical, pharmaco-toxicological and clinical standards and protocols in respect of the testing of veterinary medicinal products
Article 228 proceedings are continuing.
Progress is being made. Legislative steps have been taken. The order transposing Directive 93/40/EEC should be adopted in the spring of 2001.

Judgment given on 22/10/98, Case C-184/96
Preparations based on foie gras
A decree incorporating a mutual recognition clause into French legislation on foie gras was published in the French *Journal Officiel* on 21 December 2000. The case will be terminated very soon.

Judgment given on 18/3/99, Case C-166/97
Failure to classify an area of the Seine Estuary as an SPA and incomplete protection measures
Progress is being made.
Measures have been taken to implement the judgment and are gradually being put into effect.

Judgment given on 19/5/99, Case C-225/97
Incorrect transposal of Council Directive 92/13/EEC on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (review procedures)
Article 228 proceedings have been commenced.

Judgment given on 8/7/99, Case C-354/98
Failure to notify national measures transposing Directive 96/97/EC amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes
Article 228 proceedings are continuing.

Judgment given on 25/11/99, Case C-96/98
Deterioration of the Marais Poitevin
Article 228 proceedings have been commenced.

Judgment given on 16/12/99, Case C-239/98
Incorrect transposal of Council Directives 92/49/EEC and 92/96/EEC on direct assurance other than life assurance and direct life assurance (third insurance Directives)
Article 228 proceedings have been commenced and are continuing.
The Senate has adopted a bill at first reading. The deadline for application by mutual societies is still 1 January 2003, even though the Directives should have been incorporated into French law in 1994.

Judgment given on 15/2/00, Case C-34/98
Social contribution to reimbursement of the social debt - frontier workers
Article 228 proceedings have been commenced.

Judgment given on 15/2/00, Case C-169/98
Application of general social security contribution to frontier workers
Article 228 proceedings have been commenced.

Judgment given on 23/3/00, Case C-327/99
Failure to notify national measures implementing Council Directive 93/15/EEC on the harmonisation of the provisions relating to the placing on the market and supervision of explosives for civil uses
A draft decree sent by the French authorities is being examined by the Commission.

Judgment given on 6/4/00, Case C-256/98
Failure to notify national measures transposing Council Directive 92/43/EEC on the conservation of natural habitats and wild fauna and flora
Article 228 proceedings have been commenced and are continuing.

Judgment given on 15/5/00, Case C-296/98
Incompatibility of French insurance code with the "life" and "non-life" Directives
Article 228 proceedings have been commenced.
The French authorities have notified draft legislation. The Commission is awaiting its adoption.

Judgment given on 18/5/00, Case C-45/99
Failure to notify measures transposing Council Directive 94/33/EC on the protection of young people at work
The Commission has contacted the French authorities to ascertain what measures are planned to comply with the Court's judgment.

Judgment given on 8/6/00, Case C-46/99
Failure to notify measures transposing Council Directive 93/104/EC concerning certain aspects of the organisation of working time
Article 228 proceedings have been commenced.

Judgment given on 13/7/00, Case C-160/99
Maritime cabotage
The Commission has contacted the French authorities to ascertain what measures are planned to comply with the Court's judgment.
The Commission is examining draft legislation sent by the French authorities on 11 December 2000.

Judgment given on 12/9/00, Case C-276/97
Failure to levy VAT on motorway tolls
The Commission has contacted the French authorities to ascertain what measures are planned to comply with the Court's judgment.

Judgment given on 26/9/00, Case C-225/98
Public works contracts - school buildings in the Nord-Pas-de-Calais Region
The Commission will shortly be contacting the French authorities to ascertain what measures are planned to comply with the Court's judgment.

Judgment given on 26/9/00, Case C-23/99
Seizure of spare parts in transit - protection of designs - counterfeiting
The Commission has contacted the French authorities to ascertain what measures are planned to comply with the Court's judgment.
Progress is being made.

Judgment given on 5/10/00, Case C-16/98
Public works contracts - MPTSE - SDE - Vendée
The Commission is examining the case file to determine whether the Court's judgment requires implementing measures.

Judgment given on 23/11/00, Case C-319/99
Failure to notify national measures transposing Directive 95/47/EC of the European Parliament and of the Council on the use of standards for the transmission of television signals
Recent judgment.

Judgment given on 23/11/00, Case C-320/99
Failure to notify national measures transposing Directive 97/68/EC of the European Parliament and of the Council on measures against the emission of gaseous and particulate pollutants from internal combustion engines to be installed in non-road mobile machinery
Recent judgment.

Judgment given on 7/12/00, Case C-374/98
Failure to classify a site as an SPA and inadequate conservation measures at Vingrau and Tautavel (Pyrénées Orientales)
The Commission has contacted the French authorities to ascertain what measures are planned to comply with the Court's judgment.

Judgment given on 7/12/00, Case C-38/99
Opening and closing dates for hunting that are incompatible with the requirements of Council Directive 79/409/EEC on the conservation of wild birds
Recent judgment.

Judgment given on 14/12/00, Case C-55/99
Compulsory registration with a medicinal products agency of reagents intended for laboratories performing medical biology analyses
Recent judgment.

Ireland

Judgment given on 21/9/99, Case C-392/96
Non-conformity of Irish legislation with various provisions of Council Directive 85/337/EEC on the assessment of the effects of certain public or private projects on the environment
Article 228 proceedings have been commenced.
The Irish authorities' reply is being studied by the Commission.

Judgment given on 12/10/99, Case C-213/98
Failure to notify national measures transposing Directive 92/100/EEC on rental right and lending right and on certain rights related to copyright in the field of intellectual property
Progress is being made.
According to informal contacts with the Member State, the Irish parliament has adopted the Copyright and Related Rights Bill.
The Commission is now awaiting signature of the Commencement Order and official notification of these legislative measures.

Judgment given on 25/11/99, Case C-212/98
Failure to notify national measures transposing Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission
According to informal contacts with the Member State, the Irish parliament has adopted the Copyright and Related Rights Bill.
The Commission is now awaiting signature of the Commencement Order and official notification of these legislative measures.

Judgment given on 8/6/00, Case C-190/99
Failure to notify national measures transposing Council Directive 96/43/EC amending and consolidating Directive 85/73/EEC on the financing of veterinary inspections and controls on live animals and certain animal products
The Irish authorities have adopted legislation implementing the Court judgment. The case will be terminated very soon.

Judgment given on 12/9/00, Case C-358/97
Failure to levy VAT on tolls on roads and bridges
The Commission has contacted the Irish authorities to ascertain what measures are planned to comply with the Court's judgment.

Judgment given on 26/9/00, Case C-408/99
Failure to notify national measures transposing Council Directive 94/55/EC on the transport of dangerous goods by road and Directive 96/86 adapting that Directive to technical progress
The Commission has contacted the Irish authorities to ascertain what measures are planned to comply with the Court's judgment.

Judgment given on 14/12/00, Case C-347/99
Failure to notify national measures transposing Council Directive 95/50/EC on uniform procedures for checks on the transport of dangerous goods by road
Recent judgment.

Italy

Judgment given on 1/6/95, Case C-40/93
Admission to the profession of dentist
The Italian authorities have submitted a draft decree organising the aptitude test. The Commission is awaiting a detailed report on the conduct of this test and on the adoption of the SLIM Directive.

Judgment given on 29/2/96, Case C-307/94
Failure to notify measures transposing the Council Directive coordinating legislation relating to certain activities of pharmacists
Progress is being made. Following the commencement of Article 228 proceedings and discussions with the Member State, the remaining difficulties are in the process of being resolved in conjunction with the amendments to the above Directive, which are expected to be adopted shortly.

Judgment given on 29/1/98, Case C-280/95
Failure to comply with Decision 93/496/EEC of 9 June 1993 on the obligation to recover tax aid granted to professional road hauliers for 1992
A bill has been laid before the Italian parliament. The Commission has yet to be notified of its adoption. Article 228 proceedings have been commenced.

Judgment given on 1/10/98, Case C-285/96
Incorrect application of Council Directive 76/464/EEC on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community (Article 7: pollution reduction programmes)
The Italian authorities have submitted to the Commission a set of measures designed to give effect to the Court's judgment, and these are being examined.

Judgment given on 25/3/99, Case C-112/97
Failure to allow the installation of gas appliances which comply with 90/396/EEC
Following the commencement of Article 228 proceedings, the Italian authorities have notified new regulations.
The criteria which the new regulations lay down for the size of the aperture for ventilation in premises where the heaters are to be installed are deemed to be disproportionate and likely to raise obstacles to the commissioning of such appliances. An additional letter of formal notice has therefore been sent to the Member State. The Commission is in the process of examining its replies.

Judgment given on 9/11/99, Case C-365/97
Waste, San Rocco valley
In November the Italian authorities sent an extensive case file, which is being examined by the Commission.

Judgment given on 11/11/99, Case C-315/98

Failure to notify national measures transposing Council Directive 95/21/EC concerning the enforcement, in respect of shipping using Community ports and sailing in the waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and shipboard living and working conditions

Since the Commission has not received the measures announced by the Italian authorities, the case is to be referred to the Court under Article 228(2) of the Treaty, accompanied by a request for imposition of a penalty payment.

Judgment given on 9/3/00, Case C-358/98

Legislative barriers to the freedom to provide cleaning services

Article 228 proceedings have been commenced.

The Italian authorities have submitted measures designed to comply with the Court's judgment. The case will therefore be terminated soon.

Judgment given on 9/3/00, Case C-386/98

Failure to notify national measures implementing Council Directive 93/104/EC concerning certain aspects of the organisation of working time

The Commission has contacted the Italian authorities to ascertain what measures are planned to comply with the Court's judgment. Given the absence of any draft measures, Article 228 proceedings have been commenced.

Judgment given on 23/5/00, Case C-58/99

Restrictions on foreign investments in privatised companies

The Commission has contacted the Italian authorities to ascertain what measures are planned to comply with the Court's judgment.

Their reply is being examined.

Judgment given on 25/5/00, Case C-424/98

Incorrect application of Directives on the right of residence of retired persons, students and persons not exercising an occupational activity

The Commission is examining the compatibility of Legislative Decree No 358 amending Decree-Law No 470 transposing Directives 90/364/EEC, 90/365/EEC and 90/366/EEC.

Judgment given on 8/6/00, Case C-264/99

Legislative barriers to the activities of hauliers

The Commission has contacted the Italian authorities to ascertain what measures are planned to comply with the Court's judgment.

Judgment given on 30/11/00, Case C-422/99

Failure to notify national measures transposing Directive 97/51/EC amending Council Directive 90/387/EEC on the establishment of the internal market for telecommunications services through the implementation of open network provision

Recent judgment.

Judgment given on 7/12/00, Case C-395/99
Failure to notify national measures transposing Directive 96/51/EC amending Council Directive 70/524/EEC concerning additives in feedingstuffs, and Council Directive 96/93/EC on the certification of animals and animal products
Recent judgment.

Judgment given on 7/12/00, Case C-423/99
Failure to notify national provisions transposing Directive 98/10/EC of the European Parliament and of the Council on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment
Recent judgment.

Luxembourg

Judgment given on 11/6/98, Case C-206/96
Absence of pollution-reduction programmes regarding 99 substances on list II in the Annex to Council Directive 76/464/EEC on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community
The Luxembourg authorities have sent an extensive progress report on the measures being taken to implement the judgment, which is being examined by the Commission.

Judgment given on 14/9/99, Case C-202/98
Cargo-sharing arrangements in the bilateral agreement between Luxembourg and the MCWCS countries
Article 228 proceedings are continuing.

Judgment given on 21/10/99, Case C-430/98
Failure to notify national measures transposing Council Directive 94/45/EC on the establishment of a European Works Council for the purposes of informing and consulting employees
The Luxembourg authorities have notified implementing measures, which are being examined by the Commission.

Judgment given on 16/12/99, Case C-47/99
Failure to notify measures transposing Council Directive 94/33/EEC on the protection of young people at work
The Commission contacted the Luxembourg authorities to ascertain what measures were planned to comply with the Court's judgment. They have submitted a precise timetable for the adoption of legislative measures. The Commission is awaiting their adoption.

Judgment given on 16/12/99, Case C-138/99
Failure to notify national measures transposing Council Directive 94/56/EC establishing the fundamental principles governing the investigation of civil aviation accidents and incidents
Article 228 proceedings have been commenced.

Judgment given on 13/4/00, Case C-348/99
Failure to notify measures transposing Directive 96/9/EC of the European Parliament and of the Council on the legal protection of databases
The Commission has contacted the Luxembourg authorities to ascertain what measures are planned to comply with the Court's judgment.

Netherlands

Judgment given on 19/5/98, Case C-3/96
Failure to comply with the obligation to designate special protection areas as required by Directive 79/409/EEC on the conservation of wild birds
Progress is being made.

Austria

Judgment given on 26/9/00, Case C-205/98

Increase in tolls on the Brenner motorway

The Commission has contacted the Austrian authorities to ascertain what measures are planned to comply with the Court's judgment.

Portugal

Judgment given on 21/1/99, Case C-150/97
Assessment of certain public and private projects on the environment
Progress is being made.
The last implementing measures will be published shortly.

Judgment given on 4/7/00, Case C-62/98
Cargo-sharing arrangements in bilateral agreements between Portugal and the MCWCS countries
The Commission has contacted the Portuguese authorities to ascertain what measures are planned to comply with the Court's judgment.

Judgment given on 4/7/00, Case C-84/98
Cargo-sharing arrangements in the bilateral agreement between Portugal and Yugoslavia
The Commission has contacted the Portuguese authorities to ascertain what measures are planned to comply with the Court's judgment.

Judgment given on 13/7/00, Case C-261/98
Incorrect application of Council Directive 76/464/EEC on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community (Article 7: pollution reduction programmes)
The Portuguese authorities have sent reports on the identification and monitoring of 99 substances on list II in the Annex to the above Directive. The Commission has had to study this information and conduct additional enquiries.

Judgment given on 12/12/00, Case C-435/99
Failure to submit information required under Article 2(1) of Council Directive 91/692/EEC standardising and rationalising reports on the implementation of certain Directives relating to the environment
Recent judgment.

United Kingdom

Judgment given on 14/7/93, Case C-56/90
Quality of waters at Blackpool and Southport
The case is to be referred to the Court under Article 228(2) of the EC Treaty, accompanied by a request for imposition of a penalty payment.

