

The Law of the EUROPEAN UNION

Teaching Material



THE COMMUNITY SYSTEM OF JUDICIAL REMEDIES:
ARTICLES 226, 227, 228

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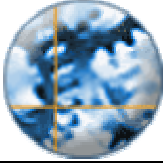
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NOTE AND QUESTIONS

Cases on Articles 226-228 (ex 169-171) TEC

The interest in the following cases does not lie in their substantive holding on this or that area of Community law. They have been selected as examples of the problems and policy dilemmas to which the 226 (ex 169) procedure gives rise. Read them with the perspective of a "public prosecutor", a Community "Attorney General" or "Solicitor General" one principal task of which is to ensure that Community law is observed by the Member State.

1. In reading these cases watch out in particular for the following features:
 - a. Discretion and power of the Commission in its decisions to prosecute or abstain from prosecution and the impact of this on the "culpability" of the prosecuted Member State
 - b. The relationship between the remedies under Article 226 (ex 169) and Article 234 (ex 177). The Court alludes to this.
 - c. The time frame of the cases -- what implications?

2. Article 227 TEC (and 142 Euratom) permits enforcement actions to be brought against Member States by Member states. Article 226 and Article 227 proceedings are not completely parallel. Identify the main differences. The procedure under Article 227 is little used. The first case under it was an action brought by France against the UK in 1978 (Case 141/78). Think of possible reasons why it is so little used?

1. RELEVANT TREATY PROVISIONS

Article 226

If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

Article 227

A Member State which considers that another Member State has failed to fulfil an obligation under this Treaty may bring the matter before the Court of Justice.

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under this Treaty, it shall bring the matter before the Commission.

The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.

If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court of Justice.

Article 228

1. If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice.

2. If the Commission considers that the Member State concerned has not taken such measures it shall, after giving that State the opportunity to submit its observations, issue a reasoned opinion specifying the points on which the Member State concerned has not complied with the judgment of the Court of Justice.

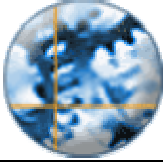
If the Member State concerned fails to take the necessary measures to comply with the Court's judgment within the time limit laid down by the Commission, the latter may bring the case before the Court of Justice. In so doing it shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court of Justice finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

This procedure shall be without prejudice to Article 227.

2. CASES

2.1. Case 7/68: Commission v. Italy (Art treasure case)



NOTE AND QUESTIONS

1. What is the policy dilemma, which this case, and many like it, poses to the Commission as the prosecutory authority of the Community? If the decision were yours, would you have brought the case? What other information would you want to have before making that policy decision?
2. Does the Commission in fact have full discretion whether or not to bring a case such as this?

Commission of the European Communities v Italian Republic

Case 7/68

10 December 1968

Court of Justice

[1968] ECR 423, [1969] CMLR 1

<http://www.curia.eu.int/en/content/juris/index.htm>

Summary of the facts and procedure

Italian Law No 1089 of 1 June 1939 on the protection of articles of artistic or historic interest contains several provisions relating to the exportation of such articles; in particular, it provides, according to the circumstances, for an absolute prohibition on exportation (Article 35), the requirement of a licence (Article 36), a right of pre-emption vested in the State (Article 39) and the imposition on exportation of a progressive tax on the value of the article ranging by successive stages from 8% to 30% (Articles 37).

In January 1960, the Commission asked the Italian Republic to abolish the tax as regards the other Member States by the end of the first stage of the transitional period, that is to say, before 1 January 1962, since it considered that the tax had an effect equivalent to a customs duty on exportation and so was contrary to Article 16 of the EEC Treaty. After a prolonged exchange of correspondence, the Commission by letter of 25 February 1964 set in motion the procedure laid down by Article 169 of the EEC Treaty and called on the Italian Government to submit its observations on the alleged violation of the Treaty by the Italian Republic. The observations did not satisfy the Commission, which then by letter of 24 July 1964 delivered the reasoned opinion

provided for by the first paragraph of Article 169 of the Treaty.

The Commission stated its reasons for declaring that the Italian Republic had failed to fulfil the obligations imposed on it by Article 16, and gave it a time-limit of two months in which to abolish the disputed tax on transactions with other Member States. This time-limit was extended to 31 December 1965 after the Commission had been informed by the Italian Government that a parliamentary committee had been set up with the task of studying a system of protection, which would take account of the Commission's observations.

On 16 May 1966, the Commission, in reply to a fresh request for an extension, informed the Italian Government that it had already granted an extension sufficient to allow for the abolition of the tax in question, having regard to the necessary parliamentary procedures, and that it reserved the right to bring the matter before the Court of Justice at the appropriate time.

A draft law by the Government to exempt exports to Member States of the Communities from payment of the tax was approved by the Italian Senate on 26 July 1967 and passed to the Chamber of Deputies. The draft law lapsed on dissolution of the Italian Parliament on 11 March 1968. Meanwhile, the Commission had brought proceedings before the Court of Justice by an application lodged on 7 March 1968.

Conclusions of the parties:

The applicant claims that the Court should:

- *declare that the Italian Republic has failed to fulfil the obligations imposed on it by Article 16 of the Treaty establishing {425} the EEC by continuing to levy against other Member States after 1 January 1962 the progressive tax provided for by Article 37 of Law No 1089 of 1 June 1939;*
- *order the defendant to pay costs.*

The defendant contends that the Court should:

- *dismiss the application by the Commission;*
- *order it to pay the costs.*

Procedure:

The submissions and arguments of the parties may be summarized as follows:

The defendant complains that the Commission lodged its application a few days prior to the dissolution of the Italian Parliament, at a time when it was known for certain that this was imminent; but it makes no formal plea of inadmissibility.

The Commission should have seen that it was advisable to defer the commencement of proceedings which only legislation could resolve in the way, which it desired. In not doing so, it failed to comply with Article 2 of the Treaty, prohibiting any measure capable of giving rise to an imbalance which might prejudice the harmonious development of the activities of Member States, by disregarding the practical difficulties facing the Italian Republic in the present case.

The applicant points out that the Italian Government does not deny that Article 169 of the Treaty allows the applicant to decide when to commence proceedings in the Court after the State concerned has not responded to the Commission's reasoned opinion within the period laid down; in the present instance the application was made nearly four years after communication of the reasoned opinion, and more than eight years after the first approaches had been made to the defendant.

Article 155 of the Treaty states that the Commission shall ensure that the provisions of the Treaty are applied, and it was therefore both entitled and bound, in view of the length of time which had already passed and the lapse of the government's draft law owing to the dissolution of the Parliament, to have to bring the matter before the Court at the time when it did so.

Judgement:

[...]

THE COMMISSION HAS BROUGHT BEFORE THE COURT, UNDER ARTICLE 169 OF THE TREATY AN APPLICATION FOR A DECLARATION THAT THE ITALIAN REPUBLIC BY CONTINUING AFTER 1 JANUARY 1962 TO LEVY THE PROGRESSIVE TAX PROVIDED FOR IN ARTICLE 37 OF LAW NO 1089 OF 1 JUNE 1939 ON THE EXPORT TO OTHER MEMBER STATES OF THE COMMUNITY OF ARTICLES HAVING AN ARTISTIC, HISTORIC, ARCHAEOLOGICAL OR ETHNOGRAPHIC VALUE, HAS FAILED TO FULFIL THE OBLIGATIONS IMPOSED ON IT BY ARTICLE 16 OF THE TREATY ESTABLISHING THE EEC.

A - ADMISSIBILITY

THE DEFENDANT, QUESTIONING THE ADMISSIBILITY OF THE APPLICATION, SUBMITS THAT THE COMMISSION, BY BRINGING THE MATTER BEFORE THE COURT AT A TIME WHEN THE ITALIAN PARLIAMENT, WHICH HAD BEFORE IT A DRAFT LAW FOR THE PURPOSE OF AMENDING THE PROVISION IN DISPUTE, WAS ON THE POINT OF BEING DISSOLVED, DISREGARDED THE OBLIGATION IMPOSED UPON THE COMMUNITY INSTITUTIONS UNDER ARTICLE 2 OF THE TREATY TO 'PROMOTE THROUGHOUT THE COMMUNITY A HARMONIOUS DEVELOPMENT OF ECONOMIC ACTIVITIES'.

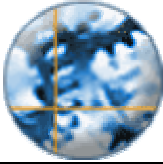
IT IS FOR THE COMMISSION, UNDER ARTICLE 169 OF THE TREATY, TO JUDGE AT WHAT TIME IT SHALL BRING AN ACTION BEFORE THE COURT; THE CONSIDERATIONS WHICH DETERMINE ITS CHOICE OF TIME CANNOT AFFECT THE ADMISSIBILITY OF THE ACTION, WHICH FOLLOWS ONLY OBJECTIVE RULES.

IN THE PRESENT CASE, THE ACTION OF THE COMMISSION WAS IN ANY CASE PRECEDED BY A PROLONGED EXCHANGE OF VIEWS WITH THE ITALIAN GOVERNMENT, BEGUN BEFORE THE EXPIRY OF THE SECOND STAGE OF THE TRANSITIONAL PERIOD, TO TRY TO PERSUADE THE COMPETENT AUTHORITIES IN THE REPUBLIC TO DO WHAT WAS NECESSARY TO AMEND THE PROVISIONS CRITICIZED BY THE COMMISSION.

THE ACTION IS THEREFORE ADMISSIBLE.

[...]

2.2. *Case C-117/95: Commission v. Italy (African horse sickness)*



NOTE AND QUESTIONS

The following case shows another dilemma the Commission has to face.

While reading the African horse sickness case, think about the importance of the pre-trial procedure from a practical point of view as well as from a broader policy (notice, fairness, et cetera) perspective.

This case seemingly comes out of conflicting results? Can you reconcile them? Can you think of any other explanations? Is the AG convincing?

1.2.1 Opinion of AG Fennelly

Commission of the European Communities v Italian Republic

Case C-117/95

6 June 1996

Advocate General Fennelly

ECR [1996] Page I-04689

<http://www.curia.eu.int/en/content/juris/index.htm>

1. The present case may be described as a partly uncontested infringement action. While admitting that it has not yet adopted measures specifically to implement the relevant directives, Italy has claimed in its defence before the Court that a 1954 law contains provisions corresponding to those of the two directives. In the particular circumstances of this case, a question arises as to the admissibility of the Commission's action.

I Facts and procedure

2. The deadlines for bringing into force the national provisions to implement Council Directive 92/35/EEC of 29 April 1992 laying down control rules and measures to combat African

horse sickness I and Council Directive 92/40/EEC of 19 May 1992 introducing Community measures for the control of avian influenza 2 (hereinafter collectively 'the Directives') both expired on 31 December 1992, in accordance with the first paragraph of Articles 20 and 22 of the Directives respectively. As it had not been informed of the adoption of any implementing measures, as required by the second paragraph of each of these provisions, the Commission invited the Italian Government by letter of 12 March 1993 to communicate to it a complete and detailed table of such measures; the Commission did not receive any reply to this letter.

3. On 2 May 1994, the Commission sent the Italian Government a reasoned opinion in accordance with Article 169 of the Treaty. This recited the duties incumbent on the Member States by virtue of the third paragraph of Article 189 of the Treaty, which states that 'a directive shall be binding, as to the result to be achieved, upon each Member State', and the first paragraph of Article 5 of the Treaty, which obliges the Member States to 'take all appropriate measures ... to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community'. The Commission stated that, in the absence of any information to the contrary, it must assume 'that the Member State has not yet adopted the [necessary] provisions' to comply with the directives and was therefore in breach of its obligations.
4. On 29 July 1994, the Italian Permanent Representation informed the Commission that the transposition of the Directives had been included in the annual Community law for 1993, and was therefore under way.
5. On 22 February 1995, the Commission initiated the present proceedings. In its application, it requests the Court 'to declare that, by not adopting within the deadline laid down the laws, regulations and administrative provisions needed in order to comply with [the Directives], the Italian Republic has failed to fulfil its obligations under the Treaty'.
6. In its statement of defence, for the first time, the Italian Government refers to Presidential Decree No 320 of 8 February 1954, laying down veterinary health regulations (hereinafter 'D.P.R. 320/54').³ According to the Government, the rules laid down in D.P.R. 320/54 'mirror' both the objectives pursued by the Community legislator and the specific provisions of the Directives. As the Government intended to adopt special measures concerning African horse fever and avian influenza, D.P.R. 320/54 had not been notified to the Commission as an implementing measure. Now that the matter has been referred to the Court, the Government relies upon D.P.R. 320/54 as a partial implementation of the Directives, though the adoption of the projected specific measures should complete the implementation process even before the Court has reached judgment in the case. The Italian Government none the less expressly concludes by accepting that the Court should find an infringement for an incorrect transposition of the Directives.
7. In its reply, the Commission expresses 'astonishment' that the Italian authorities should raise at this stage the prior existence of national provisions partially giving effect to the Directives at issue. Notwithstanding this development, it maintains its request that the Court declare that Italy has not adopted the measures necessary to comply with its obligations under the Directives (emphasis in original). The Commission adds that it has not been contested in either the pre-litigation procedure or in Italy's statement in defence that these measures have not yet been adopted.
8. The Italian Government states in its rejoinder that the forthcoming entry into force of the (new) transposition regulations will bring the 'infringements notified'⁴ to an end, and expresses the hope that the Commission will withdraw its notion

II Analysis

9. The first matter which must be clarified in the present case is the exact scope of the declaration the Commission is seeking from the Court. In both the reasoned opinion and its initial application, the Commission refers to the failure of Italy to adopt the necessary

provisions. In both cases it clearly meant that Italy had not adopted any of the requisite provisions to comply with the Directives. The Commission did not advert in any way to the possibility of a partial implementation.

10. The Commission's reply to Italy's defence is much less clear; in particular, it does not take any position whatsoever on the question of whether, and to what extent, Italian law could be considered as already being in conformity with the Directives by virtue of D.P.R. 320/54. By emphasizing the words 'the measures necessary', the Commission appears to have amended its claim to one that the Italian Republic has failed to implement the Directives completely, rather than having completely failed to implement them. The Commission thus implicitly accepts the possibility that D.P.R. 320/54 might constitute a partial implementation of the Directives; 5 Italy's failure fully to implement the Directives is therefore the only matter which can be said not to have been contested.
11. In the absence of any indication in this regard from the Commission, and in the light of Italy's reliance on pre-existing provisions, I do not consider that the Court should assume that the Commission maintains that the Italian Republic has completely failed to implement any part of the Directives. It follows, in my opinion, that the Commission must be considered to have narrowed the scope of the declaration it is requesting, to one that the Italian Republic has not implemented all of the provisions of the Directives.
12. In these circumstances, the question of the admissibility of the Commission's application should be examined; though this has not been pleaded by the Italian Government in its defence, the Court can, and in my view in the present case should, consider this matter of its own motion. 6 The Court has consistently held that 'the scope of an action brought under Article 169 of the Treaty is delimited by the pre-litigation procedure provided for by that article. Consequently the action cannot be founded on any complaints other than those formulated in the reasoned opinion'. 7 In the present case, the reasoned opinion and the Commission's application were drafted in ignorance of the existence of D.P.R. 320/54, and it is far from obvious that the Commission's present complaint respects the rights of the defence guaranteed under Article 169 of the Treaty. Furthermore, the exact scope of the alleged failure by Italy to comply with the Directives has not been identified with sufficient precision at any stage of the proceedings before the Court.

A. The pre-litigation procedure

13. In the past the Court has accepted that the Commission may amend its request for a declaration at the stage of its reply to the Member State's statement in defence to take account of subsequent developments, though of course it may only narrow, not extend, its original claim. In Case C-132/94 *Commission v Ireland* (hereinafter 'Ireland'), for example, the Commission withdrew its claim as regards part of the directive in question which had been the subject of the reasoned opinion and application under Article 169, as it accepted that the defendant Member State had in the meantime adopted some of the necessary measures. The Court upheld the Commission's amended application for a declaration that 'by failing to bring into force all the laws, regulations and administrative provisions necessary to comply with' the directive, Ireland had failed to fulfil its obligations under the directive (emphasis added).
14. Where, however, the change in the Commission's claim results in a request for a declaration which is different in kind, and not merely in scope, from that contained in the reasoned opinion, the Court will not admit the revised claim. This was the situation in Case C-274/93 *Commission v Luxembourg* (hereinafter 'Luxembourg'). There the Commission had received no reply to its letter of formal notice or reasoned opinion, and the Luxembourg Government did not file a statement of defence; however, some two weeks after the application had been lodged, Luxembourg notified the Commission of a national law which had been adopted some years before the directive had been adopted, and which governed a number of the matters dealt with in the directive. The Commission applied for a judgment in default, in accordance with Article 94(1) of the Court's Rules of Procedure, though

amending its original claim of a failure to adopt the necessary measures to a request that the Court declare that 'by not adopting within the prescribed period all the measures necessary to comply with [the directive] ... the Grand Duchy of Luxembourg had failed to fulfil its obligations under Article 25 of that directive and under Articles 5 and 189 of the EEC Treaty'.

15. The Court took the view that the Commission was now 'requesting the Court to hold, upon examination of the Luxembourg Law, that transposition of the Directive was incomplete and therefore defective, whereas in its application ... the Commission alleged failure to implement and to communicate implementing measures'. The Court refused to do so. In its judgment, it enunciated a proposition highly relevant to the present case, stating that 'before it could make such a declaration, the Court would have to carry out a detailed examination of the Luxembourg Law to establish which provisions of the Directive [had] not been properly implemented The Court could carry out such an examination only on the basis of a pre-litigation procedure that allowed the defendant Member State to address the Commission's claims relating to the defective transposition of specific provisions of the Directive.'¹² As the pre-litigation procedure had not given Luxembourg the opportunity to address those specific claims, the Court held the application to be inadmissible.
16. It is difficult to draw any relevant distinction between the circumstances in Luxembourg and those of the present case as regards the consequences of the Commission's change of claim. In both, the Commission was, in effect, taken by surprise as regards its application for a declaration of a complete failure to transpose by late reliance on pre-existing national provisions of which it was unaware. Even the total failure of a Member State to provide any reply at the pre-litigation stage or to file any defence did not deprive it in this case of the protection provided by the former. Given the serious implications of a Court ruling that a Member State has failed to implement its obligations under a directive, which can establish 'the basis of a responsibility that a Member State can incur as a result of its default',¹³ it is imperative, in my view, that the Member State be given the opportunity, at the pre-litigation stage, to counter the Commission's claim of a defective implementation, as opposed to a complete failure to implement.
17. The Court cannot therefore, in my view, be asked in such circumstances to declare that a Member State is partly in breach of its obligations, when the latter has not been able to present its views on the Commission's analysis of the extent of that breach. This follows from the first paragraph of Article 169 of the Treaty, in accordance with which the Commission can only send a reasoned opinion where the Member State has been given the opportunity to submit its observations on that matter, and not a distinct, if perhaps related, matter. As the Court noted in Case C-266/94 *Commission v Spain*, '[the] proper conduct of the pre-litigation procedure constitutes an essential guarantee required by the Treaty ... so as to ensure that any contentious procedure will have a clearly defined dispute as its subject-matter ... [it] is only on the basis of a properly conducted pre-litigation procedure that the contentious procedure before the Court will enable the latter to judge whether the Member State has in fact failed to fulfil the specific obligations which the Commission alleges it has breached'.
18. The circumstances of the present case are, in my view, for the same reasons as those given by the Court in Luxembourg, quite different from those of Ireland. By accepting that Ireland had adopted some transposition measures, in effect the Commission only maintained its application as regards those provisions of the directive which concerned fish and fishery products, which Ireland did not claim to have implemented. The proceedings before the Court could therefore be said to have had a clearly defined and uncontested subject-matter; though this was different from that of the pre-litigation stage and the Commission's initial application, the defendant Member State had been given an opportunity at the pre-litigation stage to submit its observations on all the alleged breaches of its obligations, including its duty to implement veterinary checks on fish and fishery products. In Luxembourg, on the other hand, the defendant Member State had not been given a similar opportunity prior to the litigation to present its views on the Commission's

contention that the national provisions did not give effect to the directive in question.

19. The essential distinction seems to me to lie in the definition of the Member State's failure to respect its obligations which is the subject of the application. Where the extent and nature of the actual compliance, and consequently of the alleged outstanding failure, is not in dispute, there need be no objection to the Commission's narrowing its original claim; the defendant Member State has been given the opportunity in such circumstances to contest that failure within the framework of the reasoned opinion. Where the extent and nature of the alleged failure to comply is in doubt, the defendant Member State must be afforded an opportunity, even if it is in default procedurally or does not contest the existence of the failure, to submit its observations on a reasoned opinion seeking to establish this failure before the Court can properly consider whether or not the Member State is in breach of its Treaty obligations.
20. At no stage in the present proceedings has the Commission presented 'a coherent and detailed statement of the reasons which led [it] to conclude' that Italy is in breach of its obligations under the Directives notwithstanding D.P.R. 320/54, such as the reasoned opinion is intended to provide, and on which Italy would have had the opportunity to present its comments. In these circumstances, I am of the opinion that the Commission's application should be dismissed as inadmissible.

B. Lack of precision of the Commission's claim

21. Even if the first objection to the admissibility of the Commission's amended claim could somehow be overcome, the Court would, in my view and for related reasons, still not be in a position to come to a decision on the merits, owing to the failure of the Commission to clarify which of the obligations of the Directives Italy is alleged to have breached. The necessity for the Commission to advance specific allegations of breaches by a Member State of its obligations is inherent in the nature of the Article 169 procedure, and was adverted to by the Court, for example, in C-266/94 Commission v Spain. Even if D.P.R. 320/54 was drawn to its attention at a very late stage, the Commission could have given some indication of its bearing on the matters covered by the Directives. It is established case-law that 'in proceedings under Article 169 ... it is incumbent upon the Commission to prove the allegation that the obligation has not been fulfilled. It is the Commission's responsibility to place before the Court the information needed to enable the Court to establish that the obligation has not been fulfilled, and in so doing the Commission may not rely on any presumption'; in the present case, it therefore fell to the Commission to establish the extent of Italy's failure to implement the Directives.
22. The circumstances of the present case are, if anything, more extreme than those in Luxembourg, where the Commission had sought to identify a number of provisions of the directive which had not been implemented by the national law, and Advocate General Jacobs had conducted a systematic comparative analysis of the prior Luxembourg law and the directive, and of the Commission's revised claim. In its reply in this case, the Commission has merely expressed its astonishment at the Italian Government's behaviour, without proceeding to any examination whatever of the provisions relied upon in the Italian defence; while the parties agree that the Directives have not been properly implemented, the Court has been given no indication of the extent of this omission.
23. It also appears to me that no judgment the Court could give on the substantive issues as they have been put before it in the present case would enable the purposes of Article 169 proceedings to be fulfilled. These were described by the Court in Joined Cases 15/76 and 16/76 France v Commission as being to 'obtain[] a declaration that the conduct of a Member State infringes Community law and [to] terminat[e] that conduct'. If the Court declares that a Member State has partly failed to implement a directive in circumstances where it is impossible to identify the extent of that failure, the Member State will not be able to identify which measures are 'necessary ... to comply with the judgment', in accordance with Article 171(1) of the Treaty. Nor could the Commission properly operate the

mechanism provided in Article 171(2) of the Treaty, amended as a result of the Treaty on European Union, if the first judgment of the Court were to leave open the question of the extent of the failure to implement.

24. While it might appear repugnant to what Advocate General Jacobs, in Luxembourg, termed 'the principles of procedural economy and proper administration of justice' that a Member State should be able to delay a proper examination by the Commission and the Court of the compatibility of its legislation by recourse to tactics such as those employed in the present case, it is important to bear in mind that 'the admissibility of an action based on Article 169 of the Treaty depends only on an objective finding of a failure to fulfil obligations' and is not affected by 'any inertia or opposition on the part of the Member State concerned'. 21 As Advocate General Roemer noted in Case 7/71 *Commission v France*, 'the procedure under Article 169 of the EEC Treaty ... [is] concerned not with guilt and morality but simply with the clarification of the legal position'.

In the present case, the Commission has not at any stage produced an analysis of Italy's obligations under the Directives in the light of D.P.R. 320/54, and I do not consider that, in these circumstances, the Court is in a position to clarify the law, for the reasons adverted to in Luxembourg.

25. I am sensitive to the force of the remarks of Advocate General Jacobs in Luxembourg, cited above, and particularly the possible incentive in such circumstances for Member States 'to produce legislative texts only at a very late stage in the hope that the Commission's resultant modification of its claim would render the action inadmissible'. 2s The fact remains, however, that a Member State cannot be forced under the jurisdictional system of the Treaty to enter any kind of defence in Article 169 proceedings, nor prevented from entering a defence after the pre-litigation stage is over. If a Member State were unable to raise such matters after an application had been made to the Court, the Commission would in effect be able 'to determine conclusively ... the rights and duties of a Member State ... [whereas according] to the system embodied in Articles 169 and 171 of the Treaty, the rights and duties of Member States may be determined and their conduct appraised only by a judgment of the Court'.
26. It would have been open to the Commission in the present case to include in its infringement action an alternative claim that Italy had failed, in breach of Articles 20 and 22 of the respective Directives, and/or Article 5 of the Treaty, to inform it of the relevant national measures; as noted above, it assumed from Italy's silence that no such measures existed, and omitted such a claim from its application.
27. For the sake of completeness, I should add that I do not consider particularly significant the fact that the defendant Member State has expressly concluded that the Court should find that the Directives had not been correctly transposed. In the first place, this follows logically from its defence of a partial implementation based on D.P.R. 320/54 whether or not the defendant Member State expressly reaches such a conclusion. In the second place, the Italian Government has not given any indication of the extent to which the Directives can, in its view, be considered as having been transposed *ex ante*, as it were, by the Decree. Finally, as noted above, proceedings under Article 169 are objective in character, and the Court need not accept the concessions made by the defendant; thus in Case C-334/94 *Commission v France*, the Court examined in detail the Commission's complaints, even those which had not been contested by the French Government.
28. I am therefore of the opinion that the Commission's application should be dismissed as inadmissible. As to costs, the lack of cooperation of the Italian Government has been flagrant, and has caused the misapprehension which led the Commission to initiate proceedings on the wrong basis. I therefore recommend that, as in Luxembourg, the defendant Member State be required to bear all the costs.

[...]

1.2.2 Judgement of the Court of Justice

Commission of the European Communities v Italian Republic

Case C-117/95

26 September 1996

Court of Justice

ECR [1996] I-04689

<http://www.curia.eu.int/en/content/juris/index.htm>

- 1 By application received at the Court Registry on 4 April 1995, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by failing to adopt within the period prescribed the laws, regulations and administrative provisions necessary to comply with Council Directive 2/35/EEC of 29 April 1992 laying down control rules and measures to combat African horse sickness (OJ 1992 L 157, p. 19) and Council Directive 92/40/EEC of 19 May 1992 introducing Community measures for the control of avian influenza (OJ 1992 L 167, p. 1), the Italian Republic has failed to fulfil its obligations under those Directives and under the EC Treaty.
- 2 Article 20 of Directive 92/35 provided that the Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive no later than 31 December 1992 and immediately inform the Commission thereof.
- 3 Similarly, Article 22 of Directive 92/40 required the Member States to bring into force the laws, regulations and administrative provisions necessary to comply with that Directive before 1 January 1993 and immediately inform the Commission thereof.
- 4 On 12 March 1993 the Commission since it had received no notification of measures adopted by Italy for the transposition of the Directives and had no other evidence to suggest that Italy had complied with its obligations sent a letter of formal notice to the Italian Government asking it to forward a complete and detailed list of those provisions of national law which, in its view, implemented the Directives.
- 5 In the absence of any reply to that letter, the Commission delivered a reasoned opinion to the Italian Government on 2 May 1994, calling for it to adopt the necessary implementing measures within two months.
- 6 By letter of 29 July 1994, the Italian authorities informed the Commission that the procedures for transposing the Directives were under way.
- 7 On receiving no further communication concerning implementation of the two Directives, the Commission decided to initiate these proceedings.
- 8 In its application, the Commission points out that it has as yet received no information showing that the Italian Republic has in fact adopted the necessary measures.
- 9 The Italian Government does not deny that Directives 92/35 and 92/40 have not been correctly transposed into Italian law. In its defence, however, it refers - for the first time - to a veterinary inspection measure, approved by Presidential Decree No 320 of 8 February 1954 (Gazzetta Ufficiale della Repubblica Italiana No 142 of 24 June 1954, Ordinary

Supplement), which contains a number of provisions partially transposing the Directives. According to the Italian Government, that measure was not notified to the Commission as an instrument giving effect to the Directives because steps had already been taken to adopt specific measures on avian influenza and African horse sickness.

- 10 In its reply, the Commission seeks the same form of order as in its application, since it is common ground that the necessary measures have not yet been adopted by the Italian authorities.
- 11 Brief consideration of the provisions cited by the Italian Government confirms, as the latter itself recognized, that they cannot be regarded as constituting full implementation of Directives 92/35 and 92/40.
- 12 Consequently, it must be held that, by failing to adopt within the period prescribed the laws, regulations and administrative provisions necessary to comply with Directives 92/35 and 92/40, the Italian Republic has failed to fulfil its obligations under Articles 20 and 22, respectively, of those Directives.

Costs

- 13 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The Commission asked that the Italian Republic be ordered to pay the costs. Since the Italian Republic has been unsuccessful in its defence, it must be ordered to pay the costs.

[...]

2.3. Case 77/69: Commission v. Belgium (Timber Tax case)



NOTE AND QUESTIONS

In this case the ECJ held that a Member State is liable even for the inaction of constitutionally independent institutions. Although the institution, here, was the parliament, it would seem that the holding would apply to violations of Community law the authors of which would be courts in the Member States.

1. Should an action according to article 226 (Ex 169) be commenced against a Member State for decisions of its courts? What are the policy considerations for and against such an action?
2. You will see in the section (bellow) covering the latest cases before the European courts that there are currently three cases dealing with Member states' liability for breaches of Community law by the judiciary pending before the Court.

Commission of the European Communities v Kingdom of Belgium

Case 77/69

5 May 1970

Court of Justice

[1970] ECR 237

<http://www.curia.eu.int/en/content/juris/index.htm>

1. By an application lodged at the Registry on 22 December 1969, the Commission made an application to the Court under Article 169 of the Treaty for a declaration 'that the Kingdom of Belgium, by applying the same rate laid down in Article 31-14 of the General Regulation on Duties assimilated to Stamp Duties (Royal Decree of 3 March 1927) to home-grown wood transferred standing or felled and to imported wood calculated to its value at the time of the declaration of entry for home use, has failed to fulfil its obligations under Article 95 of the Treaty establishing the European Economic Community'.

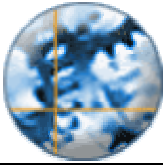
[...]

12. Following a series of steps taken by the Commission the first of which dates back to 1963, the Belgian Government has shown its willingness to take the necessary measures with a view to eliminating the discrimination complained of.

13. A draft law intended to make possible a revision of the disputed scheme was put before Parliament in 1967 and provisions were later adopted in order to revive this draft law which had lapsed owing to the dissolution of the Belgian Parliament in the meanwhile.
14. In these circumstances the Belgian Government considers that the delay in enacting the law amounts as far as it is concerned to a 'case of force majeure'.
15. The obligations arising from Article 95 of the Treaty devolve upon States as such and the liability of a Member State under Article 169 arises whatever the agency of the State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution.
16. The objection raised by the defendant cannot therefore be sustained.
17. In these circumstances, by applying a duty at the same rate, as laid down by Article 31-14 of the Royal Decree of 3 March 1927 as amended, to home-grown wood transferred standing or felled and to imported wood calculated on its value at the time of the declaration of entry for home use, the Kingdom of Belgium has failed to fulfil its obligations under Article 95 of the Treaty.

[...]

2.4. Case 39/72: Commission v. Italian Republic (Slaughtered Cows Case)



NOTE AND QUESTIONS

1. This would appear to be a moot case. What reasons can be given in support of the ECJ's position that there still exists an interest in pursuing the action? Could third parties have an interest in the ECJ issuing a ruling?
2. How much discretion should the Commission be allowed in such a case and why?

Commission of the European Communities v Italian Republic

Case 39/72

7 February 1973

Court of Justice

[1973] ECR 101

<http://www.curia.eu.int/en/content/juris/index.htm>

Summary of the facts and procedure:

Council Regulation 1975/69, together with implementing Commission Regulation 2195/69, attempted to deal with chronic surpluses of dairy products by authorising premiums to be paid to dairy farmers who slaughtered a portion of their dairy herd and by creating a system of payments to farmers for withholding dairy products from the market. The Member States were required to set up the systems, notify their farmers, verify that slaughter was taking place between February and March 1970, and pay the premiums.

Italy failed to take any action; in part because doubts arose during parliamentary debates as to the expediency of payments to farmers for withholding products. When the Commission brought an infringement action Italy argued:

Judgment:

- 8 THE DEFENDANT, WITHOUT GOING INTO THE MERITS OF THE DISPUTE, CLAIMS THAT THE PURSUIT OF THE ACTION COMMENCED BY THE COMMISSION IS NO LONGER WARRANTED BECAUSE OF THE CIRCUMSTANCES.

THE DIFFICULTIES WHICH HAD ORIGINALLY DELAYED THE PAYMENT OF THE PREMIUMS FOR SLAUGHTERING HAVING BEEN OVERCOME, THE PAYMENT OF THESE PREMIUMS IS IN PROCESS AND THEREFORE THE RAISON D' ETRE OF THE PROCEEDINGS INSTITUTED BY THE COMMISSION HAS DISAPPEARED.

AS FOR THE OMISSION TO PAY THE PREMIUM FOR NON-MARKETING, THE SITUATION HAS BECOME IN THE MEANTIME IRREMIABLE, BECAUSE IT WOULD NO LONGER BE POSSIBLE PHYSICALLY TO COMPLY RETROACTIVELY WITH THE OBLIGATIONS WHICH SHOULD HAVE BEEN PERFORMED DURING THE PERIOD PROVIDED BY THE COMMUNITY PROVISIONS IN QUESTION.