Judgment given on 12/9/00, Case C-359/97
Failure to levy VAT on tolls on roads and bridges
The Commission has contacted the United Kingdom authorities to ascertain what measures are planned to comply with the Court's judgment.

Judgment given on 7/12/00, Case C-69/99
Non-conformity of legislation on the protection of waters against pollution caused by nitrates from agricultural sources
Recent judgment.

ANNEX VI

APPLICATION OF COMMUNITY LAW BY NATIONAL COURTS: A SURVEY

1. Application of Article 234 of the EC Treaty[1]

In 2000, 224 requests for preliminary rulings were made by the national courts to the Court of Justice of the European Communities (hereinafter referred to as "the Court of Justice") in cases where difficulties arose in the interpretation of Community law or where there were doubts as to the validity of Community instruments.

When such references are recorded at the Court of Justice Registry, they are published in full in the *Official Journal of the European Communities*. The table below shows the number of references from each Member State over the last 11 years.[2]

1. NUMBER OF REFERENCES PER MEMBER STATE

	1.1 Year										
	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
Belgium	17	17	16	22	19	14	30	19	12	13	15
Denmark	5	2	3	7	4	8	4	7	7	3	3
Germany	34	50	62	57	44	51	66	46	49	49	47
Greece	2	2	1	5		10	4	2	5	3	3
Spain	6	4	5	7	13	10	6	9	55	4	5
France	21	24	15	22	36	43	24	10	16	17	12
Ireland	4	1		1	2	3		1	3	2	2
Italy	25	18	22	24	46	58	70	50	39	43	50
Luxembourg	4	2	1	1	1	2	2	3	2	4	
Netherlands	9	17	18	43	13	19	10	24	21	23	12
Austria						2	6	35	16	56	31
Portugal	2	3	1	3	1	5	6	2	7	7	8
Finland							3	6	2	4	5
Sweden						6	4	7	6	5	4
United Kingdom	12	13	15	12	24	20	21	18	24	22	26
Benelux											1
Total	**142**	**186**	**162**	**204**	**203**	**251**	**256**	**239**	**264**	**255**	**224**

After an increase in the number of cases following the 1995 accessions, the number of references has remained relatively stable. The Benelux Court of Justice has for the first time asked the European Court of Justice for a preliminary ruling, in a case concerning trademarks.[3] In *Parfums Christian Dior*[4] the European Court ruled that, since the Benelux

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1 The Commission will here follow the practice of the Court of Justice in its citation of the articles of the Treaty establishing the European Community. Where there is a reference to the Treaty in its form before the entry into force of the Treaty of Amsterdam of 1 May 1999 the number of the article is followed by the words "of the EC Treaty"; where there is a reference to the Treaty in its form after the entry into force of the Treaty of Amsterdam of 1 May 1999, the number of the article is followed by the words "EC".

2 The last four reports were published in OJ C 332, 3.11.1997, p.198, OJ C 250, 10.8.1998, p.195, OJ C 354, 7.12.1999, p.182 and OJ C 192, 30.1.2001, p.192.

3 Case C-265/00 *Campina Melkunie* v *Bureau Benelux des Marques*, pending (OJ C 247, 26.8.2000, p. 25).

4 [1997] ECR I-6013.

Court of Justice has the task of ensuring that the legal rules common to the three Benelux States are applied uniformly and the proceeding before it forms a step in the proceedings before the national courts, it must be treated as a national court for the purposes of Article 234 EC.

Except for the Luxembourg courts, the courts of all the Member States referred questions to the Court of Justice. Those 224 cases constituted 44.5% of the 503 cases brought before the Court of Justice in 2000. The table below shows the number of references from courts of final instance in each Member State and identifies the referring courts.

Origin and number of references by courts of final instance in 2000, by Member State

Belgium	Cour de cassation	1
Denmark	Højesteret	1
Germany	Bundesgerichtshof Bundesverwaltungsgericht Bundesfinanzhof Bundessozialgericht	7 4 5 1
Greece		
Spain	Tribunal Supremo	2
France	Cour de cassation Conseil d'État	3 1
Ireland	Supreme Court	1
1.1.1 Italy	Corte suprema di cassazione Consiglio di Stato	2 4
Luxembourg		
Netherlands	Raad van State Hoge Raad	5 6
Austria	Oberster Gerichtshof Bundesvergabeamt Verwaltungsgerichtshof Vergabekontrollsenat Verfassungsgerichtshof	7 1 4 2 1
Portugal	Supremo Tribunal Administrativo	5
Finland	Korkein Hallinto-oikeus	2
Sweden	Regeringsrätten	2
United Kingdom	Court of Appeal	4
(Benelux)	Gerechsthof/Cour de Justice	1

2. Significant decisions by national courts and the European Court of Human Rights

2.1. *Introduction*

This analysis reviews the account taken of Community law by national courts and the European Court of Human Rights. Unlike analyses undertaken in previous years, it is accordingly not restricted to the rulings of supreme courts; national courts at first instance are now called on to apply the relevant provisions of Community law.

The Commission has again had access to data compiled by the Research and Documentation Directorate and Computing Division of the Court of Justice; nevertheless, it is the Commission that has drawn up this report. Each year, some 1 200

judgments relating to Community law come to the attention of the Research and Documentation Directorate.

2.2. *The research*

Research was carried out on judgments first delivered or published in 1999 concerning the following questions:

a. (i) Were there cases where decisions against which there was no appeal were taken without a reference for a preliminary ruling even though they turned on a point of Community law whose interpretation was less than perfectly obvious?

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

b. Were there cases where courts, contrary to the rule in Case 314/85 *Foto-Frost*,[5] declared an act of a Community institution to be invalid?

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

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

2.3. Question 1

2.3.1. Failure to make a reference

In **Germany**, the Federal Administrative Court (*Bundesverwaltungsgericht*) delivered a ruling,[6] without making a reference to the Court of Justice, that the German rules[7] requiring a prior authorisation for all German male nationals aged between 17 and 25 intending to leave Germany for a period exceeding three months were compatible with Community law. Proceedings had been instituted before the German court by a German national studying for a doctorate at Oxford University who had been ordered, after the age of 25, to perform civilian service instead of normal military national service. The student had begun his studies without requesting the prior authorisation. Under the German rules, persons failing to meet the requirement of obtaining a prior authorisation may be ordered to perform military service or alternative civilian service after the age of 25.[8] The German court ruled that the prior authorisation did not come within the scope of Article 8a of the EC Treaty (Article 18 EC), which confers upon citizens of the Union the right to move freely within the territory of the Member States, since the restriction in question involved defence policy. It held that, under the Treaty of Maastricht that applied at the time of the order, the common foreign and security policy, and in particular the defence policy, had not yet been integrated into the European Communities' array of supranational powers, and cooperation remained inter-government. It concluded that national security and defence issues, and those relating to the operation and structure of the armed forces, fell within the powers of the Member States. Moreover, it pointed out that, if the applicant's interpretation of Article 8a of the EC Treaty were upheld, no sanctions would be applicable to nationals subject to military service, who would be able to avoid their national service obligations by moving to another Member State. It considered that its approach was in accordance with the judgment

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5 [1987] ECR 4199.

6 Bundesverwaltungsgericht, decision of 10 November 1999, 6 C 30/98, Entscheidungen des Bundesverwaltungsgerichts 110, 40.

7 See Article 3(2) of the National Service Law (Wehrpflichtgesetz).

8 See indent 3 of Article 24(1) of the Alternative Civilian Service Act (Zivildienstgesetz).

given by the Court of Justice in *Sirdar*[9] considering that that case related solely to women's access to the armed forces and was not comparable to the authorisation of periods of residence abroad in order to ensure performance of the general obligation of military service. Even supposing the obligation to obtain an authorisation came within the scope of Article 8a of the Treaty, it would be justified on the grounds of public order, public security and public health referred to in Article 48(3) and 56(1) of the EC Treaty (now Articles 39(3) EC and 46(1) EC), which constitute limitations and conditions for the purposes of Article 8a of the Treaty. The German court further considered that the requirement of an authorisation was not contrary to the first paragraph of Article 6 of the EC Treaty (Article 12 EC) since the military service obligation did not fall within the scope of the Treaty and different treatment of men subject to military service compared to women, foreigners and persons unfit for military service was justified on objective grounds. Lastly, it held that a reference to the Court of Justice was not compulsory since the correct application of Community law was so obvious that no reasonable doubt subsisted.

In **France**, pharmaceutical companies brought an action before the Council of State (*Conseil d'État*), sitting as a court of first and last instance, arguing that orders altering the price of proprietary medicinal products were *ultra vires*. In its ruling of 28 July 2000[10] the French court applied the doctrine of the *acte clair* and held that it was unnecessary to obtain a preliminary ruling from the Court of Justice. As to the substance of the case, the applicants argued that the arrangements determining prices established by Article L.162-38 of the Public Health Code, the basis for adopting the contested orders, were incompatible with, *inter alia*, Article 2, read in conjunction with Article 6, of Directive 89/105/EEC (determination of prices of medicinal products).[11] More particularly, the applicant companies challenged the authorities' right to determine at all times the price of medicinal products eligible for reimbursement without reference to any prior application by pharmaceutical companies. The government commissioner, however, emphasised in his opinion that the French court had in the past been "somewhat embarrassed" by the application of Article L.162-38 of the Public Health Code and consequently suggested making a reference to the Court of Justice on the issue of compatibility. Nevertheless, the *Conseil d'État* decided, on the basis of the limited scope of the directive, that the argument based on the incompatibility of Article L.162-38 of the Code of Public Health with the clear objectives of Article 2 of the Community directive could be dismissed without the need for a preliminary ruling from the Court of Justice. It stated that "neither Article 2 of Directive 89/105... nor Article 6 requires that the decision to alter the retail price of a proprietary medicinal product included in the list of medicinal products covered by the health insurance systems should state the reasons on which it is based or that there should be a procedure enabling the companies in question to state their views before the decision is adopted".

Moreover, French courts held on two occasions, in cases concerning the direct effect of international agreements concluded between the Communities and third countries, that it was unnecessary to refer a preliminary question to the Court of Justice.

The Administrative Court of Appeal (*Cour administrative d'appel*), Nancy, on 3 February 2000,[12] annulled the judgment of the Administrative Court (*Tribunal*

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9 Case C-273/97 [1999] ECR I-7403. The Bundesverwaltungsgericht's judgment was given before 11 January 2000, when the Court of Justice gave its judgment in Case C-285/98 *Kreil* [2000] ECR I-69.

10 Conseil d'État, 28 July 2000 *Schering-Plough*, Application No 205710.

11 Council Directive 89/105/EEC of 21 December 1988 relating to the transparency of measures regulating the prices of medicinal products for human use and their inclusion in the scope of national health insurance systems (OJ L 40, 11.2.1989, p. 8).

12 Cour administrative d'appel de Nancy, 1ère chambre, 3 February 2000, *Lilia Malaja*, Droit administratif 2000, No 208.

administratif), Strasbourg, dismissing an application by a professional basketball player of Polish nationality seeking the annulment of the decision of the French Basketball Federation refusing to treat her as a national of a country of the European Economic Area for the purposes of participating in official competitions.[13] The Nancy court, guided by the *acte clair* doctrine, refused a request to refer a preliminary question to the Court of Justice. It began by upholding the Strasbourg court's judgment concerning the direct effect of Article 37 of the Europe Agreement between the European Communities and Poland, which states "subject to the conditions and modalities applicable in each Member State, the treatment accorded to workers of Polish nationality, legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals".

However, although the court of first instance considered that the applicant could not rely on that provision because her contract of employment had not been approved by the French Basketball Federation, as required by its rules, the appeal court ruled that "however, such a condition cannot legally have the object or effect of disapplying the provisions of the Labour Code relating to the conclusion and effects of the contract of employment, in relation to which the Federation is, furthermore, a third party, and thus by withholding approval, preventing the person entitled under the contract from being considered 'legally employed' within the meaning of Article 37 of the Association Agreement; ... [the applicant], who is entitled under a contract of employment which, it is common ground, is valid under the Labour Code and holds a valid residence permit, must consequently be considered 'legally employed' in France at the date of the contested decision; consequently, if the French Basketball Federation refused to grant the applicant ... authorisation to participate in women's league matches, it would be in breach of the principle of non-discrimination laid down by Article 37 of the Agreement...".

On the other hand, the Administrative Court of Appeal (*Cour administrative d'appel*), Paris, in a judgment given on 1 February 2000,[14] did not acknowledge the direct effect of Article 5 of the Fourth Lomé Convention, under which the parties undertook to eliminate all forms of discrimination based on, *inter alia*, nationality. That provision was relied upon by the widow of a Senegal national in receipt of a military retirement pension who was refused an increase in the pension on the ground that, under a 1959 Act, the increase should only be granted to the French successors of French public servants. The Paris court ruled that Article 5 was drafted too generally to apply directly to former state servants or their successors. However, a number of judgments delivered on the same date uphold similar applications made by Mali and Senegal nationals based on Article 14 of the European Convention on Human Rights.

In **Italy,** in a dispute turning on section 1 of Act No 1369 of 23 October 1960, which absolutely prohibits intermediaries and representatives in labour relations, the Court of Cassation (*Corte di cassazione*) declined, in a judgment of 1 February 2000,[15] to make a reference for a preliminary ruling to the Court of Justice on the question whether Articles 59 and 62 of the EC Treaty (now Articles 49 and 50 EC) and Article 62 (repealed by the Treaty of Amsterdam) exclude that prohibition. The appellants, workers formally employed under a contract of employment with a cooperative of porters but actually providing their services for another employer, the Ente Ferrovie dello Stato (the Italian national railway company), initiated proceedings before the labour courts seeking

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13 Tribunal administratif de Strasbourg, 27 January 1999, *Lilia Malaja*, Nos 98-6193 and 98-6194 (IA/18597-A).

14 Cour administrative d'appel de Paris, judgment of 1 February 2000, *Bangaly*, Revue française de droit administratif, 2000, p. 693.

15 Corte di cassazione, Sezione lavoro, 1 February 2000, No 1105, Il massimario del Foro italiano, 2000, col. 112-113.

a declaration that they had been employed on an indeterminate basis by the Ente Ferrovie from the date when their *de facto* employment began and an order to the Ente Ferrovie to pay the difference in salary between that of the fictitious employment and the actual employment. The Ente Ferrovie, which was unsuccessful in the courts of first instance and appeal, took proceedings before the *Corte di cassazione* relying on, *inter alia*, the incompatibility of the national legislation with the EC Treaty.