IN THESE CIRCUMSTANCES, THE ACTION BROUGHT BY THE COMMISSION HAS LOST ITS PURPOSE ON BOTH COUNTS, SO THAT IT ONLY REMAINS FOR THE COURT TO HOLD THAT THERE IS NO NEED TO GIVE A DECISION.

- 9 THE OBJECT OF AN ACTION UNDER ARTICLE 169 IS ESTABLISHED BY THE COMMISSION' S REASONED OPINION, AND EVEN WHEN THE DEFAULT HAS BEEN REMEDIED SUBSEQUENTLY TO THE TIME LIMIT PRESCRIBED BY PARAGRAPH 2 OF THE SAME ARTICLE, PURSUIT OF THE ACTION STILL HAS AN OBJECT.

THIS OBJECT HOLDS IN THE PRESENT CASE SINCE, AS REGARDS THE PREMIUMS FOR SLAUGHTERING THE OBLIGATION PLACED ON THE ITALIAN REPUBLIC IS FAR FROM BEING COMPLETELY PERFORMED; THE QUESTION OF THE PAYMENT TO THOSE ENTITLED OF INTEREST ON THE OVERDUE PAYMENTS, IS NOT SETTLED, AND THE COMPLAINTS DEVELOPED BY THE COMMISSION IN THE COURSE OF THE PROCEEDINGS RELATE NOT ONLY TO THE DELAY IN CARRYING OUT THE REGULATIONS BUT ALSO TO CERTAIN OF THE METHODS OF APPLICATION WHICH HAVE IN EFFECT WEAKENED THEIR EFFICACY.

- 10 AS REGARDS THE NON-PERFORMANCE OF THE PROVISIONS RELATING TO THE PREMIUMS FOR NON-MARKETING, THE DEFENDANT CANNOT IN ANY CASE BE ALLOWED TO RELY UPON A FAIT ACCOMPLI OF WHICH IT IS ITSELF THE AUTHOR SO AS TO ESCAPE JUDICIAL PROCEEDINGS.

- 11 MOREOVER, IN THE FACE OF BOTH A DELAY IN THE PERFORMANCE OF AN OBLIGATION AND A DEFINITE REFUSAL, A JUDGMENT BY THE COURT UNDER ARTICLES 169 AND 171 OF THE TREATY MAY BE OF SUBSTANTIVE INTEREST AS ESTABLISHING THE BASIS OF A RESPONSIBILITY THAT A MEMBER STATE CAN INCUR AS A RESULT OF ITS DEFAULT, AS REGARDS OTHER MEMBER STATES, THE COMMUNITY OR PRIVATE PARTIES.

- 12 THE PRELIMINARY OBJECTION RAISED BY THE DEFENDANT MUST THEREFORE BE REJECTED.

[...]

- 14 THE REGULATIONS OF THE COUNCIL AND OF THE COMMISSION HAVE PROVIDED PRECISE TIME LIMITS FOR THE CARRYING INTO EFFECT OF THE SYSTEM OF PREMIUMS FOR SLAUGHTERING.

THE EFFICACY OF THE AGREED MEASURES DEPENDED UPON THE OBSERVATION OF THESE TIME LIMITS, SINCE THE MEASURES COULD ONLY ATTAIN THEIR OBJECT COMPLETELY IF THEY WERE CARRIED OUT SIMULTANEOUSLY IN ALL THE MEMBER STATES AT THE TIME DETERMINED IN CONSEQUENCE OF THE ECONOMIC POLICY THE COUNCIL WAS PURSUING.

OVER AND ABOVE THIS, AS HAS BEEN STATED BY THE COURT IN ITS JUDGMENT OF 17 MAY 1972 (CASE 93/71 ORSOLINA LEONESIO V MINISTRY OF AGRICULTURE OF THE ITALIAN REPUBLIC, REQUEST FOR A PRELIMINARY RULING MADE BY THE PRETORE DI LONATO), REGULATIONS NOS 1975/69 AND 2195/69 CONFERRED ON FARMERS A RIGHT TO PAYMENT OF THE PREMIUM AS FROM THE TIME WHEN ALL THE CONDITIONS PROVIDED BY THE REGULATIONS WERE FULFILLED.

IT CONSEQUENTLY APPEARS THAT THE DELAY ON THE PART OF THE ITALIAN REPUBLIC IN PERFORMING THE OBLIGATIONS IMPOSED ON IT BY THE INTRODUCTION OF THE SYSTEM OF PREMIUMS FOR SLAUGHTERING CONSTITUTES BY ITSELF A DEFAULT IN ITS OBLIGATIONS.

[...]

- 19 THE DEFAULT IN PUTTING INTO OPERATION THE PROVISIONS OF REGULATIONS NOS 1975/69 AND 2195/69 WITH REGARD TO PREMIUMS FOR NON-MARKETING IS DUE TO A DELIBERATE REFUSAL BY THE ITALIAN AUTHORITIES.

THE DEFENDANT JUSTIFIES THIS REFUSAL BY THE DIFFICULTY OF PROVIDING AN EFFECTIVE AND SERIOUS INSPECTION AND CONTROL OF THE QUANTITIES OF MILK WHICH ARE NOT MARKETED BUT DESTINED FOR OTHER USE, TAKING INTO ACCOUNT BOTH THE SPECIAL CHARACTERISTICS OF ITALIAN AGRICULTURE AND THE LACK OF ADEQUATE ADMINISTRATION AT A LOWER LEVEL.

IN ANY CASE, ACCORDING TO THE ITALIAN GOVERNMENT, MEASURES INTENDED TO RESTRICT THE PRODUCTION OF MILK WERE INAPPROPRIATE TO THE NEEDS OF THE ITALIAN ECONOMY, WHICH IS CHARACTERIZED BY INSUFFICIENT FOOD PRODUCTION.

DURING THE DEBATE STAGES OF REGULATION NO 1975/69 OF THE COUNCIL THE ITALIAN DELEGATION MADE THESE DIFFICULTIES KNOWN AND EXPRESSED CLEAR RESERVATIONS AT THAT TIME WITH REGARD TO THE CARRYING OUT OF THE REGULATION.

IN THESE CIRCUMSTANCES, COMPLAINT OUGHT NOT TO BE MADE AGAINST THE ITALIAN REPUBLIC FOR HAVING REFUSED TO PUT INTO EFFECT ON ITS NATIONAL TERRITORY PROVISIONS PASSED IN SPITE OF THE OPPOSITION WHICH IT HAS MANIFESTED.

- 20 [...] IT CANNOT BE ACCEPTED THAT A MEMBER STATE SHOULD APPLY IN AN INCOMPLETE OR SELECTIVE MANNER PROVISIONS OF A COMMUNITY REGULATION SO AS TO RENDER ABORTIVE CERTAIN ASPECTS OF COMMUNITY LEGISLATION WHICH IT HAS OPPOSED OR WHICH IT CONSIDERS CONTRARY TO ITS NATIONAL INTERESTS.

- 21 IN PARTICULAR, AS REGARDS THE PUTTING INTO EFFECT OF A MEASURE OF ECONOMIC POLICY INTENDED TO ELIMINATE SURPLUSES OF CERTAIN PRODUCTS, THE MEMBER STATE WHICH OMITTS TO TAKE, WITHIN THE REQUISITE TIME LIMITS AND SIMULTANEOUSLY WITH THE OTHER MEMBER STATES, THE MEASURES WHICH IT OUGHT TO TAKE, UNDERMINES THE EFFICACY OF THE PROVISION DECIDED UPON IN COMMON, WHILE AT THE SAME TIME TAKING AN UNDUE ADVANTAGE TO THE DETRIMENT OF ITS PARTNERS IN VIEW OF THE FREE CIRCULATION OF GOODS.

[...]

- 24 IN PERMITTING MEMBER STATES TO PROFIT FROM THE ADVANTAGES OF THE COMMUNITY, THE TREATY IMPOSES ON THEM ALSO THE OBLIGATION TO RESPECT ITS RULES.

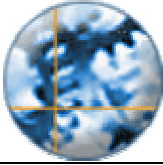
FOR A STATE UNILATERALLY TO BREAK, ACCORDING TO ITS OWN CONCEPTION OF NATIONAL INTEREST, THE EQUILIBRIUM BETWEEN ADVANTAGES AND OBLIGATIONS FLOWING FROM ITS ADHERENCE TO THE COMMUNITY BRINGS INTO QUESTION THE EQUALITY OF MEMBER STATES BEFORE COMMUNITY LAW AND CREATES DISCRIMINATIONS AT THE EXPENSE OF THEIR NATIONALS, AND ABOVE ALL OF THE NATIONALS OF THE STATE ITSELF WHICH PLACES ITSELF OUTSIDE THE COMMUNITY RULES.

- 25 THIS FAILURE IN THE DUTY OF SOLIDARITY ACCEPTED BY MEMBER STATES BY THE FACT OF THEIR ADHERENCE TO THE COMMUNITY STRIKES AT THE FUNDAMENTAL BASIS OF THE COMMUNITY LEGAL ORDER.

IT APPEARS THEREFORE THAT, IN DELIBERATELY REFUSING TO GIVE EFFECT ON ITS TERRITORY TO ONE OF THE SYSTEMS PROVIDED FOR BY REGULATIONS NOS 1975/69 AND 2195/69, THE ITALIAN REPUBLIC HAS FAILED IN A CONSPICUOUS MANNER TO FULFIL THE OBLIGATIONS WHICH IT HAS ASSUMED BY VIRTUE OF ITS ADHERENCE TO THE EUROPEAN ECONOMIC COMMUNITY.

[...]

2.5. Cases 142 and 143/80: Essevi



NOTE AND QUESTIONS

This is an important decision. Note, first, that it is not a 226 (ex 169) action but a preliminary reference 234 (ex 177). You should, thus, read the case with care with a view to exploring the relationship between the two remedies.

Note, too, that in this case, both in the Commission submission, and implicitly in the Court's decision, one can see some of the fundamental differences of the Community legal order as compared to the international legal order. Try to focus on these differences as they emerge, implicitly, from the case.

Amministrazione delle Finanze dello Stato v Essevi SpA and Carlo Salengo

Cases 142 and 143/80

27 May 1981

Court of Justice

[1981] ECR 1413

<http://www.curia.eu.int/en/content/juris/index.htm>

- 1 BY TWO ORDERS OF 19 FEBRUARY 1980 RECEIVED AT THE COURT ON 12 JUNE, THE CORTE D' APPELLO (COURT OF APPEAL), MILAN, REFERRED TO THE COURT OF JUSTICE, PURSUANT TO ARTICLE 177 OF THE EEC TREATY, CERTAIN QUESTIONS FOR A PRELIMINARY RULING ON THE INTERPRETATION OF ARTICLES 95 AND 169 OF THE EEC TREATY IN ORDER TO DETERMINE THE COMPATIBILITY WITH THE TREATY OF THE RETENTION UNDER ITALIAN LEGISLATION OF A SYSTEM OF DIFFERENTIAL TAXATION CHARGED ON POTABLE SPIRITS DISTILLED FROM WINE .
- 2 IT IS APPARENT FROM THE FILE ON THE CASE THAT THE TWO UNDERTAKINGS, RESPONDENTS IN THE MAIN ACTION, IMPORTED IN THE COURSE OF THE PERIOD FROM 1 MARCH 1962 TO 1 DECEMBER 1967, IN THE CASE OF THE FIRST UNDERTAKING, AND IN THE COURSE OF THE PERIOD FROM 18 APRIL 1960 TO 25 OCTOBER 1971, IN THE CASE OF THE SECOND UNDERTAKING, COGNAC OF FRENCH ORIGIN ON WHICH THEY PAID TAXES FIXED BY LAW FOR ' ' FIRST CATEGORY ' ' ETHYL ALCOHOL, THAT IS TO SAY FOR SPIRITS WHICH FAIL TO MEET

SPECIFIC REQUIREMENTS RELATING TO ORIGIN AND MANUFACTURE OR, IN SO FAR AS THEY ARE PRODUCED OUTSIDE THE TERRITORY OF THE STATE, CANNOT BE INSPECTED AT THE PRODUCTION STAGE .

- 3 THE RESPONDENTS IN THE MAIN ACTION INSTITUTED PROCEEDINGS BEFORE THE TRIBUNALE (DISTRICT COURT), MILAN, FOR THE RECOVERY OF THE TAXES PAID ON THE GROUND THAT ARTICLE 95 OF THE EEC TREATY HAD BEEN INFRINGED DURING THE ABOVE-MENTIONED PERIODS AND OBTAINED JUDGMENT, ON 26 JANUARY AND 1 JUNE 1978 RESPECTIVELY, AGAINST THE ITALIAN STATE FINANCE ADMINISTRATION WHICH WAS ORDERED TO REPAY THE TAXES IMPROPERLY LEVIED .
- 4 ON 31 AUGUST 1978, THE STATE FINANCE ADMINISTRATION LODGED AN APPEAL AGAINST THOSE JUDGMENTS AND, IN THE PROCEEDINGS, RELIED ON THE CASE-LAW OF THE CORTE SUPREMA DI CASSAZIONE (SUPREME COURT OF CASSATION) WHICH, IN ITS JUDGMENTS NOS 1317, 1318 AND 1321 OF 1 MARCH 1979, TOOK THE VIEW THAT THE CONTESTED SYSTEM OF TAXATION WAS LAWFUL UNDER COMMUNITY LAW. THE STATE FINANCE ADMINISTRATION CONTENDED AT THAT STAGE THAT THE COMMISSION OF THE EUROPEAN COMMUNITIES ACKNOWLEDGED, IN AN OPINION DELIVERED ON 28 FEBRUARY 1969, THAT THE ITALIAN REPUBLIC WAS ENTITLED TO IMPOSE THE TAX AS AN INSTRUMENT OF ITS AGRICULTURAL POLICY IN THE SPIRITS SECTOR AND TO MAINTAIN PROVISIONALLY THE CONTESTED SYSTEM OF DIFFERENTIAL TAXATION. IN ITS OPINION, THE COMMISSION EXPRESSLY RECOGNIZED THAT SYSTEM AS AN ' ' AID ' ' COMPATIBLE WITH THE RULES OF COMMUNITY LAW, WITH THE RESULT THAT THE STATE TAX WAS LAWFULLY LEVIED ON SPIRITS IMPORTED FROM FRANCE .
- 5 THE CORTE D ' APPELLO TAKES THE VIEW THAT THE FACTORS MENTIONED ABOVE ARE NOT SUCH AS RESOLVE ENTIRELY THE PROBLEM RAISED BEFORE IT. IT POINTS OUT THAT ALTHOUGH, IN ITS OPINION OF 28 FEBRUARY 1969, THE COMMISSION ACKNOWLEDGED THAT ITALY WAS ENTITLED TO MAINTAIN AND TO APPLY THE CONTESTED SYSTEM OF TAXATION AS AN INSTRUMENT OF ITS AGRICULTURAL POLICY, SEVERAL NEW FACTORS HAVE ARISEN SINCE THAT DATE. IN THIS CONNEXION, IT REFERS TO THE JUDGMENT DELIVERED BY THE COURT ON 15 OCTOBER 1969 IN CASE 16/69 COMMISSION V ITALY (1969) ECR 377 IN WHICH IT WAS HELD THAT POTABLE SPIRITS, LIQUEURS AND OTHER SPIRITUOUS BEVERAGES WERE NOT AGRICULTURAL PRODUCTS WITHIN THE MEANING OF THE TREATY, TO THE JUDGMENT OF 10 DECEMBER 1974 IN CASE 48/74 CHARMASSON (1974) ECR 1383 IN WHICH BARRIERS TO TRADE BETWEEN THE MEMBER STATES WERE HELD TO BE INCOMPATIBLE WITH THE COMMON MARKET AFTER THE EXPIRY OF THE TRANSITIONAL PERIOD EVEN WHERE SUCH BARRIERS FORM PART OF A NATIONAL ORGANIZATION OF THE MARKET AND, FINALLY, TO THE REASONED OPINION WHICH THE COMMISSION ADDRESSED TO THE ITALIAN REPUBLIC ON 31 JULY 1978 ON DIFFERENTIAL TAXATION IN RELATION TO THE IMPOSITION BOTH OF THE STATE TAX AND OF THE MANUFACTURING TAX .
- 6 HAVING REGARD TO THOSE NEW FACTORS AS WELL AS TO THE ARGUMENTS ADDUCED BY THE STATE FINANCE ADMINISTRATION, THE CORTE D ' APPELLO HAS REQUESTED THE COURT TO DECLARE BY WAY OF A PRELIMINARY RULING:

"- FIRST, WHAT IS THE EFFECT TO BE ATTRIBUTED TO THE AFORESAID OPINIONS DELIVERED BY THE COMMISSION UNDER ARTICLE 169 OF THE EEC TREATY; THEN WHETHER, BY APPLYING TO POTABLE SPIRITS DISTILLED FROM WINE AND IMPORTED FROM OTHER MEMBER STATES A SYSTEM OF TAXATION INCLUDING THE STATE TAX OF LIT 60 000 PER HECTOLITRE OF PURE ALCOHOL (LIT 90 000 AS

FROM MARCH 1976), WHICH IS NOT PROVIDED FOR IN THE CASE OF SIMILAR DOMESTIC PRODUCTS AND IS NOT CHARGED THEREON, ITALY HAS INFRINGED ARTICLE 95 OF THE EEC TREATY;

WHETHER, AFTER THE COMMENCEMENT OF THE SECOND STAGE REFERRED TO IN THE THIRD PARAGRAPH OF ARTICLE 95 AS BEING THE FINAL DATE FOR THE ABOLITION OF NATIONAL RULES CONFLICTING WITH THE PRINCIPLE OF EQUAL TAX TREATMENT LAID DOWN IN THE FIRST AND SECOND PARAGRAPHS OF THE SAID ARTICLE, IT IS PERMISSIBLE BY WAY OF EXCEPTION FOR ITALY TO CONTINUE A PRE-EXISTING DISCRIMINATION IN RESPECT OF THE IMPORTATION OF POTABLE SPIRITS DISTILLED FROM WINE”.