The *Corte di cassazione* first of all recalled the conditions to be met if a reference for a preliminary ruling is made, namely the question referred by the national court should concern the interpretation of Community provisions, there should be serious doubt as to their interpretation, scope or purpose and the outcome of the main case should depend on the reply given by the Court of Justice to the preliminary question referred by the national court. In those circumstances, the Italian court declined to make a reference to the Court of Justice since it considered that the conditions were not met. It considered that the actions of the Italian legislature concerning the employment of labour through fictitious posts derived from its discretionary power whose exercise was restricted to regularising unlawful situations in a broader context, i.e. protecting the economic and legal position of employed persons. Further, it considered that the prohibition in section 1 of Act No 1369 did not affect legal positions protected by Community law and consequently was not incompatible with the Community provisions that were invoked.

The *Corte di cassazione* also gave judgment[16] in a case concerning a consumer credit contract but declined to make a reference for a preliminary ruling to the Court of Justice on the scope of certain provisions of Legislative Decree No 50 of 15 January 1992, which transposes into Italian law Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises.[17] The main dispute was between a finance company and a customer who had subscribed a consumer credit contract to obtain the money needed for his daughter to qualify as a beautician. The contract was signed on the premises of the institution providing training. In challenging the order obtained by the finance company to make payment in order to reimburse the sums paid directly to the institution, the appellant claimed first of all that the trial court had no territorial jurisdiction under Article 12 of Legislative Decree No 50 of 15 January 1952, which lays down that the court with territorial jurisdiction is that of the place of residence or permanent residence of the consumer.

The finance company appealed to the *Corte di cassazione,* arguing that those rules did not apply to the case since the contract had not been concluded away from business premises but on the premises of the institution which was acting for and on behalf of the finance company. It also relied on Article 1(a) of Legislative Decree No 50, which applies to contracts signed, *inter alia*, on premises where the consumer is, even temporarily, for the purposes of study, work or therapy. Since the other party had signed the contract in the interest of his daughter, not to finance his own studies, the appellant argued that he was not covered by the Legislative Decree. Although those issues concern new elements, i.e. the meaning of "away from business premises" and "consumer" as described in the circumstances of the case, and the situation envisaged in Article 1(a) of the Legislative Decree is not covered by Article 1 of Directive 85/577/EEC, the *Corte di cassazione* did not consider making a reference for a preliminary ruling to the Court of Justice. It held that the rules in the Legislative Decree, taken as a whole, permitted a sufficiently clear response to be given to the questions. It considered that Legislative Decree No 50 did not apply to the case before it, partly because Article 12 was not applicable unless the dispute concerned the

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16 Corte di cassazione, Sezione III civile, 4 January 2000, No 372, Il massimario del Foro italiano, 2000, col. 32.

17 Council Directive 85/577/EEC of 20 December 1985 (OJ L 372, 31.12.1985, p. 31).

consumer's right to terminate a contract while the case concerned an application to rescind the contract through failure to perform, and partly because Article1(a) of the Legislative Decree referred only to the consumer, not to members of his family, and consequently the reasons for the studies concerned by that provision could not be invoked in the case. Nevertheless, in a similar situation two preliminary questions were referred to the Court of Justice by the Magistrates' Court (*Giudice di Pace*), Viadana.[18]

In **the Netherlands**, the Supreme Court (*Hoge Raad*) delivered a ruling concerning value added tax without making a reference for a preliminary ruling to the Court of Justice; on 25 July 2000[19] it ruled that it was necessary to treat as a taxable person carrying out economic activities for the purposes of Article 4 of the Sixth VAT Directive[20] a limited partnership that was renting medical equipment to its limited partner, a hospital, although the equipment had been purchased entirely with capital provided by the hospital and the hospital had chosen the type of equipment, specified the place where it would be installed and was paying the insurance for its use and assuming liability for that use. The Dutch court held that there was no reasonable doubt whether the partnership was carrying out activities involving the exploitation of property for the purpose of obtaining income from it on a continuing basis, defined as "economic activities" in Article 4(2) of the Directive. The partnership should not be considered identical with the hospital and it was entitled to a refund of the VAT paid on the purchase of the equipment.

In **Sweden**, the Supreme Administrative Court (*Regeringsrätten*) ruled on 10 April 2000[21] that it was not compelled by the third paragraph of Article 234 EC (formerly the third paragraph of Article 177 of the EC Treaty) to make a reference for a preliminary ruling to the Court of Justice before dismissing an appeal on the point whether Swedish legislation imposing a tax on income from advertising[22] is contrary to Article 33 of the Sixth VAT Directive,[23] which prohibits Member States from maintaining or introducing taxes, duties or charges which cannot be characterised as turnover taxes, and to Articles 3(1)(g) and 10 EC (formerly Article 5 of the EC Treaty). The main case concerned an enterprise publishing and distributing a free computer magazine financed from advertising revenue. Under Swedish legislation, the publisher is liable to a tax on income from the sale of advertising space but that legislation applies only to advertising intended to be published in Sweden.

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18 Cases C-541/99 *Cape* v *Idealservice* and C-542/99 *Idealservice* v *Omai,* pending (OJ C 47, 19.2.1999, p.26).

19 *Hoge Raad*, judgment of 25 July 2000, *Beslissingen in belastingzaken*, 2000, 307.

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

21 Regeringsrätten, 10 April 2000, RÅ 1999-630.

22 Advertising and Publicity Traxation Act (1972: 266).

23 See note No 20.

The *Regeringsrätten* referred to a ruling given in 1999[24] in which it had considered this issue in depth; it held that all turnover taxes did not necessarily constitute a tax prohibited under Article 33 of the Directive. The 1999 ruling was based on the judgment of the Court of Justice in *Denkavit,*[25] where it was held that the purpose of Article 33 of the Directive is to prevent Member States from introducing or maintaining taxes, duties or charges which are levied on the movement of goods and services in a way comparable to VAT and would jeopardise the functioning of the common system of VAT, and must in any event be regarded as taxation of that kind if they exhibit the essential characteristics of VAT even though they do not resemble it in every respect. In its 1999 judgment the Swedish court ruled that the tax on advertising imposed by Swedish legislation was not of a general nature, was not proportionate to the amount involved in the advertising, was not levied at each stage of production or distribution and was not calculated on the value added. It therefore held that it did not constitute value added tax for the purposes of Article 33 of the Directive.

The *Regeringsrätten* considered that in the case before it there were no grounds for departing from its previous ruling or for making a reference for a preliminary ruling. The appellant, relying on Article 3(1)(g) EC read in conjunction with Article 10 EC, argued that, since the magazines were principally intended for the foreign market and were thus exempt from taxation, they enjoyed a competitive advantage over magazines intended for the Swedish market. He considered that, in view of Member States' duty to cooperate under Article 10 EC, Sweden was not entitled to maintain the tax. The Swedish court held that those arguments did not establish that the Swedish legislation was contrary to the provisions relied upon. Moreover, it dismissed the appellant's request for a preliminary ruling without, apparently, stating the reasons why it did so. And on the same date the *Regeringsrätten* likewise dismissed another appeal based on similar circumstances and arguments.[26]

2.3.2 Relevant judgments in the context of Article 234 EC

In **Germany**, the Federal Constitutional Court (*Bundesverfassungsgericht*)[27] annulled a ruling of the Federal Administrative Court (*Bundesverwaltungsgericht*) on the grounds of infringement of the constitutional principle that no-one may be deprived of the protection of the courts established by law (second sentence of Article 101(1) of the Basic Law (*Grundgesetz*)) since the latter court had declined to make a reference to the Court of Justice.

An appeal was lodged with the *Bundesverfassungsgericht* by a female approved medical practitioner who wished to obtain the right to practise as a fund practitioner in Hamburg but had been refused the title of "general practitioner" by the Professional Association of Physicians of the Municipality of Hamburg on the ground that she had not worked full time for six months with a fund practitioner. Under the Basic Law, the *Länder* have jurisdiction in this area and in the *Land* of Hamburg Directives 86/457 (medical training)[28] and 93/16 (mutual recognition of diplomas)[29] were transposed in such a way that the Association has since 1990 required as a condition of granting the title full-time professional practice of at least six months in an approved clinic supplemented by six months' full-time practice in the surgery of an approved fund general practitioner or of a practitioner considered equivalent.

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24 Regeringsrätten, 26 February 2000, RÅ 1999-8.

25 Case C-200/90 [1992] ECR I-2217.

26 Regeringsrätten, 10 April 2000, RÅ 1999-631.

27 Bundesverfassungsgericht, order of 9 January 2001, 1 BvR 1036/99, http://www.bverfg.de.

28 Council Directive 86/457/EEC of 15 September 1986 on specific training in general medical practice (OJ L 267, 19.9.1986, p. 26).

29 Council Directive 93/16/EEC of 5 April 1993 to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications (OJ L 165, 7.7.1993, p. 1).

The appellant, who fulfilled the first condition, had worked for a year in surgery of a fund practitioner but only part time.

The doctor's application to the court of first instance and her appeal were dismissed as was the subsequent appeal to the *Bundesverwaltungsgericht*,[30] on the ground that Community law prescribes a condition of a period of full-time training of at least six months in the surgery of a general practitioner, which the appellant had not fulfilled. The Court of Justice had not in fact ruled on the question whether such requirements were contrary to the prohibition of indirect gender discrimination, but, even if the prohibition, which is incorporated in Directive 76/207 (equal treatment for men and women concerning employment),[31] were applicable in the present case, there was no reason to make a reference for a preliminary ruling to the Court of Justice; Community law itself, in Directives 86/457 and 93/16, laid down clearly and unequivocally that the training of a general practitioner must include training periods completed on a full-time basis. The *Bundesverwaltungsgericht* considered that, on the general principles that specific provisions prevail over general provisions and subsequent legislation prevails over earlier legislation, those Directives took precedence over Directive 76/207. Moreover, those Directives did not infringe either the principles of constitutional law or the fundamental rights of individuals.

Ruling with reference to its settled case-law,[32] the *Bundesverfassungsgericht* allowed the appeal on a point of constitutional law brought against that judgment. It took the view that the Court of Justice constitutes a court established by law within the meaning of the second sentence of Article 101(1) of the Basic Law and access to such a court of law has been withheld if a national court fails to fulfil its obligation to make a reference to the Court of Justice for a preliminary ruling. It held that there was an infringement of the obligation to make a reference if a court of final instance failed to comply with its obligations in this area. There is also an infringement where the Court of Justice has not given judgment on an issue of Community law that is liable to determine the outcome of a case or if its existing rulings do not fully deal with the issue. There is an infringement of the second sentence of Article 101(1) of the Basic Law if a court of competent jurisdiction of final instance exceeds its discretion in such cases to an unacceptable degree. There may be an infringement in particular where it is manifestly possible to take issue with the position adopted by that court on a question of Community law on which the outcome in the main case turns. Moreover, the *Bundesverfassungsgericht* considered that it could not conduct its review if it was not adequately acquainted with the reasons why the court of final instance ruling on the merits had declined to make a reference for a preliminary ruling to the Court of Justice. On those grounds, the *Bundesverfassungsgericht* held that the *Bundesverwaltungsgericht,* sitting as a court of final instance, had failed to an unacceptable degree to discharge its obligation to make a reference to the Court of Justice.

Moreover, the *Bundesverfassungsgericht* considered that the response of the *Bundesverwaltungsgericht* to the issue it had itself raised of the conflict between Community directives was unacceptable in the European legal area. The latter court had in fact determined the conflict between Directive 76/207, on the one hand, and Directives 86/457 and 93/16, on the other, without reference to the case-law of the Court of

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30 Bundesverwaltungsgericht, judgment of 18 February 1999, 3 C 10/98, Entscheidungen des Bundesverwaltungsgerichts 108, 289.

31 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ L 39, 14.2.1976, p. 40).

32 Bundesverfassungsgericht, order of 5 August 1998, 1BvR 264/98, Der Betrieb 1998, 1919; Zeitschrift für Wirtschaftsrecht 1998, 1728; Arbeit und Recht 1998, 465; Versicherungsrecht 1998, 1399; Europäische Zeitschrift für Wirtschaftsrecht 1998, 728; Neue Zeitschrift für Arbeitsrecht 1998, 1245; the order is cited in the Sixteenth annual report on monitoring the application of Community law.

Justice or to Community law, referring solely to criteria of German law. It had failed to refer to any judgment of the Court of Justice concerning conflicts between directives, although such rulings exist. It had failed to indicate the provisions of Community law under which it considered itself entitled to determined the conflict of rules on the basis of the principles of German law (the principles that specific provisions prevail over general provisions and subsequent legislation prevails over earlier legislation). Moreover, it had failed to set out the reasons for its judgment, which might have enabled the *Bundesverfassungsgericht* to carry out a review for the purposes of the second sentence of Article 101(1) of the Basic Law. The *Bundesverfassungsgericht* considered that a court that fails to obtain adequate information on Community law is in general in breach of the conditions on which it is compulsory to make a reference for a preliminary ruling.

Moreover, the *Bundesverfassungsgericht* considered that the *Bundesverwaltungsgericht* was also in breach of its obligation to make a reference for a preliminary ruling and of the second sentence of Article 101(1) of the Basic Law by failing to recognise that the principle of gender equality forms part of the fundamental principles of unwritten Community law that are recognised by the Court of Justice. The *Bundesverfassungsgericht* stated that the principle of equal treatment of men and women and the resultant prohibition of all direct or indirect gender discrimination form part of the fundamental general principles of the Community which have been developed by the Court of Justice as criteria that must be applied in the judicial review of action taken by Community institutions. The protection of the applicant's fundamental rights would be set at nought if the *Bundesverfassungsgericht* were unable, for want of jurisdiction, to carry out a substantive review of fundamental rights and if the Court of Justice were unable, by reason of a failure to make a reference for a preliminary ruling, to review Community secondary legislation in terms of the guarantees afforded by the fundamental rights developed by the Community.

Again in Germany, the Federal Court of Justice (*Bundesgerichtshof*) delivered a ruling on the question whether, if the point at issue in a case is whether national rules are contrary to the Basic Law and Community law, it should be referred first to the *Bundesverfassungsgericht* (Federal Constitutional Court) or direct to the Court of Justice. In that case an appeal was brought before the *Bundesgerichtshof* against a decision of the Federal Cartel Office (*Bundeskartelamt*) prohibiting the *Land* of Berlin from requiring that tenderers for public works contracts should comply with the minimum wage fixed by collective agreement applicable in the *Land*. The issue was whether the rules of the *Land* of Berlin were contrary to the Basic Law concerning the powers of the *Länder* and the fundamental freedom of association (*Koalitionsfreiheit*) permitting employers and employees to fix working conditions. The *Bundesgerichtshof* considered that there was doubt as to conformity with the rules on freedom to provide services in Article 59 of the EC Treaty (now Article 49 EC). Regarding the question of conformity with Community law, that court stated that it was not able itself to settle the issue, which would have to be referred to the Court of Justice. It also ruled that the case must first be referred to the *Bundesverfassungsgericht* for an initial ruling on the conformity of the rules with the Basic Law.[33]

In **France**, an application was made seeking the opinion of the Council of State (*Conseil d'État*) under Article 12 of Act No 87-1127 of 31 July 1987 on the interpretation of Article 141 EC (formerly Article 119 of the EC Treaty) and the provisions of Directive 79/7

[33] Bundesgerichtshof, order of 18 January 2000, KVR 23/98, Zeitschrift für Wirtschaftsrecht 2000, 426; Der Betrieb 2000, 465; Wettbewerb in Recht und Praxis 2000, 397; Neue Zeitschrift für Arbeitsrecht 2000, 327; Wertpapiermitteilungen 2000, 842; Juristenzeitung 2000, 514; Deutsche Verwaltungsblätter 2000, 1056; Zeitschrift für deutsches und internationales Baurecht 2000, 316; Zeitschrift für das gesamte öffentliche und private Baurecht 2000, 1736.

(equal treatment for men and women in matters of social security),[34] to which it responded with a decision of 4 February 2000[35] rejecting the application.

Under the French Code on civil and military retirement pensions, only women enjoy a direct claim to retirement rights if their spouse suffers from an incurable disability or disease preventing them from performing any kind of work. A claimant challenged a decision that he was not entitled under that provision on the basis that the French legislation was not compatible with Community law. The Administrative Court (*Tribunal administratif*) with jurisdiction to hear the case decided, as French law in fact empowers it, to refer the case to the *Conseil d'État*. That court found that the question of interpretation referred to it raised an issue identical to that in a case pending before it, *Griesmar*, [36] which concerned the premium for children, which, under the Code was granted only to women; it recalled that in that case it had made a reference to the Court of Justice to establish whether the term "pay" referred to in Article 119 of the EC Treaty (now Article 141 EC) must be interpreted as covering retirement pensions such as those granted under the French Code on civil and military retirement pensions or whether those pensions must be treated as social security benefits governed by Directive 79/7.

The *Conseil d'État* took the view that it was up to the *Tribunal administratif* to determine whether, having regard to those factors, it considered that its judgment depended on an additional request to the Court of Justice for a ruling as to whether Community law precluded a difference in treatment such as that established by the relevant provisions of the Code on civil and military retirement pensions. That court then in fact made a reference to the Court of Justice.[37]

In **Italy**, the *Corte di cassazione* delivered a ruling on the staying of proceedings pending the reply of the Court of Justice to questions that were relevant to the case. The District Court, Bologna (*Tribunale di Bologna*) had stayed proceedings under Article 295 of the Code of Civil Procedure since the outcome of the case turned on the interpretation of provisions of Community law on which the Court of Justice had already been asked to give a preliminary ruling. In adopting this course, the Bologna court did not consider it necessary itself to make a reference to the Court of Justice. In its ruling of 14 September 1999, the *Corte di cassazione* annulled the order staying the proceedings in that case.[38] That ruling involved an interpretation of Article 234 EC since the *Corte di cassazione* stated that a national court not being a court of last instance which considered that the outcome of a case before it involved a question of the interpretation of Community law must either refer that question to the Court of Justice and stay the proceedings or itself answer the question. On the other hand, a national court is not entitled to stay proceedings until the Court of Justice delivers judgment on a reference for a preliminary question made by another court as this would amount to staying the proceedings on grounds of expedience, which is precluded by Article 295 of the Code of Civil Procedure and moreover would deprive the parties to the case of the opportunity of participating in the procedure before the Court of Justice.

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34 Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ L 6, 10.1.1979, p. 24).

35 Conseil d'État, opinion of 4 February 2000, *Mouflin,* Revue française de droit administratif 2000, p. 468.

36 Case C-366/99, pending (OJ C 366, 18.12.1999, p.16).

37 Case C-206/00, pending (OJ C 211, 22.7.2000, p. 12).

38 Corte di cassazione, Sezione II civile, 14 September 1999, No 9813, *Caribo* v *Ministero delle Finanze*.

In the **United Kingdom**, in *R v Secretary of State for Health and Others, Ex p. Imperial Tobacco Ltd and Others*,[39] the House of Lords held by a majority that, when a domestic court is asked to grant an injunction to restrain the government of a Member State, during the implementation period, from making regulations pursuant to a directive, the question whether the applicable law is domestic law or Community law cannot be answered without a reference for a preliminary ruling to the Court of Justice.

A number of tobacco companies had sought an injunction from the High Court restraining the government from adopting provisions transposing Directive 98/43 relating to the advertising and sponsorship of tobacco products[40] pending a ruling of the Court of Justice on the validity of the directive. The High Court had allowed the appeal since it took the view that, because the period for transposition of the directive did not expire until 30 July 2001, the principles applicable to the application for an injunction were those of national law. The Court of Appeal held by a majority that the applicable principles were those of Community law as set out by the Court of Justice in the *Zuckerfabrik* case[41] and, moreover, the tobacco companies had not established that they would suffer irreparable damage if no injunction were granted.

In the meantime, the German Government had introduced an application for the annulment of Directive 98/43. In the course of that application, Advocate-General Fennelly proposed in his opinion of 15 June 2000 that the Court should annul the directive on the grounds that the Community did not have jurisdiction to adopt it on the legal basis that had been cited. Following that opinion, the British Government decided not to transpose the directive in the United Kingdom pending the judgment of the Court of Justice (which ruled that the Directive was invalid in its judgment of 5 October 2000).[42]

Nevertheless, the House of Lords was asked to declare whether the test for a domestic court hearing an application for an injunction should apply the criteria of domestic law or of Community law. In expressing the majority view, Lord Slynn of Hadley stated that it was at least arguable that, if a directive was implemented in national law before the prescribed final date, any application for interim relief to suspend the operation of the directive would be a matter for Community law and that the position should be the same on an application for interim relief to prevent the directive being adopted. He further stated that that did not exclude the possibility, if such Community test was satisfied, of a court granting interim relief against a national government although, under the decision in *Foto-Frost*, only the Court of Justice was competent to declare a directive invalid. He further stated that, while the *Zuckerfabrik* test and the domestic law test seemed to overlap in many respects, there might be differences, for example as to how far financial damage could be taken into account. Lastly, he indicated that, if, in order to give judgment in the appeal, it had been necessary to consider whether Community law applied and what was the scope of its application in the present case, it would have been necessary and obligatory for the House of Lords to refer a question to the Court of Justice. He added that "any regret that the question should be left open was reduced, at least, by the consideration that on an application of the instant kind the full circumstances had to be taken into account".

Again in the United Kingdom, the Court of Appeal gave judgment on an appeal against a decision to make a reference for a preliminary ruling. In a case before the High Court

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39 House of Lords, *R. v Secretary of State for Health and others, ex parte Imperial Tobacco Ltd and Others*, Daily Law Notes (judgment given on 7.12.2000).

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

41 Joined Cases C-143/88 and C-92/89 [1991] ECR I-415.

42 Case C-376/98 *Germany v Parliament and Council*, not yet published in the ECR.

concerning parallel imports of pharmaceutical products, the Court considered it necessary to refer a series of questions to the Court of Justice for a preliminary ruling.[43] That Court had already rejected the application by a number of the parties for leave to appeal against the decision making the reference.[44] Those parties subsequently applied to the Court of Appeal for leave to appeal.

The Court of Appeal, while accepting that the appellants' arguments on the interpretation of the law at issue in the main case might be correct, rejected the appeal, stating that the High Court was right to consider that the questions arising in the case before it were not clear and that the matter should be referred to the Court of Justice, either through the High Court itself or through another court.[45] Furthermore, the Court of Appeal took the view that, even if leave to appeal had been given, it was most unlikely that that court would conclude that the reply to the questions raised was so obvious that no reference for a preliminary ruling was necessary. Lastly, it added that a decision to make a reference to the Court of Justice should not be adopted until the national procedure had reached a stage enabling the national court to specify the factual and legal framework of the questions to be submitted. The Court of Appeal considered that that stage had been reached after the High Court had given judgment; after thus setting out the facts of the case, the Court of Appeal decided that the High Court enjoyed a discretion as to whether preliminary questions should be referred to the Court of Justice or whether the matter of a reference should be deferred to an appeal court. The Court of Appeal declared that it was not bound to intervene in the High Court's exercise of its discretion unless that court had failed to take account of a matter of which it should have taken account or else it took into account matters that were not material or unless its decision was manifestly wrong. That was not the case with the judgment of the High Court at issue. The Court of Appeal therefore rejected the appeal and the case is now pending before the Court of Justice.[46]

The possibility of a double reference, as was raised in the German case, also exists in **Benelux**, where the three Member States have concluded a treaty regulating certain matters through common uniform laws in place of national legislation, for example the uniform Benelux Laws on trademarks[47] and designs[48] under which rights to marks, designs or models provide uniform protection throughout the three countries. In order to secure uniformity, Article 6 of the Statute on the Benelux Court of Justice[49] lays down a procedure for making a reference for a preliminary ruling to the Benelux Court of Justice which is broadly similar to Article 243 EC. If questions arise on the interpretation of both the above-mentioned uniform Benelux Laws and Directives 89/104 (trademarks)[50] and Directive 98/71 (designs),[51] the national courts of the Benelux States must make a reference

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43 High Court of Jutice (England and Wales), Chancery Division, Patents Court, 28 February 2000, *Glaxo Group Ltd and Others v Dowelhurst Ltd and Swingwad Ltd*, Common Market Law Reports 2000, Vol. 2, p. 571-652.

44 High Court of Justice (England and Wales), Chancery Division, Patents Court, 7 March 2000, Glaxo Group Ltd and Others v Dowelhurst Ltd and Swingward Ltd, European Law Reports of Cases in the United Kingdom and Ireland 2000, p. 660-664.

45 Court of Appeal (England and Wales) Civil Division, 29 March 2000, *Glaxo Group Ltd and Others v Dowelhurst Ltd and Swingward Ltd*, European Law Reports of Cases in the United Kingdom and Ireland 2000, p. 664-671.

46 Case C-143/00, pending (OJ C 223, 12.8.2000, p. 12).

47 Traktatenblad 1983, No 187; Mémorial belge of 14 October 1969, amended by the Protocol of 2 December 1992, Traktatenblad 1993, No 12.

48 Traktatenblad 1966, No 292.

49 Treaty on the establishment of and the statute on the Benelux Court of Justice, done at Brussels on 31 March 1965, Traktatenblad 1965, No 71, 1966, Nos 243 and 244; 1981, No 159 and 1984, No 153.

50 First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ L 40, 1.2.1989, p. 1).

51 Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal

for a preliminary ruling to the two courts having jurisdiction, i.e. the European Court of Justice and the Benelux Court of Justice. The practical problem that arises is whether the double reference should be made successively or simultaneously. In the first case in which this situation came about, concerning parallel sales, the sale outside a closed network of approved sellers of Christian Dior perfumes by Evora, a chain of cut-price chemists, the Netherlands Supreme Court (*Hoge Raad*) referred the case to the two courts at the same time. The Benelux Court of Justice (*Benelux-Gerechtshof*) relied on the primacy of Community law and stayed the proceedings before it pending the judgment of the European Court of Justice in the same case. When the latter court had given its judgment in *Parfums Christian Dior*,[52] the Benelux Court of Justice resumed the procedure before it and gave judgment on 16 December 1998.[53] The Regional Court of Appeal (*Gerechtshof*) at The Hague also adopted this course in a case concerning the absolute refusal by the Benelux Trademarks Office of an application for registration of a trademark in the form of the word "Postkantoor" (post office) on the ground that it was of a descriptive nature.[54] After the *Parfums Christian Dior* case, in which it was confirmed that the Benelux Court of Justice was entitled to refer a case to the European Court of Justice, the *Hoge Raad der Nederlanden*, in a case again concerning an absolute refusal, this time of an application for registration of a trademark in the form of the word "Biomild", preferred to refer any questions to the Benelux Court of Justice alone, leaving that court to make the reference if it thought fit.[55] The Benelux Court of Justice duly considered the case and referring it to the European Court of Justice in June 2000,[56] i.e. two years after the *Hoge Raad's* ruling.

2.4. *Question 2*

Research revealed no decisions of this type.

2.5. *Question 3*

In **Germany**, the Bundesverfassungsgericht, in *Bananas II,*[57] clarified the scope of previous case-law on the primacy of Community law and on own jurisdiction to review the legality of Community secondary legislation in the light of the fundamental rights enshrined in the Basic Law. In proceedings at domestic law brought by Atlanta Group banana importers, the Frankfurt-am-Main Verwaltungsgericht made a reference to the Bundesverfassungsgericht following the Court of Justice judgment of 9 November 1995,[58] which had indicated that the common system for banana imports in force at the time was valid.

In its judgment, the Bundesverfassungsgericht confirmed that a reference for a preliminary ruling on the validity of an instrument of Community secondary legislation is, moreover, inadmissible if the grounds for the reference do not comprise a detailed argument to the effect that Community law, including Court of Justice case-law

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protection of designs (OJ L 289, 28.10.1998, p. 35).

52 See Note 4.

53 Benelux Court of Justice, 16 December 1998, Case A-95/4, Nederlandse Jurisprudentie 2001, No 133.

54 Gerechtshof t 's-Gravenhage, order making the double reference of 3 June 1999 initiating Case C-363/99 KPN v Bureau Benelux des Marques, pending (OJ C 47, 19.2.2000, p. 11).