SOME ASPECTS OF THE BACKGROUND TO THE CASES

- 7 IT APPEARS FROM THE DOCUMENTS LODGED WITH THE COURT BY THE ITALIAN GOVERNMENT THAT ON 8 MAY 1968 THE COMMISSION SENT TO THE ITALIAN MINISTER FOR FOREIGN AFFAIRS THE FOLLOWING LETTER:

“I SHOULD BE OBLIGED IF YOU WOULD BRING TO THE ATTENTION OF THE ITALIAN GOVERNMENT THE FOLLOWING MATTERS RELATING TO TAXES ON SPIRITS.

ITALIAN LEGISLATION ON THE TAXATION OF SPIRITS PROVIDES THAT THE LATTER ARE SUBJECT TO STATE TAX AT THE RATE OF LIT 60 000 PER HECTOLITRE OF PURE ALCOHOL AND TO A MANUFACTURING TAX OF LIT 60 000 PER HECTOLITRE OF PURE ALCOHOL. NUMEROUS REDUCTIONS ARE PROVIDED IN FAVOUR OF CERTAIN PRODUCTS INCLUDING POTABLE SPIRITS DISTILLED FROM WINE AND FROM MARC. THESE SPIRITS ARE EXEMPT FROM THE STATE TAXES AND ARE SUBJECT TO A MANUFACTURING TAX OF LIT 53 000 PER HECTOLITRE IN THE CASE OF POTABLE SPIRITS DISTILLED FROM WINE AND OF LIT 50 000 PER HECTOLITRE IN THE CASE OF POTABLE SPIRITS DISTILLED FROM MARC.

STATE TAX ON IMPORTED POTABLE SPIRITS DISTILLED FROM WINE AND FROM MARC IS CHARGED AT THE RATE OF LIT 60 000 PER HECTOLITRE OF PURE ALCOHOL AND MANUFACTURING TAX AT THE RATE OF LIT 60 000 PER HECTOLITRE OF PURE ALCOHOL.

THIS DIFFERENTIAL SYSTEM, WHICH PLACES IMPORTED PRODUCTS AT A DISADVANTAGE, IS CONTRARY TO ARTICLE 95 OF THE TREATY...

THE COMMISSION HAS ALREADY COMMUNICATED ITS OBSERVATIONS ON THESE PROBLEMS TO THE ITALIAN GOVERNMENT BY LETTER OF 4 NOVEMBER 1965. BY LETTER OF 12 FEBRUARY 1966 FROM THE ITALIAN PERMANENT REPRESENTATION, THE ITALIAN GOVERNMENT INFORMED THE COMMISSION OF ITS VIEWS. ACCORDING TO THE ITALIAN GOVERNMENT, THE PURPOSE OF THE DIFFERENTIAL TAXATION OF SPIRITS IS TO ENABLE THE VARIOUS RAW MATERIALS FOR THE PRODUCTION OF ALCOHOL TO BE USED FOR THAT PURPOSE AND THEREBY ENSURE THE SALE OF CERTAIN RAW MATERIALS FROM WHICH ALCOHOL FOR AGRICULTURAL PURPOSES MAY BE PRODUCED. CONSEQUENTLY, THIS DIFFERENTIAL SYSTEM COULD BE ABOLISHED ONLY ONCE PROVISION FOR ITALIAN AGRICULTURAL INTERESTS IN THIS SECTOR IS MADE WITHIN THE FRAMEWORK OF THE COMMON AGRICULTURAL POLICY FOR SPIRITS. SECONDLY, THE ITALIAN AUTHORITIES CONTEND THAT DISCRIMINATION WHICH IS AT LEAST AS SERIOUS EXISTS IN THE OTHER MEMBER STATES, SUCH AS THAT RESULTING FROM THE EXISTENCE OF THE MONOPOLIES IN FRANCE AND GERMANY.

THE COMMISSION DOES NOT ALTOGETHER DENY THE EXISTENCE OF THE AGRICULTURAL PROBLEMS POSED BY SPIRITS IN ITALY. FOR THIS REASON IT MAINTAINS THAT THE DIFFERENTIAL TAXATION PROVIDED FOR UNDER ITALIAN LEGISLATION AND ATTRIBUTABLE TO THE IMPOSITION OF THE STATE TAX MAY BE PERMITTED PROVISIONALLY SINCE THE STATE TAX CONSTITUTES, IN A MANNER OF SPEAKING, AN INSTRUMENT OF ITALIAN AGRICULTURAL POLICY ON SPIRITS, ENABLING THE LATTER TO BE SOLD ON THE MARKET REGARDLESS OF THEIR ORIGIN AND IRRESPECTIVE OF THE COST OF THE RAW MATERIAL.

HOWEVER, AGRICULTURAL REQUIREMENTS CANNOT JUSTIFY ALL THE ABOVE-MENTIONED DIFFERENCES IN TAXATION BETWEEN DOMESTIC PRODUCTS AND IMPORTED PRODUCTS. THE NEEDS OF AGRICULTURE ARE ALREADY PROVIDED FOR BY THE STATE TAX PAID ON IMPORTED PRODUCTS ALONE. THEREFORE, CONSIDERATIONS OF AN AGRICULTURAL NATURE CANNOT BE RELIED UPON ALSO IN THE CASE OF THE MANUFACTURING TAX IN ORDER TO JUSTIFY DIFFERENTIAL TAXATION TO THE DETRIMENT OF IMPORTED POTABLE SPIRITS DISTILLED FROM WINE AND FROM MARC AND OF IMPORTED PRODUCTS SIMILAR TO VERMOUTH AND MARSALA.

ON THOSE GROUNDS, THE COMMISSION MAINTAINS THAT THE ITALIAN REPUBLIC HAS FAILED TO FULFIL ITS OBLIGATIONS UNDER THE TREATY WITH REGARD TO THE REDUCTION IN THE MANUFACTURING TAX ON POTABLE SPIRITS DISTILLED FROM WINE AND FROM MARC AND THE REDUCTION IN THE MANUFACTURING TAX ON ALCOHOL USED IN THE MANUFACTURE OF VERMOUTH AND MARSALA. FOR THOSE REASONS, THE COMMISSION REQUESTS THE GOVERNMENT OF THE ITALIAN REPUBLIC, UNDER ARTICLE 169 OF THE TREATY, TO SUBMIT TO IT ITS OBSERVATIONS ON THE ABOVE MATTERS WITHIN ONE MONTH OF THE RECEIPT OF THIS LETTER. THE COMMISSION RESERVES THE RIGHT TO DELIVER, IF NECESSARY, AFTER TAKING NOTE OF THOSE OBSERVATIONS, THE REASONED OPINION PROVIDED FOR IN ARTICLE 169.'

- 8 FOLLOWING THE ITALIAN GOVERNMENT' S FAILURE TO TAKE ACTION IN RESPONSE TO THE COMMISSION ' S REQUESTS, ON 28 FEBRUARY 1969 THE COMMISSION DREW UP PURSUANT TO ARTICLE 169 OF THE EEC TREATY A REASONED OPINION CONCERNING TAXES ON THE CONSUMPTION OF SPIRITS WHICH IS FORMULATED IN THE FOLLOWING TERMS:

'IN ITALY, DOMESTICALLY-PRODUCED SPIRITS ARE SUBJECT TO STATE TAXES AT THE RATE OF LIT 60 000 PER HECTOLITRE OF PURE ALCOHOL AND TO A MANUFACTURING TAX OF LIT 60 000 PER HECTOLITRE OF PURE ALCOHOL. NUMEROUS REDUCTIONS ARE PROVIDED FOR BY LAW, PARTICULARLY IN THE CASE OF POTABLE SPIRITS DISTILLED FROM WINE AND FROM MARC WHICH ARE EXEMPT FROM THE STATE TAX AND SUBJECT TO A MANUFACTURING TAX OF LIT 53 000 PER HECTOLITRE IN THE CASE OF POTABLE SPIRITS DISTILLED FROM WINE AND OF LIT 50 000 PER HECTOLITRE IN THE CASE OF POTABLE SPIRITS DISTILLED FROM MARC.

ON THE OTHER HAND, POTABLE SPIRITS DISTILLED FROM WINE AND FROM MARC AND IMPORTED INTO ITALY ARE SUBJECT TO STATE TAXES AT THE RATE OF LIT 60 000 PER HECTOLITRE OF PURE ALCOHOL AND TO A MANUFACTURING TAX OF LIT 60 000 PER HECTOLITRE OF PURE ALCOHOL...

AS EARLY AS NOVEMBER 1965 THE COMMISSION DREW THE ATTENTION OF THE ITALIAN GOVERNMENT TO THE DISCRIMINATORY NATURE OF THIS SYSTEM.

SUBSEQUENTLY, BY LETTER OF 8 MAY 1968, THE COMMISSION INITIATED, FOR INFRINGEMENT OF ARTICLE 95 OF THE EEC TREATY, THE PROCEDURE PROVIDED FOR IN ARTICLE 169 OF THE TREATY. IN ITS REPLY, GIVEN BY LETTER OF 23 JULY 1968 FROM THE ITALIAN PERMANENT REPRESENTATION, THE ITALIAN GOVERNMENT INFORMED THE COMMISSION THAT IT HAD NO INTENTION OF ABOLISHING THE DIFFERENTIAL TAXES IN QUESTION UNTIL THE NATIONAL MONOPOLIES EXISTING IN GERMANY AND IN FRANCE WERE MODIFIED AND A COMMON AGRICULTURAL POLICY WAS ESTABLISHED IN THIS SECTOR...

THE ARGUMENTS ADDUCED ARE NOT CAPABLE, EXCEPT IN ONE RESPECT, OF CALLING IN QUESTION THE GROUNDS ON WHICH THE VIEWS EXPRESSED BY THE COMMISSION IN ITS LETTER OF 8 MAY 1968 ARE BASED. ABOVE ALL, IT MUST BE POINTED OUT THAT IN NO CIRCUMSTANCES MAY THE MEMBER STATES RELY ON SIMILAR INFRINGEMENTS BY OTHER MEMBER STATES IN ORDER TO ESCAPE THEIR OWN OBLIGATIONS UNDER THE PROVISIONS OF THE TREATY.

AS FOR THE ARGUMENT THAT ITALY IMPLEMENTS ITS AGRICULTURAL POLICY ON SPIRITS BY RECOURSE TO TAXATION AND THAT IT WILL NOT BE ABLE TO ALTER ITS POSITION EXCEPT IN THE CONTEXT OF THE IMPLEMENTATION OF A COMMON POLICY ON SPIRITS, THE COMMISSION HAS ALREADY ACKNOWLEDGED, IN ITS ABOVE-MENTIONED LETTER OF 8 MAY 1968, THAT ITALY WAS IN FACT ENTITLED TO IMPOSE THE TAX AS AN INSTRUMENT OF ITS AGRICULTURAL POLICY IN THIS SECTOR AND MAINTAIN PROVISIONALLY, WITHIN THAT FRAMEWORK, DIFFERENTIAL TAXATION AT THE MAXIMUM RATE OF LIT 60 000 PER HECTOLITRE OF PURE ALCOHOL RESULTING FROM THE CHARGING OF THE STATE TAX. RECOURSE TO SUCH TAXATION ENABLES SPIRITS TO BE SOLD AT A FAIRLY UNIFORM PRICE, REGARDLESS OF THEIR COST PRICE."

- 9 THE COMMISSION PROCEEDED TO CONCLUDE IN ITS REASONED OPINION THAT, AS REGARDS VARIOUS ASPECTS OF THE TAX SYSTEM OTHER THAN THE STATE TAX, THERE WAS A FAILURE BY THE ITALIAN REPUBLIC TO FULFIL ITS OBLIGATIONS UNDER THE TREATY. IT SHOULD BE NOTED THAT THIS REASONED OPINION DID NOT RESULT IN PROCEEDINGS BEING INSTITUTED BEFORE THE COURT.
- 10 ON 31 JULY 1975, THE COMMISSION SENT TO THE ITALIAN GOVERNMENT, PURSUANT TO THE FIRST PARAGRAPH OF ARTICLE 169, A FRESH COMMUNICATION SETTING FORTH, IN THE LIGHT OF THE RULE AGAINST DISCRIMINATION CONTAINED IN ARTICLE 95, CERTAIN CRITICISMS DIRECTED AT THE TAX SYSTEM FOR SPIRITS IN FORCE IN ITALY IN RELATION TO THE MANUFACTURING TAX, THE ORDINARY STATE TAX AND THE SPECIAL STATE TAX AND REQUESTING THE ITALIAN GOVERNMENT TO BRING TO AN END THE DISCRIMINATION WHICH THIS SYSTEM ENTAILED VIS-A-VIS PRODUCTS IMPORTED FROM OTHER MEMBER STATES.
- 11 SINCE THE COMMISSION WAS NOT FULLY SATISFIED WITH THE RESPONSE OF THE ITALIAN AUTHORITIES TO THIS NEW ACTION ON ITS PART, IT DELIVERED ON 31 JULY 1978 A REASONED OPINION ON DIFFERENTIAL TAXATION CONCERNING THE CHARGING OF THE MANUFACTURING TAX AND THE STATE TAX ON SPIRITS. AS BEFORE, THE REASONED OPINION WAS NOT FOLLOWED BY THE INITIATION OF PROCEEDINGS BEFORE THE COURT.
- 12 THE ITALIAN GOVERNMENT HAS ARGUED BEFORE THE COURT THAT THE CONTESTED SYSTEM OF TAXATION IS IN REALITY MERELY AN AID IN FAVOUR OF AGRICULTURE GRANTED IN THE FORM OF A TAX ADVANTAGE RESERVED TO

DOMESTIC PRODUCTION. IT TAKES THE VIEW THAT THIS SYSTEM OF AID WAS UPHOLD BY THE REASONED OPINION OF 28 FEBRUARY 1969 AND THAT, IN THE ABSENCE OF ANY MEASURE TO THE CONTRARY, THAT AUTHORIZATION STILL SUBSISTS AND MUST THEREFORE BE ACCEPTED AS BEING VALID BY THE NATIONAL COURTS. EVEN IN THE ABSENCE OF ANY AUTHORIZATION, THAT AID MAY BE MAINTAINED BY VIRTUE OF ARTICLE 93 ON THE GROUND THAT IT PREDATES THE ENTRY INTO FORCE OF THE TREATY.

SIGNIFICANCE OF THE ATTITUDES ADOPTED AND THE OPINIONS DELIVERED BY THE COMMISSION UNDER THE PROCEDURE PROVIDED FOR IN ARTICLE 169

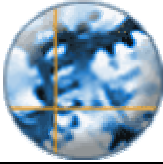
- 13 THE PURPOSE OF THE QUESTIONS SUBMITTED BY THE CORTE D' APPELLO IS IN THE FIRST PLACE TO ESTABLISH THE LEGAL SIGNIFICANCE AND AUTHORITY OF OPINIONS DELIVERED BY THE COMMISSION UNDER THE PROCEDURE FOR INSTITUTING PROCEEDINGS UNDER ARTICLE 169 OF THE TREATY AGAINST A STATE FOR FAILURE TO FULFIL ITS OBLIGATIONS. MORE PRECISELY, THE QUESTION IS ONE OF DETERMINING THE LEGAL EFFECT OF AN ASSURANCE OF THE KIND GIVEN BY THE COMMISSION IN ITS LETTER OF FORMAL NOTICE OF 8 MAY 1968 AND ITS OPINION OF 28 FEBRUARY 1969, ISSUED PURSUANT TO ARTICLE 169 OF THE TREATY, AUTHORIZING ITALY PROVISIONALLY TO MAINTAIN A SYSTEM OF SO-CALLED ' ' DIFFERENTIAL TAXATION".
- 14 ARTICLE 169 PROVIDES THAT IF THE COMMISSION CONSIDERS THAT A MEMBER STATE HAS FAILED TO FULFIL ITS OBLIGATIONS UNDER THE TREATY, ' ' IT SHALL DELIVER A REASONED OPINION ON THE MATTER AFTER GIVING THE STATE CONCERNED THE OPPORTUNITY TO SUBMIT ITS OBSERVATIONS ' '. THE ARTICLE ADDS THAT THE COMMISSION MAY BRING THE MATTER BEFORE THE COURT OF JUSTICE IF THE STATE CONCERNED DOES NOT COMPLY WITH THE OPINION WITHIN THE PERIOD LAID DOWN BY THE COMMISSION.
- 15 THE PURPOSE OF THAT PRELIMINARY PROCEDURE WHICH COMES WITHIN THE GENERAL SCOPE OF THE SUPERVISORY TASK ENTRUSTED TO THE COMMISSION UNDER THE FIRST INDENT OF ARTICLE 155 IS, IN THE FIRST PLACE, TO GIVE THE MEMBER STATE AN OPPORTUNITY TO JUSTIFY ITS POSITION AND, AS THE CASE MAY BE, TO ENABLE THE COMMISSION TO PERSUADE THE MEMBER STATE TO COMPLY OF ITS OWN ACCORD WITH THE REQUIREMENTS OF THE TREATY. IF THIS ATTEMPT TO REACH A SETTLEMENT IS UNSUCCESSFUL, THE FUNCTION OF THE REASONED OPINION IS TO DEFINE THE SUBJECT-MATTER OF THE DISPUTE.
- 16 ON THE OTHER HAND, THE COMMISSION IS NOT EMPOWERED TO DETERMINE CONCLUSIVELY, BY OPINIONS FORMULATED PURSUANT TO ARTICLE 169 OR BY OTHER STATEMENTS OF ITS ATTITUDE UNDER THAT PROCEDURE, THE RIGHTS AND DUTIES OF A MEMBER STATE OR TO AFFORD THAT STATE GUARANTEES CONCERNING THE COMPATIBILITY OF A GIVEN LINE OF CONDUCT WITH THE TREATY. ACCORDING TO THE SYSTEM EMBODIED IN ARTICLES 169 TO 171 OF THE TREATY, THE RIGHTS AND DUTIES OF MEMBER STATES MAY BE DETERMINED AND THEIR CONDUCT APPRAISED ONLY BY A JUDGMENT OF THE COURT.
- 17 A FORTIORI, THE COMMISSION CANNOT, IN THE ATTITUDES WHICH IT ADOPTS AND IN THE OPINIONS WHICH IT IS OBLIGED TO DELIVER UNDER ARTICLE 169, EXEMPT A MEMBER STATE FROM COMPLIANCE WITH ITS OBLIGATIONS UNDER THE TREATY. SUCH ASSURANCES CANNOT HAVE THE EFFECT, IN PARTICULAR, OF PRECLUDING INDIVIDUALS FROM RELYING IN LEGAL PROCEEDINGS, ON THE RIGHTS CONFERRED UPON THEM BY THE TREATY IN ORDER TO CONTEST ANY

LEGISLATIVE OR ADMINISTRATIVE MEASURES OF A MEMBER STATE WHICH MAY BE INCOMPATIBLE WITH COMMUNITY LAW.

- 18 THE ANSWER TO THE FIRST PART OF THE QUESTIONS SUBMITTED SHOULD THEREFORE BE THAT OPINIONS DELIVERED BY THE COMMISSION PURSUANT TO ARTICLE 169 HAVE LEGAL EFFECT ONLY IN RELATION TO THE COMMENCEMENT OF PROCEEDINGS BEFORE THE COURT AGAINST A STATE ALLEGED TO HAVE FAILED TO FULFIL ITS OBLIGATIONS UNDER THE TREATY AND THAT THE COMMISSION MAY NOT, BY ADOPTING AN ATTITUDE IN THE CONTEXT OF THAT PROCEDURE, RELEASE A MEMBER STATE FROM ITS OBLIGATIONS OR IMPAIR RIGHTS WHICH INDIVIDUALS DERIVE FROM THE TREATY .

[...]

2.6. Case C - 191/95: Commission v. Germany (Principle of Collegiality)



NOTE AND QUESTIONS

Following the Escevi case (142-143/80), the Court came to pronounce on the principle of collegiality as regards the adoption of a reasoned opinion by the Commission.

Commission of the European Communities v Federal Republic of Germany

C-191/95

29 September 1998

Court of Justice

[1998] ECR I-5449

<http://www.curia.eu.int/en/content/juris/index.htm>

Summary of the facts and procedure:

In the context of Article 226 (formerly 169) proceedings against Germany for failure to transpose correctly an EC directive, the German government has raised, inter alia, a plea of inadmissibility alleging breach of the principle of collegiality as regards the issuance of the reasoned opinion and the commencement of proceedings.

Judgment:

[...]

Admissibility

ARGUMENTS OF THE PARTIES

- 27 The German Government maintains that the reasoned opinion was issued and proceedings before the Court commenced under the delegation procedure. In its view, although recourse

to that procedure is compatible with the principle of collegiality for the purpose of adopting measures of management or administration, it is excluded for decisions of principle such as the adoption of a reasoned opinion and the commencement of proceedings before the Court. Article 169 of the Treaty requires the reasoned opinion and the bringing of proceedings before the Court to be the subject of a decision by the Commission acting as a college.

- 28 The Commission replies that the decisions to send the letter of formal notice, to notify the reasoned opinion and to commence proceedings before the Court were taken at meetings of the Commission acting as a college.

[...]

ANALYSIS OF THE COURT

- 31 At the hearing on 9 December 1997, the German Government claimed that, in the light of the documents produced, the Commission had not established that the members of the college, when they decided to issue the reasoned opinion and commence proceedings before the Court, had sufficient information available to them as regards the content of those measures. The college of Commissioners ought to have had available all the relevant information of fact and law to enable it to ensure that its decisions were devoid of ambiguity and to guarantee that the measures notified had actually been adopted by the college and corresponded to its intention, since it is the college which takes political responsibility for them.
- 32 The Commission states that for reasons of efficiency, given the number of proceedings for failure to fulfil obligations, Commissioners do not have available draft reasoned opinions when they adopt the decision to issue such measures; this is not necessary in view of the fact that reasoned opinions do not have immediate binding legal effect. However, the crucial information is available to the members of the college, in particular the facts complained of and the provisions of Community law which, in the view of the Commission's services, have been breached. Thus the college reached its decision on the proposals of its services to issue the reasoned opinion and to commence proceedings before the Court in full knowledge of the facts. Drafting of reasoned opinions takes place at administrative level, under the responsibility of the member of the Commission with competence in the matter, following the adoption of the decision by the college to take such a step.
- 33 It is important to remember, at the outset, that the functioning of the Commission is governed by the principle of collegiate responsibility (Case C-137/92 P Commission v BASF and Others [1994] ECR I-2555, paragraph 62).
- 34 It is common ground that the decisions to issue the reasoned opinion and to commence proceedings are subject to that principle of collegiate responsibility.
- 35 Recourse to Article 169 provides one of the means by which the Commission ensures that the Member States give effect to the provisions of the Treaty and those adopted under the Treaty by the institutions (Case C-422/92 Commission v Germany [1995] ECR I-1097, paragraph 16). The decisions to issue a reasoned opinion and to commence proceedings before the Court thus come within the general scope of the supervisory task entrusted to the Commission under the first indent of Article 155 of the EC Treaty.
- 36 In issuing a reasoned opinion, the Commission formally sets out its position with regard to the legal position of the Member State concerned. Moreover, by formally stating the infringement of the Treaty with which the Member State concerned is charged, the reasoned

opinion concludes the pre-litigation procedure provided for in Article 169 (Case 74/82 Commission v Ireland [1984] ECR 317, paragraph 13). The decision to issue a reasoned opinion cannot therefore be described as a measure of administration or management and may not be delegated.

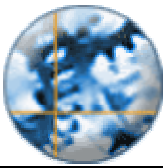
- 37 The same is true of the decision to apply to the Court for a declaration of failure to fulfil obligations. In its role as guardian of the Treaty, the Commission is competent to decide whether it is appropriate to bring proceedings against a Member State for failure to fulfil its obligations (see, to that effect, Case C-431/92 Commission v Germany [1995] ECR I-2189, paragraph 22). Such a decision falls within the discretionary power of the institution (see, in particular, Case C-200/88 Commission v Greece [1990] ECR I-4299, paragraph 9) and cannot be described as a measure of administration or management.
- 38 Thus the first plea of inadmissibility, as refined during the current proceedings, concerns the consequences of compliance with the principle of collegiality as regards the conditions in which the college could, first, consider that the Federal Republic of Germany had failed to fulfil one of its obligations under the Treaty and issue a reasoned opinion on that matter and, second, when it considered that that State had not complied with that opinion within the period prescribed, decide to bring the present action.
- 39 According to settled case-law, the principle of collegiality is based on the equal participation of the Commissioners in the adoption of decisions, from which it follows in particular that decisions should be the subject of collective deliberation and that all the members of the college of Commissioners should bear collective responsibility at political level for all decisions adopted (Case 5/85 AKZO Chemie v Commission [1986] ECR 2585, paragraph 30; Joined Cases 46/87 and 227/88 Hoechst v Commission [1986] ECR 2859, and Case 137/92 P Commission v BASF and Others, cited above, paragraph 63).
- 40 The Court has also held that compliance with that principle is of concern to individuals affected by the legal consequences of a Commission decision (see, to that effect, Commission v BASF and Others, cited above, paragraph 64).
- 41 Nevertheless, the formal requirements for effective compliance with the principle of collegiality vary according to the nature and legal effects of the acts adopted by that institution.
- 42 Thus the Court has held that, with regard to decisions adopted for the purpose of ensuring observance of the competition rules, in which the Commission finds that there has been an infringement of those rules, issues directions to undertakings and imposes pecuniary penalties upon them, that the undertakings or associations of undertakings addressed by such decisions must be assured that the operative part and the statement of reasons were actually adopted by the college of Commissioners (see, to that effect, Commission v BASF and Others, cited above, paragraphs 65 to 67).
- 43 In this case the detailed procedure governing the collective deliberation by the college of Commissioners concerning the issue of the reasoned opinion and the bringing of an action for failure to fulfil obligations must therefore be determined in the light of the legal effects of those decisions with regard to the State concerned.
- 44 The issue of a reasoned opinion constitutes a preliminary procedure (Joined Cases 142/80 and 143/80 Essevi and Salengo [1981] ECR 1413, paragraph 15), which does not have any binding legal effect for the addressee of the reasoned opinion. It is merely a pre-litigation stage of a procedure which may lead to an action before the Court (Joined Cases 6/69 and 11/69 Commission v France [1969] ECR 523, paragraph 36). The purpose of that pre-

litigation procedure provided for by Article 169 of the Treaty is to enable the Member State to comply of its own accord with the requirements of the Treaty or, if appropriate, to justify its position (Case C-157/94 Commission v Netherlands [1997] ECR I-5699, paragraph 60; Case C-158/94 Commission v Italy [1997] ECR I-5789, paragraph 56; and Case C-159/94 Commission v France [1997] ECR I-5815, paragraph 103).

- 45 If that attempt at settlement is unsuccessful, the function of the reasoned opinion is to define the subject-matter of the dispute. The Commission is not, however, empowered to determine conclusively, by reasoned opinions formulated pursuant to Article 169, the rights and duties of a Member State or to afford that State guarantees concerning the compatibility of a given line of conduct with the Treaty. According to the system embodied in Articles 169 to 171 of the Treaty, the rights and duties of Member States may be determined and their conduct appraised only by a judgment of the Court (see, to that effect, *Essevi and Salengo*, cited above, paragraphs 15 and 16).
- 46 The reasoned opinion therefore has legal effect only in relation to the commencement of proceedings before the Court (see *Essevi and Salengo*, cited above, paragraph 18) so that where a Member State does not comply with that opinion within the period allowed, the Commission has the right, but not the duty, to commence proceedings before the Court (see, to that effect, *Case 247/87 Star Fruit v Commission* [1989] ECR 291, paragraph 12).
- 47 The decision to commence proceedings before the Court, whilst it constitutes an indispensable step for the purpose of enabling the Court to give judgment on the alleged failure to fulfil obligations by way of a binding decision, nevertheless does not per se alter the legal position in question.
- 48 It follows from all the foregoing considerations that both the Commission's decision to issue a reasoned opinion and its decision to bring an action for a declaration of failure to fulfil obligations must be the subject of collective deliberation by the college of Commissioners. The information on which those decisions are based must therefore be available to the members of the college. It is not, however, necessary for the college itself formally to decide on the wording of the acts which give effect to those decisions and put them in final form.
- 49 In this case it is not disputed that the members of the college had available to them all the information they considered would assist them for the purposes of adopting the decision when the college decided, on 31 July 1991, to issue the reasoned opinion, and approved, on 13 December 1994, the proposal to bring the present action.
- 50 In those circumstances, it must be held that the Commission complied with the rules relating to the principle of collegiality when it issued the reasoned opinion with regard to the Federal Republic of Germany and brought the present action.
- 51 Consequently the plea of inadmissibility alleging breach of the principle of collegiate responsibility must be dismissed as unfounded.

[...]

2.7. *Joined Cases 314 and 316/81 and 83/82: Procureur de la République*



NOTE AND QUESTIONS

While reading the following case, a preliminary reference rather than a 226 (ex 169) action, pay attention to the effect of 226 (ex 169) actions on subsequent proceedings between individuals or between individuals and the State before national courts.

Procureur de la République and Comité national de défense contre l'alcoolisme v. Alex Waterkeyn and Others

Joined Cases 314 to 316/81 and 83/82

14 December 1982

Court of Justice

[1982] ECR 4337

<http://www.curia.eu.int/en/content/juris/index.htm>

- 1 BY TWO JUDGMENTS OF 30 JANUARY 1981 AND A JUDGMENT DATED 12 FEBRUARY 1981 WHICH WERE RECEIVED AT THE COURT ON 18 DECEMBER 1981 AND A JUDGMENT OF 6 JANUARY 1982 WHICH WAS RECEIVED AT THE COURT ON 8 MARCH 1982 THE TRIBUNAL DE GRANDE INSTANCE (REGIONAL COURT), PARIS, REFERRED TO THE COURT FOR A PRELIMINARY RULING UNDER ARTICLE 177 OF THE EEC TREATY A QUESTION ON THE INTERPRETATION OF ARTICLE 171 OF THE EEC TREATY IN ORDER TO OBTAIN GUIDANCE ON THE INFERENCES TO BE DRAWN FROM THE JUDGMENT OF 10 JULY 1980 (CASE 152/78 COMMISSION V FRENCH REPUBLIC (1980) ECR 2299) BY WHICH THE COURT DECLARED THAT ' ' BY SUBJECTING ADVERTISING IN RESPECT OF ALCOHOLIC BEVERAGES TO DISCRIMINATORY RULES AND THEREBY MAINTAINING OBSTACLES TO THE FREEDOM OF INTRA-COMMUNITY TRADE, THE FRENCH REPUBLIC HAS FAILED TO FULFIL ITS OBLIGATIONS UNDER ARTICLE 30 OF THE EEC TREATY".
- 2 THE PRELIMINARY QUESTION SUBMITTED BY THE NATIONAL COURT, WHICH IS THE SAME IN ALL FOUR CASES, WAS RAISED IN THE COURSE OF PROSECUTIONS BROUGHT AGAINST THE RESPONSIBLE OFFICERS OF VARIOUS UNDERTAKINGS (MANUFACTURERS AND IMPORTERS OF ALCOHOLIC BEVERAGES, ADVERTISING AGENTS AND PUBLISHERS) FOR OFFENCES AGAINST THE PROVISIONS OF THE FRENCH CODE ON THE RETAIL OF ALCOHOLIC BEVERAGES AND MEASURES AGAINST ALCOHOLISM (HEREINAFTER REFERRED TO AS "THE CODE") RESULTING

FROM ADVERTISING CAMPAIGNS TO PROMOTE VARIOUS ALCOHOLIC BEVERAGES, NAMELY AN APERITIF MADE IN FRANCE (CASE 314/82, TWO BRANDS OF PORT IMPORTED FROM PORTUGAL (CASES 315 AND 316/81) AND A BRAND OF WHISKY IMPORTED FROM THE UNITED KINGDOM (CASE 83/82).