55 Hoge Raad der Nederlanden, order of 19 June 1998, Nederlandse Jurisprudentie 1999, No 68.

56 Benelux Court of Justice, 26 June 2000, Nederlandse Jurisprudentie 2000, No 551, introducing the abovementioned Case C-265/00 (see Note 3).

57 Bundesverfassungsgericht, Order of 7 June 2000, 2 BvL 1/97, Zeitschrift für Wirtschaft 2000, 1456; Wertpapiermitteilungen 2000, 1661; Europäische Grundrechte 2000, 328; Neue Juristische Wochenschrift 2000, 3124; Die öffentliche Verwaltung 2000, 957; Europäische Zeitschrift für Wirtschaftsrecht 2000, 702; Europarecht 2000, 799; Bayerische Verwaltungsblätter 2000, 754.

58 Case C-466/93 *Atlanta Fruchthandelsgesellschaft (II)* v *Bundesamt für Ernährung und Forstwirtschaft* [1995] ECR I-3799.

subsequent to the Bundesverfassungsgericht's "Solange II" judgment,[59] is located below the necessary level of protection of fundamental rights guaranteed by the Grundgesetz, with the result that, generally speaking, protection is no longer guaranteed. Accordingly, the grounds for the reference should compare the protection of fundamental rights at national level with protection at Community level.

According to the Bundesverfassungsgericht, the reference in question does not meet these requirements. In particular, it is alleged that the referring judge based his decision on a misinterpretation of the Bundesverfassungsgericht's *Maastricht* judgment[60] when he stated that, henceforth, it would once again exercise its competence to examine Community acts, when in fact it would do so in cooperation with the Court of Justice. The Bundesfassungsgericht declared that it had not abandoned its rule in *Solange II* in *Maastricht* and that there was no contradiction between the two decisions. In the case in point, given that, in its judgment of 26 November 1996,[61] the Court of Justice had ruled that Article 30 of Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas required the Commission to take any transitional measures it judged necessary in order to assist the transition from national arrangements to the common organization of the markets, the referring judge should have spelt out in even greater detail why protection of fundamental rights was not sufficient. The referring judge should have acknowledged that his reference decision was inadequately reasoned, at the latest when the judgment was given by the Court. Unlike the Bundesverfassungsgericht itself in a previous decision,[62] the Court of Justice ruled that protection of the right to property entailed the imposition of any transitional measures deemed necessary in order to assist the transition from national arrangements to the common organization of the markets. As such, those decisions could be said to illustrate the correlation of procedures designed to guarantee protection of fundamental rights by the national courts and by the courts of Community law. Accordingly, the Bundesverfassungsgericht rejected as inadmissible the reference for a preliminary ruling from the Frankfurt-am-Main Verwaltungsgericht.

Also in Germany, the Bundesverfassungsgericht declared inadmissible the appeal lodged against the judgment given by the Bundesverwaltungsgericht further to the preliminary ruling by the Court of Justice in the Alcan case[63] on the grounds that, *in casu,* there was no infringement of the constitutional principles of legal certainty and legitimate expectations.

In accordance with the Court judgment, the Bundesverwaltungsgericht[64] had rejected the appellant's proceedings for annulment of the decision by the Land of Rheinland-Pfalz requiring it to repay the aid awarded, which was deemed to be illegal. Emphasing the mandatory nature of the Court's decision, the Bundesverwaltungsgericht stated that the competent national authority was bound to withdraw the aid award decision, which had

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59 Bundesverfassungsgericht, Order of 22 October 1986, 2 BVR 197/83 (Solange II), Entscheidungen des Bundesverfassungsgerichts 73, 339.

60 Bundesverfassungsgericht, Judgment of 12 October 1993, 2 BvR 2134/92 and 2 BvR 2159/92 (Maastricht), Entscheidungen des Bundesverfassungsgerichts 89, 155.

61 Case C-68/95 *T. Port v Bundesanstalt für Landwirtschaft und Ernährung* [1996] ECR I-6065.

62 Bundesverfassungsgericht, Judgment of 25 January 1995, 2 BvR 2689/94 and BvR 52/95, Zeitschrift für Europäisches Wirtschaftsrecht 1995, 126.

63 Case C-24/95 *Land Rheinland-Pfalz v Alcan Deutschland* [1997] ECR I-1591.

64 Bundesverwaltungsgericht, Order of 17 February 2000, 2 BvR 1210/98, Wertpapiermitteilungen 2000, 621; Zeitschrift für Wirtschaftsrecht 2000, 633; Europäische Grundrechte 2000, 175; Internationales Steuerrecht 2000, 253; Deutsche Verwaltungsblätter 2000, 900; Neue Juristische Wochenschrift 2000, 2015; Europäische Zeitschrift für Wirtschaftsrecht 2000, 445; Europarecht 2000, 257; Bayerische Verwaltungsblätter 2000, 655.

been taken contrary to Community law, and to recover the aid, even though German law prohibited recovery on the grounds that the deadline established for that purpose had expired and the aid recipient had not benefited financially. The Bundesverwaltungsgericht also took the view that the appellant's argument to the effect that the Court of Justice had exceeded the powers vested in it by the Treaty and had acted in lieu of the legislature was unfounded. It found that the Court had merely reinforced its previous case-law whereby aid paid in violation of Community law had to be recovered in accordance with the procedures of national law, in so far as those procedures did not make recovery of aid impossible in practice. Regarding the defendant's argument that the Court had failed to observe the fundamental right to respect for legitimate expectations, the Bundesverwaltungsgericht took the view that the Court had observed the principle by ruling that, in principle, a well-informed economic operator can only have confidence in the legality of the aid paid to him if it had been notified to the Commission in application of Article 93(3) of the Treaty (now Article 88(3) EC), and that the appellant could have set out the specific circumstances which could have created expectations meriting protection by filing an application for annulment of the Commission decision establishing the unlawful nature of the aid.

An appeal was subsequently lodged against the decision with the Bundesverfassungsgericht on the grounds that it was unconstitutional. The Bundesverfassungsgericht took the view that the Community's public interest in implementing the Community competition rules should be taken into consideration as part of a decision concerning the recovery of unlawful aid. It also ruled that, in authorising recovery of the aid even though the deadline provided for in German law had expired, the Bundesverwaltungsgericht had merely applied the principle of the primacy of Community law. It also found that the appellant could have realised that the aid was unlawful in terms of form and content when it was paid, or that it could have contested the Commission's decision to recover the aid. Lastly, the Bundesverfassungsgericht noted that the Court's judgment merely applied Article 93(2) of the EC Treaty (now Article 88(2) EC), so that the question of whether it was an act which exceeded the Commission's powers within the meaning of the Bundesverfassungsgericht's *Maastricht* judgment did not arise, and the judgment in question was confined to the individual case at issue and did not create a general administrative rule.

In **Austria,** an appeal was lodged with the Oberste Gerichtshof[65] in connection with proceedings instituted against two managers of a limited liability company on whom a penalty had been imposed because they had failed to submit the company's annual accounts to the commercial court within the deadline provided for by law. That omission is penalised by the Austrian Act on the accounting obligations of traders and certain types of company, which transposes First Council Directive 68/151/EEC[66] and Fourth Council Directive 78/660/EEC[67] into Austrian law. The managers argued before the Oberste Gerichtshof that application of the Austrian Act on accounting obligations infringed their fundamental rights in that they would be obliged to publish their accounts, invoking *inter alia* freedom to exercise a profession, the right to property, the right to protection of personal data and the principle of equality. Referring to the Court of Justice

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65 Oberster Gerichtshof, Judgment of 9 March 2000, 6 Ob 14/00b, Wirtschaftsrechtliche Blätter 2000, p. 286-288.

66 68/151/EEC: First Council Directive of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (OJ L 65, 14.3.1968, p. 8).

67 Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (OJ L 222, 14.8.1978, p. 11).

judgment in *Daihatsu,*[68] the Oberste Gerichtshof ruled that the national legislature was bound to transpose a directive even if it violated rights recognised by the Constitution. The primacy of Community law also applied in respect of national constitutional law. As such, the law transposing a directive which violated such rights could not be declared unconstitutional.

Still in Austria, the Oberste Gerichtshof was called on to examine which guarantee institution has power under Article 3 of Directive 80/987[69] to pay employees' claims in the event of the insolvency of their employer where that employer is established in a Member State other than the one in which the employee lives and carried out his paid employment. The case in point concerned an Austrian worker employed by a company operating in Austria and working for that company on a temporary basis in Germany. After a few weeks, the company went bankrupt and the worker claimed his pay from the Austrian guarantee institution. The claim was rejected on the grounds that the worker had been employed in Germany and that, as a result, the guarantee institution was not competent. In accordance with the Court of Justice's *Mosbaek* judgment,[70] the Oberste Gerichtshof ruled that the competent institution was that of the state in which, in accordance with Article 2(1) of the Directive, either the decision had been taken to open the proceedings for the collective satisfaction of creditors' claims or it had been established that the employer's undertaking or business had been closed down, namely in this instance the Austrian institution.[71]

With this judgment, the Oberste Gerichtshof abandoned its case-law concerning the application of the territoriality principle as regards the protection of employees' rights in the event of insolvency of the employer. However, it should be noted that the judgment in question does not appear to take account of the Court of Justice's *Everson* judgment,[72] given about five weeks earlier, which indicates that, where the employees adversely affected by the insolvency of their employer were employed in a Member State by the branch established in that State of a company incorporated under the laws of another Member State, where that company has its registered office and in which it was placed in liquidation, the institution responsible, under Article 3 of Council Directive 80/987/EEC of 20 October 1980, for payment to those employees of outstanding claims is that of the State in whose territory they were employed.

In **Belgium**, in a case concerning the ban on misleading advertising, the Court of Cassation,[73] while not accepting the application lodged by one of the parties to refer the case to the Court of Justice for a preliminary ruling, confirmed the interpretation placed by the Liège Court of Appeal on the concept of a consumer protected by the Business Practice and Consumer Protection Act[74] (the "CPA"). The provisions of the CPA on misleading advertising transpose Directive 84/450[75] into Belgian law. According to that

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68 Case C-97/96 *Daihatsu-Händler v Daihatsu Deutschland* [1997] ECR I-6843.

69 Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (OJ L 283, 28.10.1980, p. 23).

70 Case C-117/96 *Mosbæk Lønmodtagernes Garantifond* [1997] ECR I-5017.

71 OGH, Judgment of 27 January 2000, 8 ObS 148/99v (published in Wirtschafsrechtliche Blätter 2000, p. 232).

72 Case C-198/98 *Everson* [1999] ECR I-8903.

73 Court of Cassation, 12 October 2000, Revue de jurisprudence de Liège, Mons et Bruxelles, 2001, p. 188.

74 Loi du 14 July 1991 sur les pratiques du commerce et sur l'information et la protection du consommateur (Moniteur belge, 29 August 1991).

75 Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising

interpretation, the law is designed to protect poorly educated, poorly informed consumers.

The Belgian authorities brought an action for an injunction against a mail order company on the grounds that it had used advertising methods prohibited by the CPA. The action concerned, *inter alia*, an advertising campaign in the form of a survey designed to encourage customers to place orders and a promotional gift linked to the purchase of goods or services. Although the Court of First Instance ruled largely in the Belgian authorities' favour, they appealed against the judgment because they had not been successful in respect of the above two matters. The Liège Court of Appeal allowed the appeal and revised the judgment. The mail order company then appealed to the Court of Cassation. In its first plea, based on the CPA and Directive 84/450, the claimant challenged the Court of Appeal's interpretation of the concept of "protected consumer", which assumed consumers to be poorly informed and lacking critical judgment. It argued that, in so far as the definition of a "protected consumer" underpinning the Court's appeal was wrong, the judgment it had handed down was not justified in law. The Court of Appeal had taken the view that protection should be extended to the most poorly informed consumers who, when confronted by a skilful presentation, lacked critical judgment and were unable to detect tricks, exaggerations or deceptive omissions by the persons who produced the advertisement. The claimant maintained the contrary view that the law in question was designed to protect the average, normally and reasonably well informed consumer. It called on the national courts to interpret the CPA's provisions in the light of Directive 84/450, which they transposed into Belgian law. It also invoked Court of Justice case-law which stated that the concept of "consumer" within the meaning of the Directive should be interpreted as referring to the average, normally and reasonably circumspect consumer. Lastly, the claimant proposed that, in the event of any doubt, the Court of Cassation should refer the case to the Court of Justice for a preliminary ruling.

The Court of Cassation dismissed the appeal. First, it took the view that the Court of Appeal's decision to the effect that the conduct at issue *in casu* was incompatible with fair trading practice was based solely on section 94 of the CPA, which comprises a general ban on any act incompatible with fair trading practice. According to the Court of Cassation, in assessing whether a particular form of conduct is incompatible with fair practice, the judge may take account of the specific situation of certain categories of consumer and of the need to afford them additional protection. Accordingly, it took the view that the decision contained in the judgment to the effect that the purpose of the legislation was to protect poorly educated, poorly informed consumers was founded in law. With regard to the plea drawn from the interpretation of Directive 84/450, the Court of Cassation merely stated that section 94 did not transpose the Directive and that the above considerations demonstrated that the decision underpinning the judgment was founded in law. The Court therefore rejected the arguments based on sections 7 (defining the concept of consumer), 22 and 23 (prohibiting misleading advertising) of the CPA and, accordingly, the arguments derived from the provisions of the Community Directive as transposed into Belgian law.

Still in Belgium, by its judgment of 25 February 2000,[76] the Court of Cassation confirmed the principle in its judgment of 7 May 1999[77] concerning the application of competition rules to the liberal professions, in a case against the Order of Pharmacists.

(OJ L 250, 19.9.1984, p. 17).

76 Court of Cassation, 25 February 2000, nº D.98.0041.F.

77 Court of Cassation, 7 May 1999, Rechtskundig Weekblad, 1999-2000, p. 112-11, quoted in the Seventeenth Annual Report on Monitoring the Application of Community Law.