- 3 THE ACCUSED CONTENDED BEFORE THE NATIONAL COURT THAT THE JUDGMENT OF 10 JULY 1980 DECLARED THE PROVISIONS OF THE CODE WHICH THEY WERE ALLEGED TO HAVE INFRINGED TO BE CONTRARY TO COMMUNITY LAW AND THAT THEREFORE ALL PROCEEDINGS AGAINST THEM OUGHT TO BE WITHDRAWN.
- 4 CONSIDERING THAT IN THIS INSTANCE IT WAS NECESSARY TO DETERMINE WHETHER COMMUNITY LAW, AS LAID DOWN BY THAT JUDGMENT, RENDERS ARTICLES L 1, L 17, L 18 AND L 21 OF THE CODE DIRECTLY AND IMMEDIATELY INAPPLICABLE, THE NATIONAL COURT REQUESTED THE COURT OF JUSTICE TO EXPLAIN THE EFFECT OF ITS JUDGMENT OF 10 JULY 1980 HAVING REGARD TO THE PROVISIONS OF ARTICLE 171 OF THE TREATY.
- 5 IN THE PROCEEDINGS BEFORE THE COURT THE ACCUSED EXPANDED UPON THEIR VIEW THAT THE JUDGMENT OF 10 JULY 1980 HAD ' ' GENERAL EFFECT ' ' INASMUCH AS THE COURT HAD CONDEMNED IN ITS ENTIRETY THE FRENCH LEGISLATION ON THE ADVERTISING OF ALCOHOLIC BEVERAGES AS LAID DOWN IN THE CODE. THEY ARGUED THAT THERE WAS THEREFORE NO NEED TO DISTINGUISH BETWEEN THE PRODUCTS IN QUESTION ON THE BASIS OF THEIR ORIGIN. IN PARTICULAR, IT WAS NOT PERMISSIBLE TO TREAT NATIONAL PRODUCTS DIFFERENTLY FROM PRODUCTS IMPORTED FROM OTHER MEMBER STATES TO THE DETRIMENT OF THE FORMER. THE ACCUSED EMPHASIZED THAT SUCH ' ' GENERAL EFFECT ' ' HAD BEEN RECOGNIZED IN FRANCE IN JUDGMENTS GIVEN BY SEVERAL COURTS OF FIRST INSTANCE AND OF APPEAL.
- 6 THAT VIEW WAS CONTESTED BY THE COMITE NATIONAL DE DEFENSE CONTRE L ' ALCOOLISME, CIVIL PARTY IN THE PROCEEDINGS BEFORE THE NATIONAL COURT, AND BY THE COMMISSION AND THE FRENCH GOVERNMENT. THESE SUBMIT THAT THE COURT FOUND THE FRENCH LEGISLATION TO BE CONTRARY TO ARTICLE 30 OF THE TREATY ONLY IN SO FAR AS THE MARKETING OF ALCOHOLIC PRODUCTS ORIGINATING IN OTHER MEMBER STATES IS SUBJECT, DE FACTO OR DE JURE, TO MORE STRINGENT PROVISIONS THAN THOSE APPLYING TO COMPETING NATIONAL PRODUCTS. AS REGARDS PRODUCTS IMPORTED FROM PORTUGAL, THE COMMISSION AND THE FRENCH GOVERNMENT POINT OUT THAT ARTICLE 30 OF THE EEC TREATY GOVERNS INTRA-COMMUNITY TRADE ONLY AND THAT THE SYSTEM APPLICABLE TO THOSE PRODUCTS COMES UNDER THE AGREEMENT ON FREE- TRADE CONCLUDED ON 22 JULY 1972 WITH THAT STATE (OFFICIAL JOURNAL, ENGLISH SPECIAL EDITION 1972 (31 DECEMBER), P. 167) WITHOUT PREJUDICE TO THE EFFECT WHICH THAT AGREEMENT MAY HAVE IN THE MATTER.
- 7 IN VIEW OF THE DOUBTS WHICH HAVE THUS ARISEN FOLLOWING THE JUDGMENT OF 10 JULY 1980 IT IS NECESSARY TO RECALL THE SCOPE OF THAT JUDGMENT BEFORE ANSWERING THE QUESTION SUBMITTED BY THE NATIONAL COURT.

SCOPE OF THE JUDGMENT OF 10 JULY 1980

- 8 THE COMMISSION ' S APPLICATION WHICH LED TO THE JUDGMENT OF 10 JULY 1980 SOUGHT A DECLARATION THAT THE FRENCH REPUBLIC HAD FAILED TO FULFIL ITS OBLIGATIONS UNDER ARTICLE 30 OF THE EEC TREATY BY REGULATING THE ADVERTISING OF ALCOHOLIC BEVERAGES IN A WAY DISCRIMINATORY TO PRODUCTS ORIGINATING IN OTHER MEMBER STATES. THE COMMISSION CONTENDED THAT THE RULES LAID DOWN BY THE CODE WERE STRUCTURED IN SUCH A WAY THAT THE ADVERTISING OF CERTAIN IMPORTED ALCOHOLIC PRODUCTS WAS PROHIBITED OR SUBJECT TO RESTRICTIONS WHILST THE ADVERTISING TO PROMOTE NATIONAL PRODUCTS WAS ENTIRELY UNRESTRICTED

OR LESS RESTRICTED.

- 9 IN ITS JUDGMENT THE COURT HELD THAT THE RULES ON THE ADVERTISING OF ALCOHOLIC BEVERAGES LAID DOWN BY THE CODE ARE CONTRARY TO ARTICLE 30 OF THE EEC TREATY INASMUCH AS THEY CONSTITUTE AN INDIRECT RESTRICTION ON THE IMPORTATION OF ALCOHOLIC PRODUCTS ORIGINATING IN OTHER MEMBER STATES TO THE EXTENT TO WHICH THE MARKETING OF THOSE PRODUCTS IS SUBJECT, IN LAW OR IN FACT, TO MORE STRINGENT PROVISIONS THAN THOSE WHICH APPLY TO NATIONAL OR COMPETING PRODUCTS.
- 10 IN THIS REGARD THE COURT EMPHASIZED IN PARTICULAR THAT SINCE THEY COME UNDER THE TAX ARRANGEMENTS APPLYING TO WINE FRENCH NATURAL SWEET WINES ENJOY UNRESTRICTED ADVERTISING WHILST IMPORTED SWEET WINES AND LIQUEUR WINES ARE SUBJECTED TO A SYSTEM OF RESTRICTED ADVERTISING. SIMILARLY, WHILST DISTILLED SPIRITS TYPICAL OF NATIONAL PRODUCE, SUCH AS RUM AND SPIRITS OBTAINED FROM THE DISTILLATION OF WINES, CIDER OR FRUIT, ENJOY COMPLETELY UNRESTRICTED ADVERTISING, IT IS PROHIBITED IN REGARD TO SIMILAR PRODUCTS WHICH ARE MAINLY IMPORTED PRODUCTS, NOTABLY GRAIN SPIRITS SUCH AS WHISKY AND GENEVA.
- 11 CONTRARY TO THE CONTENTION ADVANCED BY THE ACCUSED, THE JUDGMENT OF 10 JULY 1980 ONLY AFFECTS THE TREATMENT OF PRODUCTS IMPORTED FROM OTHER MEMBER STATES AND THE FRENCH LEGISLATION WAS DECLARED TO BE CONTRARY TO ARTICLE 30 ONLY IN SO FAR AS IT ENACTS RULES WHICH ARE LESS FAVOURABLE TO THOSE PRODUCTS THAN TOWARDS NATIONAL PRODUCTS WHICH MAY BE REGARDED AS BEING IN COMPETITION WITH THEM.
- 12 IT FOLLOWS, IN THE FIRST PLACE, THAT THE BREACH OF OBLIGATIONS FOUND BY THE COURT DOES NOT CONCERN THE RULES APPLICABLE TO NATIONAL PRODUCTS AND, SECONDLY, THAT THE COURT WAS NOT CALLED UPON TO CONSIDER THE RULES APPLICABLE TO PRODUCTS IMPORTED FROM NON-MEMBER COUNTRIES. THE ONLY INFERENCE WHICH MUST BE DRAWN FROM THE JUDGMENT TO WHICH THE PRELIMINARY QUESTION REFERS IS THEREFORE THAT, AS FAR AS ADVERTISING IS CONCERNED, THE FRENCH REPUBLIC MUST TREAT ALCOHOLIC PRODUCTS ORIGINATING IN OTHER MEMBER STATES IN THE SAME WAY AS COMPETING NATIONAL PRODUCTS AND CONSEQUENTLY IT MUST REVISE THE CLASSIFICATION SET OUT IN ARTICLE L 1 OF THE CODE IN SO FAR AS THAT CLASSIFICATION HAS THE EFFECT OF PUTTING AT A DISADVANTAGE, IN FACT OR IN LAW, CERTAIN PRODUCTS IMPORTED FROM OTHER MEMBER STATES.

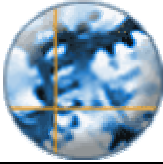
EFFECT OF THE JUDGMENT OF 10 JULY 1980

- 13 ARTICLE 171 STATES THAT "IF THE COURT OF JUSTICE FINDS THAT A MEMBER STATE HAS FAILED TO FULFIL AN OBLIGATION UNDER THIS TREATY, THE STATE SHALL BE REQUIRED TO TAKE THE NECESSARY MEASURES TO COMPLY WITH THE JUDGMENT OF THE COURT OF JUSTICE".
- 14 ALL THE INSTITUTIONS OF THE MEMBER STATES CONCERNED MUST, IN ACCORDANCE WITH THAT PROVISION, ENSURE WITHIN THE FIELDS COVERED BY THEIR RESPECTIVE POWERS, THAT JUDGMENTS OF THE COURT ARE COMPLIED WITH. IF THE JUDGMENT DECLARES THAT CERTAIN LEGISLATIVE PROVISIONS OF A MEMBER STATE ARE CONTRARY TO THE TREATY THE AUTHORITIES EXERCISING LEGISLATIVE POWER ARE THEN UNDER THE DUTY TO AMEND THE PROVISIONS IN QUESTION SO AS TO MAKE THEM CONFORM WITH THE REQUIREMENTS OF COMMUNITY LAW. FOR THEIR PART THE COURTS OF THE MEMBER STATE CONCERNED HAVE AN OBLIGATION TO ENSURE, WHEN PERFORMING THEIR DUTIES, THAT THE COURT ' S JUDGMENT IS COMPLIED WITH

- 15 HOWEVER, IT MUST BE EMPHASIZED IN THIS REGARD THAT THE PURPOSE OF JUDGMENTS DELIVERED UNDER ARTICLES 169 TO 171 IS PRIMARILY TO LAY DOWN THE DUTIES OF MEMBER STATES WHEN THEY FAIL TO FULFIL THEIR OBLIGATIONS. RIGHTS FOR THE BENEFIT OF INDIVIDUALS FLOW FROM THE ACTUAL PROVISIONS OF COMMUNITY LAW HAVING DIRECT EFFECT IN THE MEMBER STATES ' INTERNAL LEGAL ORDER, AS IS THE CASE WITH ARTICLE 30 OF THE TREATY PROHIBITING QUANTITATIVE RESTRICTIONS AND ALL MEASURES HAVING EQUIVALENT EFFECT. NEVERTHELESS, WHERE THE COURT HAS FOUND THAT A MEMBER STATE HAS FAILED TO FULFIL ITS OBLIGATIONS UNDER SUCH A PROVISION, IT IS THE DUTY OF THE NATIONAL COURT, BY VIRTUE OF THE AUTHORITY ATTACHING TO THE JUDGMENT OF THE COURT, TO TAKE ACCOUNT, IF NEED BE, OF THE ELEMENTS OF LAW ESTABLISHED BY THAT JUDGMENT IN ORDER TO DETERMINE THE SCOPE OF THE PROVISIONS OF COMMUNITY LAW WHICH IT HAS THE TASK OF APPLYING.
- 16 THEREFORE THE ANSWER TO THE QUESTION SUBMITTED MUST BE THAT IF THE COURT FINDS IN PROCEEDINGS UNDER ARTICLES 169 TO 171 OF THE EEC TREATY THAT A MEMBER STATE' S LEGISLATION IS INCOMPATIBLE WITH THE OBLIGATIONS WHICH IT HAS UNDER THE TREATY THE COURTS OF THAT STATE ARE BOUND BY VIRTUE OF ARTICLE 171 TO DRAW THE NECESSARY INFERENCES FROM THE JUDGMENT OF THE COURT. HOWEVER, IT SHOULD BE UNDERSTOOD THAT THE RIGHTS ACCRUING TO INDIVIDUALS DERIVE, NOT FROM THAT JUDGMENT, BUT FROM THE ACTUAL PROVISIONS OF COMMUNITY LAW HAVING DIRECT EFFECT IN THE INTERNAL LEGAL ORDER.

[...]

2.8. Liability of Member State for breach of Community law by judiciary



NOTE AND QUESTIONS

The ECJ was requested to adjudicate on the issue of a member state's liability for loss or damage caused to individuals as a result of a breach of community law by a supreme court for the first time in Case C-224/01: Köbler v Austria. The same issue arose in Case C-453/00: Kühne & Heitz and Case C-129/00: Commission v Italy (bellow).

2.8.1 Case C-224/01: Köbler v Austria

See Unit IV.

2.8.2 Case C-129/00: Commission v Italy

Commission of the European Communities v Italian Republic

Case C-129/00

9 December 2003

Court of Justice

ECR [2004] I-0000

<http://www.curia.eu.int/en/content/juris/index.htm>

Summary of the facts and procedure:

An Italian law which was introduced in 1990, provides that where a person has paid a tax, which has been subsequently declared incompatible with Community law, they can be entitled to reimbursement provided they have not passed on the burden of that tax to a third party (i.e. tax on goods which has been passed onto the consumer in the price). This provision exists in order to prevent unjust enrichment. In cases which have arrived before the ECJ from the national

courts, the Italian courts have stated that this provision has been interpreted as meaning that there is a presumption that the burden of the tax has been passed on to a third party and it is for the person seeking reimbursement to prove otherwise. In Case C-343/96 Dilexport the Court declared that this provision, as interpreted by the Italian courts to include this presumption, was incompatible with Community law. The Court considered that it infringed the principle of effectiveness as it made it excessively difficult or practically impossible for a Community national to exercise his rights under Community law i.e. the reimbursement of a tax which had been levied but which was incompatible with Community law.

Whilst Dilexport was pending before the Court of Justice, the Commission also started infringement proceedings against Italy on the same issue. The Commission claimed that by requiring the claimant to prove that they have not passed on the burden to a third party, Italy had breached its obligations under Community law. A Member State must ensure that the objective pursued by Community law is attained in the national legal order, irrespective of which State agency by its acts or omissions has occasioned the failure in that regard. In this case the distinct question arises as to whether national case-law may constitute a ground for establishing a Treaty infringement.

Judgment:

[...]

- 10 The Commission claims that, in Joined Cases C-192/95 to C-218/95 Comateb and Others [1997] ECR I-165, paragraph 25, the Court observed that, in relation to indirect taxes, no presumption can be allowed that a taxpayer has passed on the tax by subsequent sales, requiring him, should he wish to obtain repayment of a charge of that nature, to prove the contrary negative.
- 11 The Commission argues that the case-law of the Corte suprema di cassazione (Italy) results in the establishment of such a presumption against a taxpayer who is claiming repayment of charges incompatible with Community law, which are covered by Article 29(2) of Law No 428/1990. The reasoning of that court's decisions on the point vary, but rest essentially on the analysis that, save in exceptional circumstances, commercial companies pass on indirect taxes to their customers. The most developed reasoning which the Corte suprema di cassazione has used to reach that conclusion, particularly in its judgment No 2844 of 28 March 1996, is based on the following considerations:
 - the importer was not a private individual, but a commercial or industrial company;
 - the undertaking was trading normally, unlike in situations of loss-making or insolvency where sales at less than cost price could have been presumed;
 - the undue charges had been levied by the entire Italian customs service, which could not but have created a climate of trust as regards their legitimacy;
 - the undue charges had been applied over a long period without objection.
- 12 According to the Commission, the Corte suprema di cassazione also relies on the assumption that commercial undertakings usually pass on indirect taxes to third parties, in order to hold that applications to the courts made by the administrative authorities to obtain the production of accounting documents from the undertakings concerned or the inspection thereof are not purely 'fishing expeditions', which would render them unlawful, but are a valid method of obtaining evidence that charges have been passed on.
- 13 In addition the Corte supreme di cassazione holds, on the basis of Article 116 of the Italian Code of Civil Procedure, that failure to produce accounting documents following such an application, combined with the presumption that charges are usually passed on, proves that such has indeed been the case. The Commission states that the same solution is applied

even where the undertaking which fails to produce those documents explains that they have not been preserved because of the expiry of the 10-year period of obligatory preservation laid down by the Italian Civil Code. In view of the delays of several years which can occur between an application to the court for production of accounting documents and the court's decision thereon, an obligation to preserve those documents beyond the statutory preservation period is excessive for businesses, particularly because of the high costs and storage problems which it involves. It is thus an additional obstacle to the actual repayment of charges contrary to Community law.

- 14 The Commission states that many trial courts follow those principles, as do certain experts appointed in judicial proceedings to examine the accounting documents of taxpayers and to determine whether or not they have passed on the charges in question. It provides some examples in that regard.
- 15 That approach establishes a de facto presumption that taxpayers pass on to third parties the charges contrary to Community law of which they seek repayment, a presumption which it is then for them to rebut by adducing evidence to the contrary, in disregard of the Court's holding in paragraph 52 of the judgment in *Dilexport*.
- 16 The Commission adds that the reasoning in question is illogical, because it starts with the premiss that businesses usually pass on indirect taxes to establish a presumption in exactly the same terms as that premiss. The factors sometimes deployed in this reasoning, relating to the nature of the business, the fact that the applicant is not insolvent and the general and long-term application of the disputed charges, are completely irrelevant. Thus, an undertaking that does not pass on charges to third parties might merely make a smaller profit, but would not necessarily become insolvent. To deduce from the absence of insolvency that taxes have actually been passed on is arbitrary.
- 17 According to the Commission the Italian administrative authorities do not observe the principles applicable to the repayment of charges contrary to Community law either. The circulars of the Minister for Finances No 21/2/VII of 11 March 1994 and No 480/VIII of 12 April 1995 state essentially that the passing on of charges to third parties is established if such taxes have not been accounted for, from the year of their payment, as payments to the public purse for undue tax and credited as an asset in the balance sheet of the undertaking which is claiming their repayment. Lack of such accounting shows that the undertaking regarded the charges in question as ordinary expenses and necessarily passed them on. The Commission submits that such an approach leads to undertakings being subjected to an excessive obligation, above all as regards the years preceding the establishment of the incompatibility of such taxes with Community law.
- 18 The Commission claims that even if certain taxpayers succeed in their actions before the trial courts, at the price, it says, of long and costly proceedings, that fact does not suffice to conclude that there has been observance of the principle of effectiveness, by which the detailed national procedural rules applied to claims based on rights which subjects derive from Community law must not make the exercise of those rights in practice impossible or excessively difficult. Moreover, the successful actions by certain taxpayers, which enabled them, according to the Italian Government, to obtain repayment of ITL 120 billion between 1992 and 2000, net of interest and costs, are insignificant compared with the sums which are the subject, in this respect, of litigation. The Commission argues that the principle of effectiveness would be observed only if cases of rejection of repayment claims were exceptional and maintains that the exercise of rights derived from the Treaty cannot be impeded by general measures based on a presumption of abuse of rights.
- 19 The Italian Government accuses the Commission of indulging in speculation and ignoring facts. Only an actual finding that taxpayers who have paid taxes contrary to Community law cannot, or can only with great difficulty, obtain their repayment could amount to disregard of the principle of effectiveness. In that regard, apart from the amount of the principal sums repaid, mentioned in the preceding paragraph, the Italian Government points to 17 decisions or judgments by various trial courts, which have upheld the taxpayers' claims and

become final.

- 20 As regards the possibility of an inquiry by the Court to quantify the percentage of successful repayment claims in relation to the total number brought, the Italian Government argues that the application of such a measure would be tantamount to transferring to the Court the onus of proving the failure to fulfil obligations alleged by the Commission which the Commission must be able to prove at the end of the pre-litigation stage.
- 21 In the alternative, the Italian Government analyses the principles of the detailed rules, criticised by the Commission, for the exercise of the right to recover sums paid though not due and argues, first, that the Commission admits that Article 29(2) of Law No 428/1990 is in itself compatible with Community law. It submits that that provision requires the administrative authorities to show that the taxpayer has passed on the charge to third parties if they are to escape the obligation to repay the amount thereof.
- 22 The Italian Government points out, secondly, that, in paragraph 25 of the judgment in *Comateb and Others*, cited above, the Court held that, '[t]he actual passing on [of an indirect tax], either in whole or in part, depends on various factors in each commercial transaction which distinguish it from other transactions in other contexts' and, '[c]onsequently, the question whether an indirect tax has or has not been passed on in each case is a question of fact to be determined by the national court which may freely assess the evidence'. The Italian Government contends that, in his Opinion in *Dilexport*, Advocate General Ruiz-Jarabo Colomer added that the national court could call upon all the methods of proof allowed by national law to establish the facts. The Government explains that the Corte suprema di cassazione is not the judge of the merits, but confines itself to laying down certain general principles of evidence, on the basis of procedural circumstances which may vary considerably depending on the dispute. The judge of the merits might well accept means of deduction as methods of proof. The court decisions in favour of taxpayers produced in this case establish merely that the administrative authorities have not proved that charges were passed on.
- 23 As for the administrative authorities, which are subject to this burden of proof, it is legitimate for them to seek access to the claimant's accounts, because only such inquiry enables them to adduce that evidence and it is not, consequently, in any way a 'fishing expedition'. If the claimant does not produce its accounts voluntarily, it is usual that, if it pursues its claims in court, the authorities seek such production by the same route. That is the meaning of the two ministerial circulars mentioned in paragraph 17 of this judgment and criticised by the Commission. The Italian Government makes clear that courts regard failure to produce accounts as an argument in favour of the authorities only if the application for production of those documents was lodged before the expiry of the statutory preservation period. In that case, even if the court rules on that application only after such expiry, the duty to act in good faith in the proceedings requires the taxpayer to preserve its accounts and to produce them pursuant to the judicial decision to grant the application (Judgment No 9797 of the Corte suprema di cassazione of 18 November 1994).
- 24 The Italian Government adds that even if long proceedings are sometimes necessary in order to obtain repayment, the adverse effects connected to such length of time are offset by the award of interest on the sums due.

Findings of the Court

- 25 According to the Court's settled case-law, in the absence of Community rules on the recovery of national charges levied though not due, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, secondly, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (see, inter alia, Case 33/76

Rewe [1976] ECR 1989, paragraph 5, and Case C-255/00 Grundig Italiana [2002] ECR I-8003, paragraph 33).

- 26 As regards Article 29(2) of Law No 428/1990, as pointed out in paragraph 7 in this judgment and in the light of the differences in construction of that provision, the judgment in *Dilexport*, cited above, delivered in the context of a reference for a preliminary ruling where it was for the national judge to decide the case, stated that, if there was a presumption that the duties and charges unlawfully levied or collected when not due have been passed on to third parties and the plaintiff was required to rebut that presumption in order to secure repayment of the charge, the provision in question must be regarded as contrary to Community law.
- 27 In the present action for failure to fulfil obligations, it is by contrast for the Court itself to determine whether, taking account of the matters relied upon by the Commission, the application by the Italian authorities of Article 29(2) of Law No 428/1990 actually leads to the establishment of such a presumption or otherwise results in making the exercise of the right to repayment of such taxes virtually impossible or excessively difficult, in which cases it would be necessary to make a declaration of the Italian Republic's failure to fulfil obligations.
- 28 The Commission's complaint in support of its action has three aspects. First, many Italian courts, especially and repeatedly the Corte suprema di cassazione, consider that the passing on of charges to third parties is established from the sole fact that the claimant is a commercial undertaking, sometimes adding to it the grounds that the undertaking has not gone bankrupt and that the charge has been levied for years throughout the national territory without objection. Secondly, the authorities systematically seek the production of claimants' accounting documents. The courts before which claimants bring objections accede to such applications by adopting the same sort of reasoning as that set out above and they regard with disfavour claimants' failure to produce the documents even though the statutory period for their preservation has expired. Thirdly, the authorities regard failure to account for the amount of the taxes in question, from the year of their payment, as payments to the public purse for undue tax and credited as an asset in the balance-sheet of the undertaking which is claiming their repayment, as proof that those charges have been passed on to third parties.
- 29 A Member State's failure to fulfil obligations may, in principle, be established under Article 226 EC whatever the agency of that State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution (Case 77/69 *Commission v Belgium* [1970] ECR 237, paragraph 15).
- 30 The scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts (see, particularly, Case C-382/92 *Commission v United Kingdom* [1994] ECR I-2435, paragraph 36).
- 31 In this case what is at issue is Article 29(2) of Law No 428/1990 which provides that duties and charges levied under national provisions incompatible with Community legislation are to be repaid, unless the amount thereof has been passed on to others. Such a provision is in itself neutral in respect of Community law in relation both to the burden of proof that the charge has been passed on to other persons and to the evidence which is admissible to prove it. Its effect must be determined in the light of the construction which the national courts give it.
- 32 In that regard, isolated or numerically insignificant judicial decisions in the context of case-law taking a different direction, or still more a construction disowned by the national supreme court, cannot be taken into account. That is not true of a widely-held judicial construction which has not been disowned by the supreme court, but rather confirmed by it.
- 33 Where national legislation has been the subject of different relevant judicial constructions, some leading to the application of that legislation in compliance with Community law, others leading to the opposite application, it must be held that, at the very least, such legislation is

not sufficiently clear to ensure its application in compliance with Community law.

- 34 In the present case, the Italian Government does not dispute that a certain number of judgments of the Corte suprema di cassazione lead, by deductive reasoning, to the conclusion that, in the absence of evidence to the contrary, commercial undertakings trading normally pass on an indirect tax by subsequent sales, in particular if it is levied throughout the national territory for an appreciable period without objection. The Italian Government confines itself to explaining that numerous trial courts do not accept such reasoning as proof of such passing on and to providing examples of taxpayers who secured repayment of charges contrary to Community law, since the authorities did not succeed in those cases in proving to the relevant court that the taxpayers had passed on those charges.
- 35 The reasoning followed in the cited judgments of the Corte suprema di cassazione is itself based on a premiss which is a mere presumption, namely that indirect taxes are in principle passed on by subsequent sales by economic operators where they have the chance. The other factors, if any, taken into account, namely the commercial nature of the taxpayer's business, the fact that its financial situation is not parlous and the levying of the tax in question throughout the national territory for an appreciable period without objection, permit the conclusion that an undertaking which has carried on its business in such a context has in fact passed on the charges in question only if one relies on the premiss that all economic operators act thus, save in special circumstances such as the absence of one or other of those factors. However, as the Court has already held (see *San Giorgio*, cited above, paragraphs 14 and 15; *Joined Cases 331/85, 376/85 and 378/85 Bianco and Girard* [1988] ECR I-1099, paragraph 17; *Commission v Italy*, cited above, paragraph 7, and *Comateb and Others*, paragraph 25), and for the economic reasons pointed out by the Advocate General in points 73 to 80 of his Opinion, such a premiss is unjustified in a certain number of situations and is merely a presumption which cannot be accepted in the context of the examination of claims for repayment of indirect taxes contrary to Community law.
- 36 As regards the requirement, as a condition precedent to any repayment, for production of the accounting documents of the undertaking which is claiming repayment of charges contrary to Community law, the following considerations must be taken into account.
- 37 Such a requirement, concerning the years for which repayment is claimed, which is raised during the period for which the accounting documents in question must obligatorily be preserved, cannot be regarded in itself as reversing, to taxpayers' disadvantage, the burden of proof that the charges have not been passed on to third parties. Such documents provide neutral factual information from which, in particular, the authorities may try to show that the charges have been passed on to others (see, to that effect, *Case C-147/01 Weber's Wine World and Others* [2003] ECR I-0000, paragraph 115). In that situation, and in the absence of special circumstances upon which the claimant could rely, failure to produce accounting documents when they are requested by the authorities can be regarded by them or by the courts as a factor to be taken into account in showing that the charges have been passed on to third parties. However, that factor cannot, by itself, be sufficient for it to be presumed that those charges have been passed on to third parties nor, a fortiori, to impose on the claimant the onus of rebutting such a presumption by proving the contrary (see, to that effect, *Weber's Wine World and Others*, cited above, paragraph 116).
- 38 In any event, in situations where the authorities seek the production of those documents after the expiry of their statutory preservation period and the taxpayer fails to produce them, the fact of drawing the conclusion therefrom that the taxpayer has passed on the charges in question to third parties or of drawing the same conclusion subject to the taxpayer proving the contrary amounts to establishing to the taxpayer's disadvantage a presumption which results in making excessively difficult the exercise of the right to repayment of charges contrary to Community law.
- 39 In relation to the fact that the authorities consider that the passing on of a charge to third

parties is established if the amount of that charge has not been accounted for, from the year of its payment, as a payment to the public purse for undue tax, and credited as an asset in the balance-sheet of the undertaking seeking its repayment, it must be held as follows.

- 40 Such reasoning leads to the establishment of an unjustified presumption to the claimant's disadvantage. In view of the conditions in which a claim for repayment of a charge occurs, to add the amount of that charge as an asset to the balance sheet for the year of its payment assumes that the taxpayer immediately considers that it has a high chance of successfully disputing its payment, although, under the very terms of Article 29(1) of Law No 428/1990, it has a period of several years to bring such claim. Furthermore, the taxpayer may very well, even while challenging the payment of the charge, consider its chances of success insufficiently sure to take the risk of accounting for the corresponding amount as an asset. In that regard, in view of the difficulties of obtaining a favourable outcome to a claim for repayment in the circumstances revealed in this case, such an entry could even be alleged to be contrary to the principles of lawful accounting. In addition, to consider that the passing on of the charge to third parties is established on the ground that its amount has not been added as an asset to the balance sheet already depends on the presumption that indirect taxes are usually passed on by subsequent sales, a presumption which has been declared to be contrary to Community law in the course of the consideration of the first aspect criticised by the Commission.
- 41 In the light of the foregoing considerations, it must be declared that, by failing to amend Article 29(2) of Law No 428/1990, which is construed and applied by the administrative authorities and a substantial proportion of the courts, including the Corte suprema di cassazione, in such a way that the exercise of the right to repayment of charges levied in breach of Community rules is made excessively difficult for the taxpayer, the Italian Republic has failed to fulfil its obligations under the EC Treaty.

[...]

2.9. Penalty payment for failure to comply with an earlier judgment of the ECJ



NOTE AND QUESTIONS

According to Article 228 of the EC-Treaty, the ECJ imposed in this case for the first time a penalty payment on a member state for failure to comply with an earlier judgment of the Court. Greece had to pay a daily penalty of 20 000 Euros until the 26th of February, measures required to comply with the judgment given by the Court on 7 April 1992 have finally been adopted by Greek authorities. Greece paid 5 400 000 Euros altogether (for the period between July 2000 and March 2001).

Before this case the Commission made two other applications for fines to the ECJ:

- Case C-224/99: Commission v France (women night work)
- Case C-197/98: Commission v Greece (diploma recognition),

But both were subsequently dropped.

1. Is the imposition of a penalty payment an effective way of ensuring the member states' compliance with ECJ-judgments?
2. Evaluate the possible consequences of this ECJ's decision, particularly in comparing it with Article 88 of the ECSC-Treaty which empowers the High Authority to record the failure of a state, without first bringing the case before the ECJ. Furthermore, the Council may decide to withhold Community-expenditure for the member state concerned.

Note that the Court has power to order injunctive measures in interim proceedings under Article 243, but it does not have these powers under Article 228, when giving judgment in Article 226 proceedings.

2.9.1 Case C - 387/97: Commission v. Greece (Kouropitos pollution)

Commission v Hellenic Republic

C-387/97

Court of Justice

4 July 2000

<http://www.curia.eu.int/en/content/juris/index.htm>

Summary of facts and procedure

By application lodged at the Court Registry on 14 November 1997, the Commission brought an action under Article 171 of the EC Treaty (now Article 228 EC) for a declaration that, by failing to take the necessary measures to comply with the judgment of the Court of 7 April 1992 in Case C-45/91 Commission v Greece [1992] ECR I-2509 the Hellenic Republic has failed to fulfil its obligations under Article 171 of the EC Treaty (now Article 228 EC), and for an order requiring the Hellenic Republic to pay to the Commission, into the account 'EC own resources, a daily penalty payment of ECU 24 600 for each day of delay in implementing the measures necessary to comply with the judgment in Case C-45/91, from notification of the present judgment.

In its judgment in Case C-45/91, the Court held: 'By failing to take the measures necessary to ensure that in the area of Chania waste and toxic and dangerous waste are disposed of without endangering human health and without harming the environment, and by failing to draw up for that area plans for the disposal of waste and of toxic and dangerous waste, the Hellenic Republic has failed to fulfil its obligations under Articles 4 and 6 of Council Directive 75/442/EEC of 15 July 1975 on waste, and Articles 5 and 12 of Council Directive 78/319/EEC, of 20 March 1978 on toxic and dangerous waste.'

The Commission was not notified of any measures to comply with the judgment in Case C-45/91, and so it considered that the Hellenic Republic has not taken the measures required for implementation of the Court's judgment. Therefore, after an exchange of letters with the Hellenic Government, on 6 August 1996, it delivered a reasoned opinion under Article 226 of the Treaty. Since that opinion was not acted upon, the Commission brought the present proceedings.

Judgment

64 As regards, first, fulfilment of the obligation imposed by Article 4 of Directive 75/442 to dispose of waste without endangering human health and without harming the environment, the Greek Government does not dispute that solid waste, in particular household refuse, is still tipped into the river Kouroupitos.

[...]

69 It is true that, according to the Greek Government, the competent authorities, which have planned to establish and put into operation a mechanical recycling and composting plant and a landfill site at Strongilo Kefali in the municipality of Khordakios, have come up against opposition from the members of the public concerned, in the form of complaints and actions brought before the competent administrative and judicial authorities challenging the administrative decisions concerning the location of the two installations.

70 However, as has already been pointed out in paragraph 21 of the judgment in Case C-45/91, it is settled case-law that a Member State may not plead internal circumstances, such as difficulties of implementation which emerge at the stage when a Community measure is put into effect, to justify a failure to comply with obligations and time-limits laid down by Community law.

[...]