The Court reiterated that the Order of Pharmacists was an "association of undertakings" within the meaning of the Competition Act - based on Articles 81 EC (formerly Article 85) et seq. - and that its decisions, in so far as their object or effect was to distort competition, had to be assessed by the Order's disciplinary bodies with a view to determining whether they were valid in the light of the competition rules. Accordingly, when a body of the Order of Pharmacists imposed competition restrictions on one or more of its members that were not necessary to uphold the fundamental rules of the profession but which were designed in reality to promote certain material interests of pharmacists or to set up, or maintain, economic arrangements, this might constitute a decision by a body of an association of undertakings which could be automatically declared null and void by the appeals board. A decision basing a disciplinary penalty on a general, absolute prohibition on advertising and on any competition on the pharmaceuticals market was not founded in law.

Still in Belgium, in a judgment of 15 September 2000,[78] the Brussels Court of Appeal issued a ruling on the scope of Community exhaustion and the concept of the trade mark proprietor's "consent" to the sale in the European Economic Area of goods marketed under a trade mark within the meaning of Article 7 of First Council Directive 89/104/EEC,[79] as interpreted by the Court of Justice. The parties to the dispute were a US company which owned a well-known brand of jeans and a retailer which sold goods of that brand on the basis of parallel imports. The US company took action to oblige the retailer to stop using the brand name unless the goods in question were marketed in the EEA by the trade mark proprietor or with his consent. The appellant asked the Court of Appeal, on a subsidiary basis, to suspend its decision pending the Court of Justice judgment in *Davidoff* and *Levi-Strauss*[80] and to refer a series of questions concerning Article 7 of the Directive as interpreted in *Sebago*[81] to the Court of Justice for a preliminary ruling.

Firstly, the Court of Appeal ruled that the right conferred by the trade mark to prohibit a third party from using it in the European Economic Area in relation to goods which had been put on the market outside the EEA and which had not been reimported into the EEA with the proprietor's consent was designed, in accordance with Community case-law,[82] to guarantee the integrity of the internal market. It added, in reply to an argument put forward by the defendant to the effect that this right could not be made subject to the condition that such use also constituted, *prima facie,* an infringement of the trade mark's origin function, or that this use took place in conditions likely to damage the image of the trade mark with the public.

The Court of Appeal pointed out that, given that Article 7 of Directive 89/104/EEC prohibits international exhaustion, the protection extended to the trade mark proprietors within the EEA could not be conditional on the existence of a restriction on exports to the EEA imposed by the proprietor on each of his distributors based in third countries. Deciding to the contrary would, according to the Court, be tantamount to reintroducing the principle of international exhaustion, given that it was impossible for the trade mark proprietor to prove that the world distribution network of the products in question was watertight. Moreover, the fact that the trade mark proprietor had not banned his distributors based in third countries from exporting to the EEA could not have the

78 Brussels Court of Appeal, 15 September 2000, Revue de droit intellectuel, 2000, p. 263.

79 See footnote 50.

80 Joined Cases C-414/99 (OJ C 6, 8.1.2000, p. 18) and C-415/99 (OJ C 79, 18.3.2000, p. 5).

81 Case C-173/98 *Sebago* [1999] ECR I-4103.
Case C-355/96 *Silhouette International Schmied v Hartlauer Handelsgesellschaft* [1998] ECR I-4799.

slightest impact on the obligation incumbent on proprietors to comply with the specific purpose of the trade mark right, namely the exclusive right to use the trade mark for the launch of a product in the EEA. Consequently, the lack of such measures could be taken as constituting implicit consent by the proprietor to products from third countries being placed on the market in the EEA. Lastly, the Court of Appeal pointed out that, in accordance with *Sebago*, the notions of goods being put on the market in the EEA and of goods being put on the market with the proprietor's consent within the meaning of Article 7(1) of the Directive must be analysed, on an individual basis, with reference to the relevant unit or lot of the goods for which exhaustion was invoked. It stipulated that, contrary to what was argued by the defendant, this interpretation could not entail the obligation for the proprietor of the trade mark to attach a sign to the goods whereby resellers could check whether they were intended for the European market or not. It also pointed out that resellers who had any doubts as to whether goods had been lawfully placed on the market in the EEA were obliged to conclude that consent had not been given and to refrain from acquiring the goods in question with a view to resale. With regard to the burden of proof in respect of Community exhaustion, the Court of Appeal specified that the onus was on the adversary of the trade mark proprietor to produce documents showing that the goods it was selling were the same as the goods for which an invoice had been issued further up the sales chain by an authorised seller.

Lastly, with regard to the defendant's argument that the trade mark proprietor was abusing his exclusive right in seeking to restrict competition on the goods concerned within the EEA, the Court of Appeal pointed out that import restrictions within the EEA on products from third countries could not have the effect of hindering intercommunity trade, and that if the principle of a ban on international exhaustion affected such products, its ultimate purpose was to preserve the internal market's integrity.

In **Spain,** in a judgment of 30 November 2000,[83] the Tribunal Constitucional confirmed an earlier ruling to the effect that, although Community secondary legislation does not have the same status as constitutional law and cannot therefore be taken into account as a parameter for constitutional review of legislation, it is, nevertheless, a criterion whereby the meaning and the scope of the rights and freedoms enshrined in the Spanish Constitution can be determined. The action was brought by the Spanish Ombudsman for the annulment of certain provisions of the Protection of Personal Data Act,[84] which transposes Directive 95/46[85] into Spanish law. The claimant alleged *inter alia* a violation of the fundamental right to respect for privacy as enshrined in the Constitution and a violation of the constitutional restrictions on the use of information technology, which were established with a view to protecting that right. According to the claimant, the Spanish legislature gave a broader scope than the Directive to the exceptions from the obligation incumbent on persons processing data to notify the person required to issue such data and to that person's right of access to such data. Referring to the Directive and to Article 8 of the Charter of Fundamental Rights of the European Union, which reinforce its constitutional interpretation of these rights, the Tribunal Constitucional annulled the relevant provisions of the Protection of Personal Data Act.

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83 Tribunal Constitucional, Pleno, 30 November 2000, nº 292/2000, Diario La Ley nº 5213, 27 December 2000.

84 Ley Orgánica nº 15/1999, de 13 de diciembre, de Protección de Datos de Carácter Personal (Boletín Oficial del Estado nº 298, 14 December 1999).

85 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31).

In a decision of 24 April 2000,[86] given following a preliminary ruling by the Court of Justice,[87] the Juzgado de Primera Instancia e Instrucción nº 5 in Oviedo took the view that, in that ruling, the Court had missed an opportunity to interpret Directive 93/83[88] in the light of the Berne Convention and to provide a uniform interpretation, which was necessary for the national courts in the Member States, of the disputed provisions. The Juzgado was attempting to determine whether the fact that a hotel received satellite or cable broadcasting signals and distributed them to its various rooms constituted "communication to the public" or "reception by the public" within the meaning of the Directive. With a view to highlighting the lack of a uniform interpretation of the Directive, the Juzgado carried out a wide-ranging review of examples of contradictory case-law of the Spanish courts and the courts of the other Member States. Referring to the submissions of the Advocate-General in the case, and following the interpretation of the Berne Convention which he had proposed, the Juzgado concluded that the fact of receiving television signals and distributing them by cable to the various rooms of a hotel constituted communication to the public requiring the authorisation of the copyright holders or payment of copyright. The Juzgado based its conclusion on the criterion proposed by the Advocate General, namely that distribution should be for profit, and on the definition of the hotel's customers as a "successive public", these being elements which enabled a distinction to be drawn between that type of distribution and distribution to private households.

In **France**, in a judgment of 22 February 2000,[89] the Chambre commerciale of the Court of Cassation rejected a series of appeals contesting the classification of drugs subject to the pharmacists' sales monopoly, which the Amiens Court of Appeal had attributed to a series of products which, it was claimed, were parapharmaceutical products. The Court of Cassation applied Council Directive 76/768/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products and Council Directive 65/65/EEC of 26 January 1965 on the approximation of provisions laid down by law, regulation or administrative action relating to proprietary medicinal products and the judgment of the Court of Justice in *Upjohn*[90] as regards the definition of medicines "by function" or "by presentation". It confirmed the position of the Court of Appeal which, referring to *Keck* and *Mithouard*,[91] had taken the view that the prohibition on the sale of certain products outside pharmacies formed part of selling arrangements and thus fell outside Article 30 of the Treaty (now Article 28 EC), in so far as the national rules affected in the same manner, in law and in fact, the marketing of domestic products and of imported products.

The Chambre criminelle of the French Court of Cassation reached the same conclusions in a judgment of 5 September 2000,[92] which stated that the rules establishing a pharmaceutical monopoly, which applied equally to products imported from the Member States and from the European Community and to domestic products, were justified in the

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86 Juzgado de Primera Instancia e Instrucción nº 5 de Oviedo, 24 April 2000, Entidad de Gestión de Derechos de los Productores Audiovisuales (EGEDA) c. Hostelería Asturiana, SA (HOASA).

87 Case C-293/98 *Egeda* v *Hostelería Asturiana* [2000] ECR I-629.

88 Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ L 248, 6.10.1993, p. 15).

89 Court of Cassation, Chambre commerciale, financière et économique, judgment of 22 February 2000, Beiersdorf, Bulletin des arrêts de la Court of Cassation - Chambres civiles 2000, IV, nº 34.

90 Case C-112/89 *Upjohn* [1991] ECR I-1703.

91 Joined Cases C-267/91 and C-268/91 *Keck* and *Mithouard* [1993] ECR I-6097.

92 Court of Cassation, Chambre criminelle, judgment of 5 September 2000, Gabard, Bulletin des arrêts de la Court of Cassation - Chambre criminelle, 2000, nº 26.

light of Articles 30 and 36 of the EC Treaty (now Articles 28 and 30 EC) by the need to protect public health.

In a judgment of 14 June 2000,[93] the Paris Court of Appeal, drawing its conclusions from the Court of Justice's *Parodi* judgment,[94] questioned the case-law of the Court of Cassation[95] with regard to the conditions in which a credit institution based in another Member State could grant a mortgage loan in France. The Court of Appeal stated that the French law predating Council Directive 89/646/EEC[96] had not merely created an obstacle to freedom to provide banking services in requiring authorised credit institutions based in another Member State to obtain to obtain a fresh authorisation from the supervisory authority of the State of destination, but had made it impossible to exercise that Community freedom by coupling such authorisation with a condition of establishment on the national territory for the service provider.

The Court of Appeal then considered the question whether such legislation was necessary in the light of the interests to be protected. In so doing, it took over the distinction which the Court of Justice had drawn in paragraph 29 of the *Parodi* judgment with regard to the nature of the banking activity in question and the risk incurred by the person for whom the service was intended. The Court took the view that the French law went beyond what was objectively necessary to protect the interests it sought to protect and accordingly declared it incompatible with the Treaty.

In **Greece**, by an elliptical reasoning, the Symvoulio tis Epikrateias (Council of State), in its judgment of 30 March 1999,[97] did not apply the interpretation given by the Court of Justice in its preliminary ruling in *SETTG* of 5 June 1997.[98] The Court had ruled that the Greek legislation which prescribed a mandatory legal form of employment relation for services provided by tourist guides to tourist offices and travel agencies which organised tourist programmes was incompatible with Article 59 (now, following amendments, Article 49 EC). The Symvoulio tis Epikrateias found that the interpretation given by the Court was not relevant *in casu*, in so far as the dispute was not linked to Community law. In its opinion, the lack of an element linking the dispute to Community law resulted from the fact that none of the parties to the dispute was a Community national established in another Member State which wanted to provide its services in Greece. The legislation referred for a preliminary ruling was thus regarded as a simple legal basis for the arbitration ruling subject to supervision by the Symvoulio tis Epikrateias in the main proceedings, the arbitration ruling in itself forming the real substance of the dispute. Accordingly, the Symvoulio tis Epikrateias completely excluded from the settlement of the dispute the question of the incompatibility of the legislation with Community law and the resulting obligation not to apply it as the legal basis for the arbitration ruling. Apparently, no explanation was given as to the reasons why the Symvoulio regarded the Court of Justice's preliminary ruling as immaterial to the subject-matter of the dispute.

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93 Paris Court of Appeal, judgment of 14 June 2000, SCI Parodi, Recueil Dalloz, 2000, Jur., p. 614.

94 Case C-222/95 *Parodi* v *Banque H. Albert de Bary* [1997] ECR I-3899.

95 Court of Cassation, Chambre commerciale, financière et économique, Judgment of 20/10/98 , SCI Parodi, Bulletin des arrêts de la Court of Cassation - Chambres civiles 1998, IV, nº 246.

96 Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC (OJ L 386, 30.12.1989, p. 1).

97 Symvoulio tis Epikrateias, 30 March 1999, 1014/1999, To Syntagma, 1999, p. 1129, Elliniki Dikaiosyni 2000, p. 1131, EDDDD 2000, p. 400.

98 Case C-398/95 *SETTG* v *Ypourgos Ergasias* [1997] ECR I-3091.

Still in Greece, a discrepancy between a preliminary ruling given by the Court of Justice[99] and the final decision of the appeal court was observed in three judgments of the Athens Administrative Court of 31 August 1999. The Court took the view that the failure to transpose Directive 89/48/EEC[100] did not constitute *in casu* a violation by the State of its Community obligations and, accordingly, did not give rise to an obligation to compensate for loss sustained by individuals because of failure to incorporate the Directive into national law.[101] The Administrative Court thus appears to have gone further than the Court of Justice ruling, which merely indicated that the Directive was not applicable in a situation purely internal to a Member State, without entering the debate on the conditions governing the state's civil liability for failing to incorporate the Directive into national law. Furthermore, the fact that Greece had been condemned by a previous Court of Justice ruling on precisely the same grounds[102] was not taken into account.

In **Italy**, in the course of prior review of the organisation of a referendum for the repeal of an Act, the Corte costituzionale issued a ruling on the obligations resulting for Member States from the implementation of a Community Directive.[103] In Italy, the organisation of a referendum for the repeal of an Act is authorised only on two conditions, namely that the referendum petition is signed by at least 500 000 voters and that the Corte costituzionale has carried out advance checks to ensure that the referendum question is not unconstitutional. In the case in point, the proposed referendum concerned the repeal of section 5 of Act No 863 of 19 December 1984, which restricted the use of part-time employment contracts. This subject was covered by Directive 97/81,[104] which was due to be implemented by 20 January 2000 and which the Italian authorities had not yet incorporated into national law.

Firstly, the Corte costituzionale checked whether the proposed question was constitutional not merely in the light of the restrictions on the use of referenda laid down in Article 75(2) of the Constitution - which prohibits *inter alia* referenda on laws ratifying international treaties - but also in the light of those resulting from a systematic interpretation of the Constitution. An interpretation of that type would entail examining the referendum's compatibility with the Community Directives and checking whether they produced effects which might prevent the repeal of an Act if the repeal would prevent the Italian authorities from complying with their obligations under Community secondary legislation. Having affirmed the primacy of Community law over national law, the Corte costituzionale ruled that the Act in question formed a "hard core" of provisions which already complied with the Directive. As such, it could not be repealed before other measures which met the obligations resulting from the Directive had been adopted. In other words, the situation of "pre-conformity" (*preconformazione*) established by the Act had to be maintained after the deadline for implementing the Directive had expired. In that connection, the Corte costituzionale referred to Court of Justice case-law to the effect that the obligation incumbent on the Member States to cooperate required them to refrain from taking any measures liable seriously to

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99 Joined Cases C-225/95, C-226/95 and C-227/95 *Kapasakalis and others v Greek State* [1998] ECR 4239.

100 Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration (OJ 1989, L 19, p. 16).

101 Dioikitiko Protodikeio Athinon, 31 August 1999, 8240/1999, 8241/1999 and 8242/1999.

102 Case C-365/93 *Commission v Greece* [1995] ECR I-499.

103 Corte costituzionale, 7 February 2000, Gazzetta Ufficiale della Repubblica Italiana, 2000, Spec. 1, nº 7, p. 65.

104 Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex: Framework Agreement on part-time work (OJ L 14, 20.1.1998, p. 9).

compromise the result prescribed by the Directive between the date on which a Directive entered into force and the end of the period prescribed for transposal.[105] The Corte costituzionale found *in casu* not merely that the period for incorporating Directive 97/81 had expired on 20 January 2000, with the result that the Italian authorities had failed to meet their obligations, but that in addition the Directive specifically stated that its implementation could not serve to justify any regression in relation to the situation which already existed in each Member State in terms of the level of protection for employees. Repealing the relevant Act by means of a referendum would mean the end of the protection for employees enshrined in the legislation governing part-time work. As a result, the Italian authorities would be liable for failing to meet a specific obligation in Community law, which would be an infringement of Article 75(2) of the Constitution.

Still in Italy, on 1 February 2000 the Corte di cassazione had occasion to issue a ruling on the direct effect of a Directive on situations which had come into being before the deadline for its implementation in the Member States expired.[106] Directive 93/13/EEC[107] was implemented by Act No 52 of 6 February 1996, whereas the deadline for incorporation into national law was 31 December 1994. Article 10 states that the Directive is applicable to all contracts concluded after that date. In accordance with the Act of 1996, the new section 1469-*bis* of the Italian Civil Code regards provisions which confer jurisdiction on a court sitting in a place other than that in which the consumer is resident or domiciled as unfair. The Giudice di pace di Roma, ruling on a dispute concerning a contract signed in May 1994 between a member of the professions and a consumer, declared that it had no jurisdiction and that the case should be heard by the court for the place of residence of the consumer (Udine), on the grounds that the protection provided to consumers by the new section 1469-*bis* of the Civil Code was also applicable to contracts concluded before the entry into force of the Act implementing Directive 93/13/EEC by virtue of the latter's direct effect. The Corte di cassazione, ruling on the appeal against the decision filed by the member of the professions concerned, reversed the contested judgment and referred the case to the Giudice di pace di Roma for a decision on the substance. Having noted that the direct effect of a Directive implied that its provisions were unconditional and sufficiently specific in terms of their content, and that the Member State concerned had failed to implement the Directive within the deadline set for that purpose, the Corte di cassazione stated that it was not certain that Council Directive 93/13/EEC met the requirement regarding the unconditional and specific nature of its provisions. However, the Court ruled that, on the date on which the disputed contract was signed (May 1994), the Italian authorities had not failed to comply with their obligations in so far as the deadline for implementing the Directive, i.e. December 1994, had not expired at that point in time. Accordingly, the Corte di cassazione concluded, the self executing effect of Directive 93/13/EEC, which was likely to affect the provisions conferring jurisdiction, as the Giudice di pace di Roma had declared, could not be taken into account.

Lastly, still in Italy, in a case concerning the privatisation of an airport company via the sale of most of its shares, the Consiglio di Stato ruled that a ministerial decree limiting the stake in the company's capital of public bodies, even economic bodies, and State-owned companies to 2% was compatible with Community law.[108] A State-owned

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105 Case C-129/96 *Inter-Environnement Wallonie* v *Région wallonne* [1997] ECR I-7411.

106 Corte di cassazione, Sezione I, 1 February 2000, nº 1099, Giustizia civile, 2000, p. 1690.

107 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1994, p. 29).

108 Consiglio di Stato, Sezione VI, 1 April 2000, Il Consiglio di Stato, 2000, I, p. 833.

company in which the *comune* and *provincia* of Milan held a 99% stake petitioned the Tribunale amministrativo regionale Lazio to revoke the clause in the sales notice for the airport company's shares which reproduced that 2% limit. The appellant claimed *inter alia* that the principles of non-discrimination, freedom of establishment and freedom of movement of capital and the principle of proportionality had been violated. In its judgment of 14 July 1999, the Tribunale amministrativo rejected the appeal on the grounds that the principle of proportionality did not constitute an autonomous criterion whereby the lawfulness of Community acts could be assessed, but merely a criterion whereby the Treaty provisions could be interpreted.[109] Ruling in the proceedings filed by the appellant, the Consiglio di Stato, confirming the decision given at first instance, indicated the scope of the principle of proportionality.

The Consiglio di Stato referred to Court of Justice case-law[110] which maintains that the principle of proportionality is a general principle of Community law which the institutions of the Member States must take into account when exercising their discretionary powers and which serves to assess the activity of the national legislature as well as legislative acts themselves. While acknowledging that the argument based on an infringement of the principle of proportionality had not been sufficiently elaborated by the parties, the Consiglio di Stato pointed out that the imposition of a limit on holdings by State-owned companies in the capital of a company undergoing privatisation was a necessary and appropriate measure in order to achieve the objectives of the transaction, namely to transfer the shares in a public company to individuals against payment so as to enable the public objectives laid down by law to be achieved more effectively. It would not be possible to realise these objectives if shares could be transferred from the State to a public company and vice versa. In addition, once the legitimacy of the limit had been accepted, it could not be questioned by the courts in so far as it represented an economic policy choice by the Government, which decided what the maximum level of the public-sector holding in the capital of a privatised company should be.

In the **United Kingdom**, in connection with appeals filed respectively against two contradictory decisions by the High Court regarding transfers of undertakings within the meaning of the 1981 Transfer of Undertakings (Protection of Employment) Regulations, by which Directive 77/187[111] was incorporated into domestic law in the United Kingdom, the Court of Appeal ruled that the transferor's liability in tort to an employee in respect of a personal injury which had accrued before the transfer was transferred to the transferee by virtue of Reg. 5(2) of the 1981 Regulations.[112] The Court of Appeal notes that Reg. 5(2)(a) concerns "all the transferor's rights, powers, duties and liabilities under or in connexion with the contract of employment", which implies that the transfer does not concern contractual rights alone but all rights established "in connexion with" the contract of employment. Even in the absence of an explicit reference to liability in tort, these provisions are therefore sufficiently broad to encompass the employer's liability in tort. As a consequence, *in casu* the employer's liability on the grounds of negligence had indeed been transferred to the transferee by virtue of the 1981 Regulations.

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109 Tribunale amministrativo regionale del Lazio, Sezione III, 14 July 1999, No 2155, I tribunali amministrativi regionali, 1999, I, p. 3126-3133.

110 Case 176/84 *Commission* v *Greece* [1987] ECR I-1193; 19 June 1980, joined Cases 41/79, 121/79 and 796/79 *Testa v Bundesanstalt für Arbeit* [1980] ECR 1979; Case C-427/85 *Commission* v *Germany* [1988] ECR 1123 and Case C-127/92 *Enderby* [1993] ECR I-5535.

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

112 Court of Appeal (Civil Division), *Martin v Lancashire County Council, Bernadone v Pall Mall Services Group Ltd and others*, [2000] ALLER 544 (judgment given on 16.5.2000).

In the second case, the Court of Appeal ruled in addition that the transferor's rights to compensation by virtue of an insurance policy against accidents in the workplace, even though it had been taken out with a third party (the insurer), had also been transferred to the transferee. Pointing out that the purpose of Directive 77/187 was to safeguard employees' rights in the event of transfers of undertakings, the Court of Appeal took the view that the 1981 Regulations, which incorporated the Directive into domestic law in the United Kingdom, should, in so far as possible, be interpreted as meaning that employees should not be deprived of rights which they would have enjoyed vis-à-vis their employer if no transfer had taken place and which had been created by virtue of or in connexion with the contract of employment. Accordingly, in the case in point, the benefit of the insurance policy taken out with the transferor had been transferred to the transferee.

Still in the United Kingdom, the Court of Appeal,[113] setting aside the judgment given in the court below, took the view that Article 7 of Directive 93/104[114] was not sufficiently precise and unconditional to have direct effect. In this case, which involved a dispute between a swimming instructor and her employer, a regional authority, the Employment Appeal Tribunal had ruled that the claimant, who was not paid during the school holidays, was entitled to four weeks' annual paid holiday by virtue of Article 7(1) of the Directive, which provides that "Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice". At the time of the events in question, in 1997, the Directive had not yet been incorporated into domestic law in the United Kingdom, although the deadline for incorporation had been set at 23 November 1996. Incorporation took the form of the Working Time Regulations (SI 1998, No 1883), which entered into force on 1 October 1998. The claimant argued that the direct effect of these provisions could be pleaded against the administration for the period between those two dates. The Employment Appeal Tribunal concluded that Article 7 was sufficiently precise and unconditional to have direct effect and that the claimant could therefore rely on it against the defendant.

Examining Article 7 within the broader context of the nature, general structure and wording of the Directive, Lord Justice Mummery in the Court of Appeal focused *inter alia* on the concept of "working time", which is defined by Article 2 of the Directive as "any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice". He held that this definition, which was not precisely worded and referred to the national laws of the Member States, was of particular importance in the context of Section II, which included Article 7 on annual leave. Although Article 7 was precise as regards the minimum period of paid annual leave, namely four weeks, it did not follow that the obligation enshrined in that Article was sufficiently precise for an individual to be able to rely on it in the national courts. Since neither Article 7 nor any other article of the Directive specifies the length of "working time" that an employee must accumulate in order to qualify for the annual leave provided for in Article 7, Lord Justice Mummery concluded that the Article could not be deemed to have direct effect.

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[113] Court of Appeal (Civil Division) *Gibson v East Riding of Yorkshire District Council*, [2000] CMLR 329 (judgment given on 21.6.2000).

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

Still in the United Kingdom, in connection with proceedings concerning the termination of a commercial agent's contract, the Outer House of the Court of Session[115] (in Scotland) reiterated the principle of interpretation in line with Community law and indicated that, where a Directive borrowed one of its elements from the legal system of a Member State, it was possible to rely on the law of that Member State to determine the exact scope of the Directive. Noting firstly that the Commercial Agents (Council Directive) Regulations 1993 relied on by the claimant had been adopted to incorporate Directive 86/653/EEC[116] into domestic law in the United Kingdom, Lord Hamilton reiterated the need to interpret national law, in so far as possible, in a way which reflected not merely the wording and objectives of the Directive which it was designed to incorporate, but also the interpretation placed on it by the Court of Justice, rather than adopting a literal interpretation of national law. He also stated, as a general principle, that legislation adopted for the purpose of incorporating a Community Directive amended the other provisions of existing national law in the field in question only where they were incompatible with the Directive. Regarding the possibility of relying in Scotland on the law of another Member State and the practice of the courts of that State in determining the scope of a Community Directive which had borrowed one of its elements from that legal system, Lord Hamilton took the view that this was in line with the objective of approximating the laws of the Member States. Since the Directive in question provided for a solution based on French law, it might be necessary, with a view to achieving a harmonised approach, to take into account the experience of the French courts in the field without necessarily having to call on specialists in French law. Lord Hamilton took the view that this was an exercise in comparative law, for which purpose the Scottish courts were perfectly entitled to take foreign law sources into account.

In a similar case,[117] the Inner House of the Court of Session reiterated that the applicable national law had to be interpreted in the light of Community law. Having been advised that the compensation arrangements provided for in Directive 86/653/EEC were based on French law, it proceeded to interpret the domestic legislation in the light of the French law governing the system for compensating self-employed commercial agents on termination of their contract.

Lastly, the Outer House of the Court of Session[118] ruled on the exhaustion of trade mark rights in a case concerning the parallel import of Davidoff brand goods from Singapore to the United Kingdom. The case filed by the claimants - who owned the trade mark - which was based on Directive 89/104, [119] was designed to secure, in the absence of the defendants' consent, a ban on the distribution by the defendants of goods bearing the trade mark within the European Economic Area. The parties agreed that the dispute mainly concerned the concept of "consent" referred to in Article 7 of the Directive. The claimants argued that neither they themselves nor the transferees had put the goods on the market in the EEA, and that they had made them available to their distributors in Singapore with a view to their resale in that territory. A contract, governed by German law, had been made for the sale of the goods in question, granting the sellers exclusive rights to distribute the goods within the Asian territory specified therein and obliging the distributors to ensure compliance with that restriction by successive resellers.

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115 Court of Session, Outer House, *Stewart Roy v M R Pearlman Ltd* [1999] CMLR 1155 (judgment given on 10.3.1999).

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

117 Court of Session, Inner House, *King v T. Tunnock Ltd*, European Law Reports of Cases in the United Kingdom and Ireland 2000, p. 531 (judgment given on 16.3.2000).

118 Court of Session, Outer House, *Zino Davidoff SA v M&S Toiletries Ltd*, [2000] CMLR 735 (judgment given on 4.4.2000).

119 See footnote 50.

The Outer House took the view that the defendants had failed to prove that the claimants had given their consent, arguing that the claimants' intention of restricting the resale of the goods to the territory specified in the contract was clearly indicated in the contract and that the defendants' argument to the effect that the claimants' consent could be implicitly assumed from the fact that they had not taken any measures to prevent the subsequent import of the goods into the EEA (for instance, a specific ban on the goods themselves) did not reflect trading circumstances. Lord Kingarth, sitting in the Outer House, diverged from the decision given in a similar case in April 1999[120] by Mr Justice Laddie, sitting in the Chancellery Division of the English High Court, who had ruled that Davidoff could not rely on its British trade mark against goods imported from Singapore. He took the view that, under English contract law, given that no specific restrictions had been imposed on the distributor when he purchased the goods, the proprietor of the trade mark was presumed to agree to the resale of the goods in the EEA. It should be noted that the English judge referred to the Court for a preliminary ruling on the concept of implicit consent.[121] Lord Kingarth emphasised the differences between the case at issue and the English decision, in particular the fact that the sales contract was made under German law, not English law. He took the view that the defence's argument based on implicit consent was not relevant, given the clear export restrictions laid down in the sales contract, which indicated that the goods in question could be resold only in the specified Asian territories. In that context, the Scottish judge ruled that it was not possible to presume implied consent to subsequent resale in the EEA.

With regard to the concept of "consent" referred to in Article 7 of the Directive in particular, Lord Kingarth ruled that the claimants' case was founded. Without denying the possibility that consent may be implied, the claimants had invoked the principle put forward in the *Silhouette* judgment[122] that as Article 7(1) derogated from the rights conferred by Article 5(1) on the trade mark proprietor, it must be interpreted restrictively.

Lastly, given that references for a preliminary ruling on the concept of consent had been addressed to the Court in *Davidoff* and *Levi Strauss*, and that none of the parties asked it to refer the matter to the Court, the Scottish court took the view that it was not necessary to do so. The Outer House of the Court of Session[123] subsequently granted an interim interdict to the claimants. More specifically, Lord McCluskey considered that deliberate interference with bar coding constituted, at first sight, an attempt to dissimulate the origin of the goods and a violation of the claimants' rights.

Still in the United Kingdom, the High Court of Justice of the Isle of Man,[124] sitting as an appellate court, gave a judgment on 19 January 1999 holding that neither Article 52 of the EC Treaty nor Community legislation on the free movement of persons and freedom to provide services applied in the Isle of Man and that, as a result, the Court of Justice judgments concerning those fields had no effect on Manx law. It concluded that the Manx courts were not bound to follow the Court's judgments.

The appellant, a British citizen resident on the Isle of Man, had been charged, more than three months but less than one year after arriving on the island, with driving without a licence. At the time of his arrest, he held a valid UK driving licence but had failed to exchange it for a licence issued by the Manx authorities within the three months required by Manx law. The appellant relied, *inter alia*, on a section of the Road Traffic Act 1985

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120 Davidoff SA/A&G Imports Ltd, [1999] 3 All ER 711.

121 See joined Cases C-414/99 *Davidoff* and C-415/99 *Levi Strauss*, note 80.

122 Case C-355/96 *Silhouette* [1998] ECR I-4799.

123 Court of Session, Outer House, *Zino Davidoff SA v M&S Toiletries Ltd* (judgment given on 8.8.2000).

124 High Court of Justice of the Isle of Man, Staff of Government Division, *Fielding v Oake* (judgment given on 19.1.1999).

which, he claimed, obliged the Manx authorities to take the necessary measures to give effect, on the Isle of Man, to Community transport legislation. Rejecting that argument, the High Court pointed out firstly that Community road transport legislation did not apply to the Isle of Man by virtue of Protocol No 3 to the 1972 Act of Accession. It added that, although the section relied on by the appellant empowered the Manx authorities to take measures to make Community law applicable, it created no obligation on them to do so. The appellant also referred to the judgment given by the Court of Justice in *Skanavi and Chryssanthakopoulos*,[125] in which proceedings against a person holding a licence issued in another Member State but having failed to exchange it for a licence of the Member State of residence within the requisite period were deemed to be incompatible with Article 43 of the Treaty. In that connection, the High Court ruled that neither Article 43 of the Treaty on freedom of establishment nor Community law on free movement of workers and freedom to provide services applied to the Isle of Man, and that consequently the case-law in question was not relevant.

2.6. *Question 4*

In **Austria**, an appeal was lodged with the Oberster Gerichtshof in two cases concerning refusal to give the necessary administrative authorisation for the purchase of real estate in the Tyrol.

In the first case,[126] a German citizen had bought a house in the Tyrol in July 1997 with a view to making it his principal residence. The competent authority of first instance (Bezirkshauptmannschaft Schwaz) had refused permission for the purchase of the property pursuant to the Tyrolean provincial law on real estate transactions (*Tiroler Grundverkehrsgesetz*), although the appellant had invoked not only the free movement of persons but also the freedom of establishment, claiming that he had obtained authorisation to pursue a business in Austria. The competent authority, applying to the applicant the rules laid down for all purchases of property by foreigners, argued that such an establishment had no commercial, cultural or social interest for the province of Tyrol.

The Oberster Gerichtshof held that the Bezirkshauptmannschaft should have known that the conditions cited in its decision were not applicable to citizens of a Member State of the European Union, a fact which was also borne out by a circular from the Tyrolean provincial government. Given the precedence of Community law and the decisions of the Court of Justice, the Bezirkshauptmannschaft should have observed the principles of the free movement of persons and freedom of establishment, even if national law stated the opposite. It explained that the government could be held liable, if a provincial authority does not apply Community law or applies it incorrectly. In this particular case, the province of Tyrol was ordered to pay the appellant's legal costs arising from the unlawful decision.

In the second case,[127] in which the Austrian court of first instance had referred to the Court of Justice for a preliminary ruling,[128] the Oberster Gerichtshof had ultimately to settle the question of whether it is the province or the federal State which has to make good the damage suffered by an individual because a provincial law does not conform to Community law. Since this is a controversial question for Austrian commentators, the Oberster Gerichtshof, following the Court's reasoning in *Konle* (referred to above), ruled that reparation for damage caused to individuals by national measures taken in breach of

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125 Case C-193/94 *Skanavi and Chryssanthakopoulos* [1996] ECR I-929.
126 Oberster Gerichtshof, 1 Ob 12/00x (judgment given on 10.6.2000).
127 Oberster Gerichtshof, 1 Ob 146/00b (judgment given on 25.7.2000).
128 C-302/97 *Konle* [1999] ECR I-3099.

Community law need not necessarily be provided by the federal State. By analogy with the Administrative Liability Act (*Amtshaftungsgesetz*), which states that a public authority that commits a breach in accordance with "operational and management criteria" is liable, only the province concerned can be liable for compensation for the damage caused, and not the federal State. The application was therefore rejected, since it was lodged against the State and not the province of Tyrol.

In **Belgium**, in a judgment of 14 January 2000,[129] the Court of Cassation felt obliged to spell out the criteria for determining the liability of the State where it adopts or approves a regulation contrary to a Community provision having direct effect in the domestic legal system. The case in point concerned the national rules on the technical characteristics of vehicles. The Court of Cassation held that the acts of the administrative authority were to be assessed in the light of the general criteria of Belgian civil liability law, which were wider than those of Community law.[130]

The original appeal contended that, by not allowing the type approval of buses from other Member States which do not meet the Belgian rules on turning circles, contrary to Article 30 of the Treaty (now Article 28 EC) the Belgian State was at fault and as a result the claimant had suffered loss, for which it was claiming damages. In the contested decision, the Brussels Court of Appeal, relying on *Factortame*,[131] had held that an administrative authority that issued a regulation in violation of the Treaty was at fault only if the infringement was sufficiently serious and manifest, explaining that for an infringement of Community law to be regarded as sufficiently serious the decisive criterion is the obvious disregard of that law by the Member State. It had then listed the factors that the court could be asked to consider in order to conclude that an infringement is manifest.[132] In view of the specific circumstances of the application, the Brussels Court of Appeal had concluded that there was no manifest infringement of Article 30 of the Treaty in this particular case, at least not during the period for which damages were sought.

The Court of Cassation set aside the judgment on the ground that it infringes the national rules on civil liability. The Court first acknowledges that, unless there are grounds for exemption, an administrative authority is at fault where it passes or adopts a regulation which fails to comply with a provision of international law having direct effects in the domestic legal system, with the result that it incurs civil liability if that fault causes damage. The Court then notes that the Appeal Court, without concluding that there were grounds for exempting the State from liability, decided that the infringement committed by the State did not constitute a fault. On the basis of this finding alone, and without commenting on the principles of Community law adduced by the Appeal Court, the Court of Cassation concludes that the judgment breaches the national rules on civil liability.

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129 Court of Cassation, No C.98.0477.F.

130 Article 1382 of the Belgian Civil Code sets out the conditions for civil liability, i.e. fault, damage and a causal link between the two.

131 Joined Cases C-46/93 and C-48/93 [1996] ECR I-1029.

132 These include the degree of clarity of the infringed rule, the extent of the discretion allowed to the national authorities, whether the failure to fulfil obligations is deliberate or involuntary, whether the error of law is excusable or not and whether the attitude taken by a Community authority may have contributed to the omission, adoption or retention of national measures contrary to Community law.

In **Greece**, in judgment 2079/1999 of 26 February 1999[133] concerning the defective transposal of Directive 89/48,[134] the Council of State (Symvoulio tis Epikrateias) did not comment on the problems of *Francovich*, even though the appellant had pleaded the civil liability of the State on account of the defective transposal of the Directive and the Court of Justice had given judgment against Greece for failing to meet its obligations.[135] While recognising the obligation on the State to transpose the Directive, the Symvoulio tis Epikrateias finds that it is for the legislature and the executive to choose the appropriate legal means of fulfilling that obligation and concludes that the courts have no jurisdiction to intervene in the matter, especially by acknowledging the civil liability of the State for the infringement of its Community obligations.

In **Ireland**, the Circuit Court applied the *Francovich* decision in a novel way in its judgment of 29 October 1999 in *Dublin Bus* v *Motor Insurers' Bureau of Ireland* (MIBI).[136] Ireland had transposed the Second Motor Insurance Directive 84/5[137] through an agreement with the defendant, a private law association representing insurance companies operating in this field. The agreement provided for a wider exemption than that in the Directive with regard to cover for damage caused by unidentified vehicles, which it had extended to cases where the driver cannot be identified. The Court of Justice has ruled that the Directive was wrongly transposed. Moreover, according to the Circuit Court, given the method of transposal selected by the Irish authorities, the MIBI, as a partner of the State, should be associated with the State. The Circuit Court described the MIBI therefore as an offshoot of the State, whose civil liability for a sufficiently serious error of transposal it was possible to establish. Since the MIBI was already aware that the exemption provided for by the agreement was too wide, and had already stated that it would not rely on it in other cases, the Circuit Court held that the tests imposed by the *Francovich* and *British Telecom* judgments were met and ordered the MIBI to pay damages to the party injured by the faulty transposal of the Directive.

In the **Netherlands**, the Supreme Court (Hoge Raad), in a VAT judgment[138] delivered on 29 March 2000, held that a recovery of tax ordered by the tax authorities in breach of a provision of the Law on VAT, which was deemed to be consistent with the Sixth VAT Directive 77/388,[139] did not infringe Community law and that there was therefore no need under Community law to grant compensation for the injury suffered by the taxpayer. The Hoge Raad stressed that, while the Netherlands had correctly transposed the Directive, the recovery at issue was not based on the chargeable events within the meaning of the provision concerned and that, therefore, VAT was not due in this particular case. (The taxpayer, who had obtained only the lump-sum repayment laid down by the Law on tax investigations, was claiming compensation in the Hoge Raad for the expenditure actually incurred in bringing an action against the recovery of the tax.) The claim was accordingly rejected.

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133 Symvoulio tis Epikrateias, plenary session, 26 February 1999, Deltio Forologikis Nomothesias, 1999, 1783-1787; EDDDD, 2000, 98-104; European Current Law, 2000, Part 6, No 75 (summary in English).

134 Council Directive 89/48/CEE of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration (OJ L 19, 24.01.1989,p. 16).

135 Case C-365/93 [1995] ECR I-499.

136 McMahon J., not yet published.

137 Second Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (OJ L 8, 15.2.1984, p. 17).

138 Hoge Raad, judgment of 29 March 2000, *Beslissingen in belastingszaken* 2000, 342.

139 See footnote 20.

In the **United Kingdom**, as part of the proceedings brought by many thousands of depositors against the Bank of England following the winding-up of the Bank of Credit and Commerce International SA ("BCCI"), the House of Lords gave judgment[140] on, first, the constituent parts of the tort of misfeasance in public office and, second, whether Directive 77/780/EEC on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions[141] gives individuals a right to damages against the State which they may assert in the national courts. In 1980 the Bank of England ("the Bank"), acting as the supervisory authority for the purposes of the Banking Act 1979 (which transposed the Directive into national law), had authorised BCCI to carry on the business of licensed deposit taking institution. In 1991, at the Bank's request, the High Court appointed receivers to the BCCI. This decision entailed the closure of BCCI in the United Kingdom and considerable losses for thousands of depositors. The collapse of BCCI was mainly due to fraud on a vast scale perpetrated at senior level within BCCI. The depositors then sued the Bank on the basis of, firstly, the tort of misfeasance in public office - they claimed that certain senior officials had acted in bad faith by giving an authorisation to BCCI when it was illegal, by turning a blind eye to what went on after the authorisation had been granted and by failing to take the necessary measures to close BCCI down - and, secondly, of Directive 77/780.

As regards the complaint based on the Directive, the House of Lords held that the Community instrument did not impose obligations on the Member States that created rights on which individuals could base actions for damages. It was not necessary to recognise such rights in order to achieve the purpose of the Directive, which is a first step towards the approximation of laws on the business of credit institution in the Community and seeks to remove the obstacles to the freedom of establishment while recognising the need for rules to protect savings. It follows that the approximation measures must meet the double test of protecting savings and creating a level playing field between credit institutions operating in more than one Member State. According to the House of Lords, while the Directive requires the competent authorities to cooperate where a credit institution pursues its business in one or more Member States other than that where its registered office is situated, it does not go so far as to impose supervisory obligations on the competent authority within each Member State. Applying the theory of the "acte clair", the House of Lords gave its decision without referring the matter to the Court for a preliminary ruling.

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[140] *Three Rivers District Council and others v The Governor and Company of the Bank of England*, [2000] CMLR 205 (judgment given on 18.5.2000).

[141] First Council Directive 77/780/EEC of 12 December 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions (OJ L 322, 17.12.1977, p. 30).