76 Contrary to the claims of the Greek Government, legislation or specific measures amounting only to a series of ad hoc normative interventions that are incapable of constituting an organised and coordinated system for the disposal of waste and toxic and dangerous waste cannot be regarded as plans which the Member States are required to adopt under Article 6 of Directive 75/442 and Article 12 of Directive 78/319 (see, by analogy, Case C-214/96 *Commission v Spain* [1998] ECR I-7661, paragraph 30).

78 On the basis of all the foregoing considerations it must be held that, by failing to take the measures necessary to ensure that waste is disposed of in the area of Chania without endangering human health and without harming the environment in accordance with Article 4 of Directive 75/442 and by failing to draw up for that area plans for the disposal of waste, pursuant to Article 6 of Directive 75/442, and of toxic and dangerous waste, pursuant to Article 12 of Directive 78/319, the Hellenic Republic has not implemented all the necessary measures to comply with the judgment in Case C-45/91 and has failed to fulfil its obligations under Article 171 of the Treaty.

Setting of the penalty payment

79 Relying on the method of calculation set out in its memorandum 96/C 242/07 of 21 August 1996 on applying Article 171 of the EC Treaty (OJ 1996 C 242, p. 6) and its communication 97/C 63/02 of 28 February 1997 on the method of calculating the penalty payments provided for pursuant to Article 171 of the EC Treaty (OJ 1997 C 63, p. 2), the Commission has proposed that the Court should, in respect of failure to comply with the judgment in Case C-45/91, impose a penalty payment of ECU 24 600 for each day of delay from the date of notification of the present judgment until the breach of obligations has been remedied. The Commission contends that a financial penalty in the form of a periodic penalty payment is the most appropriate means of achieving the objective of compliance with the judgment as soon as possible.

80 The Greek Government claims that the Court should set the penalty payment on the basis of coefficients of seriousness and duration, which are more favourable to the Hellenic Republic than those applied by the Commission. It contends that the coefficient relating to the duration of the infringement, determined unilaterally by the Commission without considering the extent to which the judgment has been complied with, does not reflect the existing situation and would be unfair to the Hellenic Republic. While the Commission has a discretion to determine coefficients relating to seriousness, duration and the Member States' ability to pay, without their assent, it is exclusively for the Court to assess what is just, proportionate and equitable.

81 As to that, Article 171(1) of the Treaty provides that, if the Court finds that a Member State has failed to fulfil an obligation under the Treaty, that State is required to take the necessary measures to comply with the Court's judgment.

82 Article 171 of the Treaty does not specify the period within which a judgment must be complied with. However, in accordance with settled case-law, the importance of immediate and uniform application of Community law means that the process of compliance must be initiated at once and completed as soon as possible (Case 131/84 *Commission v Italy* [1985] ECR 3531, paragraph 7, Case 169/87 *Commission v France* [1988] ECR 4093, paragraph 14, and Case C-334/94 *Commission v France*, cited above).

83 If the Member State concerned has not taken the necessary measures to comply with the

Court's judgment within the time-limit laid down by the Commission in the reasoned opinion adopted pursuant to the first subparagraph of Article 171(2) of the Treaty, the Commission may bring the case before the Court. As provided in the second subparagraph of Article 171(2), the Commission is to specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

- 84 In the absence of provisions in the Treaty, the Commission may adopt guidelines for determining how the lump sums or penalty payments which it intends to propose to the Court are calculated, so as, in particular to ensure equal treatment between the Member States.
- 85 Memorandum 96/C 242/07 states that decisions as to the amount of a fine or penalty payment must be taken with an eye to their purpose, namely the effective enforcement of Community law. The Commission therefore considers that the amount must be calculated on the basis of three fundamental criteria: the seriousness of the infringement, its duration and the need to ensure that the penalty itself is a deterrent to continuation of the infringement and to further infringements.
- 86 Communication 97/C 63/02 identifies the mathematical variables used to calculate the amount of penalty payments, that is to say a uniform flat-rate amount, a coefficient of seriousness, a coefficient of duration, and a factor intended to reflect the Member State's ability to pay while ensuring that the penalty payment is proportionate and has a deterrent effect, calculated on the basis of the gross domestic product of the Member States and the weighting of their votes in the Council.
- 87 Those guidelines, setting out the approach which the Commission proposes to follow, help to ensure that it acts in a manner which is transparent, foreseeable and consistent with legal certainty and are designed to achieve proportionality in the amounts of the penalty payments to be proposed by it.
- 88 The Commission's suggestion that account should be taken both of the gross domestic product of the Member State concerned and of the number of its votes in the Council appears appropriate in that it enables that Member State's ability to pay to be reflected while keeping the variation between Member States within a reasonable range.
- 89 It should be stressed that these suggestions of the Commission cannot bind the Court. It is expressly stated in the third paragraph of Article 171(2) of the Treaty that the Court, if it 'finds that the Member State concerned has not complied with its judgment ... may impose a lump sum or a penalty payment on it. However, the suggestions are a useful point of reference.
- 90 First, since the principal aim of penalty payments is that the Member State should remedy the breach of obligations as soon as possible, a penalty payment must be set that will be appropriate to the circumstances and proportionate both to the breach which has been found and to the ability to pay of the Member State concerned.
- 91 Second, the degree of urgency that the Member State concerned should fulfil its obligations may vary in accordance with the breach.
- 92 In that light, and as the Commission has suggested, the basic criteria which must be taken into account in order to ensure that penalty payments have coercive force and Community law is applied uniformly and effectively are, in principle, the duration of the infringement, its degree of seriousness and the ability of the Member State to pay. In applying those criteria, regard should be had in particular to the effects of failure to comply on private and public interests and to the urgency of getting the Member State concerned to fulfil its obligations.
- 93 In the present case, having regard to the nature of the breaches of obligations, which continue to this day, a penalty payment is the means best suited to the circumstances.
- 94 As regards the seriousness of the infringements and in particular the effects of failure to comply on private and public interests, the obligation to dispose of waste without

endangering human health and without harming the environment forms part of the very objectives of Community environmental policy as set out in Article 130r of the EC Treaty (now, after amendment, Article 174 EC). The failure to comply with the obligation resulting from Article 4 of Directive 75/442 could, by the very nature of that obligation, endanger human health directly and harm the environment and must, in the light of the other obligations, be regarded as particularly serious.

- 95 The failure to fulfil the more specific obligations of drawing up a waste disposal plan and drawing up, and keeping up to date, plans for the disposal of toxic and dangerous waste, imposed by Article 6 of Directive 75/442 and Article 12 of Directive 78/319 respectively, must be regarded as serious in that compliance with those specific obligations was necessary in order for the objectives set out in Article 4 of Directive 75/442 and Article 5 of Directive 78/319 to be fully achieved.
- 96 Thus, contrary to the Commission's submissions, the fact that specific measures have been taken, in accordance with Article 5 of Directive 78/319, to reduce the quantities of toxic and dangerous waste cannot have a bearing on the seriousness of the failure to comply with the obligation, under Article 12 of Directive 78/319, to draw up, and keep up to date, plans for the disposal of toxic and dangerous waste.
- 97 In addition, account should be taken of the fact that it has not been proved that the Hellenic Republic has failed fully to comply with the obligation to dispose of toxic and dangerous waste from the area of Chania in accordance with Article 5 of Directive 78/319.
- 98 As regards the duration of the infringement, suffice it to state that it is considerable, even if the starting date be that on which the Treaty on European Union entered into force and not the date on which the judgment in Case C-45/91 was delivered.
- 99 Having regard to all the foregoing considerations, the Hellenic Republic should be ordered to pay to the Commission, into the account 'EC own resources, a penalty payment of EUR 20 000 for each day of delay in implementing the measures necessary to comply with the judgment in Case C-45/91, from delivery of the present judgment until the judgment in Case C-45/91 has been complied with.

[...]

2.9.2 Case C - 278/01: Commission v. Spain

Commission of the European Communities v Kingdom of Spain

Case C-278/01

Court of Justice

25 November 2003

<http://www.curia.eu.int/en/content/juris/index.htm>

Summary of facts and procedure

The Court of Justice held in 1998¹ that Spain had not observed the limit values laid down by the Directive concerning bathing water² as regards the quality of inshore bathing water.

Under the EC Treaty, if the Commission considers that a Member State has not taken the necessary measures to comply with a judgment of the Court, it may lay down a period for compliance with that judgment. On the expiry of that period the Commission may bring the matter before the Court and request that the Member State be ordered to pay a lump sum or a penalty payment. In 2001, taking the view that Spain had not complied with the judgment of 1998, the Commission brought an action before the Court seeking the imposition of a penalty payment in the amount of EUR 45,600 per day of delay in the adoption of the measures necessary to comply with that judgment.

Judgment

[...]

- 25 In its judgment in *Commission v Spain* the Court found that, by failing to take all necessary measures to ensure that the quality of inshore bathing water in Spain conforms to the limit values set in accordance with Article 3 of the directive, the Kingdom of Spain had failed to fulfil its obligations under Article 4 thereof.
- 26 Under Article 228(1) EC the Kingdom of Spain was required to take the necessary measures to comply with that judgment.
- 27 Article 228 EC does not specify the period within which the judgment must be complied with. However, in accordance with settled case-law, the importance of immediate and uniform application of Community law means that the process of compliance must be initiated at once and completed as soon as possible (*Case C-387/97 Commission v Greece* [2000] ECR I-5047, paragraph 82, and case-law cited).
- 28 According to Article 228(2) EC, if the Member State concerned has not taken the necessary measures to comply with the Court's judgment within the time-limit laid down by the Commission in its reasoned opinion, the latter may bring the case before the Court of

¹ Judgment in *Case C-91/96 Commission v Spain* [1998] ECR I-505.

² Council Directive 76/160/EEC of 8 December 1975 on the quality of bathing water (OJ 1976 L 31, p. 1).

Justice, specifying the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

- 29 In order to do this, the Commission must assess the circumstances as they appear on the expiry of the time-limit laid down in its reasoned opinion, issued on the basis of the first subparagraph of Article 228(2) EC.
- 30 It should be noted that there were three bathing seasons between the delivery of the judgment in *Commission v Spain* and expiry of the time-limit laid down in the reasoned opinion in this case. Even if compliance with that judgment calls for complex and long-term operations, as the Spanish Government claims, a period of that length must be regarded as sufficient to adopt the measures needed to comply with the Court's judgment under Article 228 EC.
- 31 The considerations relied on by the Spanish Government relating to the complexity and length of operations necessary to comply with the judgment in *Commission v Spain* cannot therefore lead to this application being dismissed.
- 32 As regards the measures taken by the Kingdom of Spain with a view to complying with that judgment, the most recent statistics communicated to the Court of Justice indicate that there has been some progress in the rate of compliance of the bathing water in question with the mandatory values set in accordance with the Directive, reaching 85.1% for the 2002 bathing season. None the less, it is common ground that inshore bathing water in Spanish territory has not yet been brought into conformity with those mandatory values.
- 33 The Commission also observed that the Spanish Government has, over the years, reduced the number of bathing areas in inshore bathing water without justifying that reduction. According to the Commission, 39 areas were eliminated in 1998, 10 in 1999 and 14 in 2000. The numbers of bathing areas in inshore bathing water decreased from 302 in 1996 to 202 in 2000. The Kingdom of Spain is therefore attempting to comply with the judgment in *Commission v Spain* not by improving the quality of that water but by contriving to reduce the number of bathing areas.
- 34 The merits of that argument will not be considered. Suffice it to observe that it is not relevant to a finding of failure to fulfil obligations in this case because the Commission based this action on figures appearing in its annual reports and reproduced at paragraphs 20 and 21 of this judgment, which do not include areas which have been removed from the list of bathing areas.
- 35 In the light of all the foregoing considerations, it must be held that, by not taking the measures necessary to ensure that the quality of inshore bathing water in Spanish territory conforms to the limit values set in accordance with Article 3 of the Directive, notwithstanding its obligations under Article 4 of that directive, the Kingdom of Spain has not taken all the measures necessary to comply with the Court's judgment in *Commission v Spain* and has accordingly failed to fulfil its obligations under Article 228 EC.

[...]

- 40 Having found that the Kingdom of Spain has not complied with its judgment in *Commission v Spain*, the Court may, under the third subparagraph of Article 228(2) EC, impose on it a lump sum or penalty payment.
- 41 In that connection it must be pointed out that the Commission's suggestions cannot bind the Court and merely constitute a useful point of reference. In exercising its discretion, it is for the Court to fix the lump sum or penalty payment that is appropriate to the circumstances and proportionate both to the breach that has been found and to the ability to pay of the Member State concerned (see *Commission v Greece*, cited above, paragraphs 89 and 90).
- 42 Clearly a penalty payment is likely to encourage the Member State in infringement to put an end as soon as possible to the breach that has been found. For the purposes of determining the penalty payment in this case it is, first of all, necessary to consider the frequency of the

proposed penalty payment; secondly, whether its amount should stay the same or decrease; and thirdly, the exact calculation of its amount.

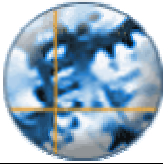
- 43 As regards the frequency of the proposed penalty payment in this case, it should be noted that, under Article 13 of the Directive, as amended, the state of bathing water is assessed on an annual basis. Pursuant to that provision the Member States are required to send to the Commission a report on the implementation of the Directive every year. The report must be made to the Commission before the end of the year in question.
- 44 It follows that any finding that the infringement has been brought to an end can only occur annually when those reports are submitted.
- 45 A daily penalty payment could therefore be due for a period during which the requirements imposed by the Directive have already been met and even though it is only possible to ascertain subsequently that the Directive has been implemented. The Member State could therefore be required to pay the penalty for periods in which the infringement has in fact ended.
- 46 The penalty payment must therefore be imposed not on a daily basis but on an annual basis, following submission of the annual report relating to the implementation of the Directive by the Member State concerned.
- 47 With regard to the unchanging nature of the amount of the penalty payment proposed by the Commission, it must be observed that it is particularly difficult for the Member States to achieve complete implementation of the Directive, as the Advocate General has pointed out at points 66 and 67 of his Opinion.
- 48 In the light of that particular factor, it is conceivable that the defendant Member State might manage significantly to increase the extent of its implementation of the Directive but not to implement it fully in the short term. If the amount of the penalty payment were to stay the same it would continue to be due in its entirety for as long as the Member State concerned had not achieved complete implementation of the Directive.
- 49 In those circumstances, a penalty which does not take account of the progress which a Member State may have made in complying with its obligations is neither appropriate to the circumstances nor proportionate to the breach which has been found.
- 50 In order for the penalty payment to be appropriate to the particular circumstances of the case and proportionate to the breach which has been found, the amount must take account of progress made by the defendant Member State in complying with the judgment in *Commission v Spain*. To that end it is necessary to require that Member State to pay annually an amount calculated according to the percentage of bathing areas in Spanish inshore waters which do not yet conform to the mandatory values laid down under the Directive.
- 51 The payment will be due from the time when the quality of bathing water achieved in the first bathing season following delivery of this judgment is ascertained and, if appropriate, at the time when it is subsequently ascertained annually.
- 52 As regards the amount of the fine, the basic criteria which must be taken into account are, in principle, the duration of the infringement, its degree of seriousness and the ability of the Member State to pay (see *Commission v Greece*, paragraph 92).
- 53 With regard to the duration of the infringement, it must be acknowledged that compliance with the judgment in *Commission v Spain* by the Member State concerned is difficult to achieve in a short time. In this case such compliance presupposes detection of the problems, drawing up plans of action and implementing those plans. In that context, account must amongst other things be taken of the fact that the Community directives on public procurement require, inter alia, that the specifications be drawn up exhaustively before the public procurement procedure is initiated and they cannot be amended subsequently. Furthermore, the directives require the awarding authorities to comply with certain time-

limits which may not be reduced, and they strictly limit the possibility of urgent procedures.

- 54 Having regard to those considerations, it must be concluded that the coefficient of 2 (on a scale of 1 to 3) proposed by the Commission to reflect the duration of the infringement is too harsh in this case and that a coefficient of 1.5 is more appropriate.
- 55 With regard to the seriousness of the breach, the Spanish Government's argument that account ought to be taken, in the fixing of the penalty payment, of the fact that 79.2% of the bathing areas concerned already conformed to the limit values in the Directive at the time when this action was brought must be rejected. It is clear from the file in the case that in its proposal the Commission has taken into consideration the extent to which the Directive has been implemented by the Spanish authorities by improving the rate of conformity of the waters in question from 54.5% in 1992 to 79.2% in 2000.
- 56 The Spanish Government's argument that it was unable to take advantage of the 10 year period for implementing the Directive available to the other Member States must also be rejected. It was open to the Kingdom of Spain to request a transitional period for application of the Directive when it acceded to the European Communities. Since it did not make any such request it cannot now rely on its failure to do so to claim a reduction in the penalty payment.
- 57 It must further be observed that the purpose of bringing bathing water into conformity with the limit values of the Directive is to protect public health and the environment. In so far as the breach found at paragraph 35 of this judgment can endanger human health and damage the environment it is clearly of significance.
- 58 Having regard to those factors, the coefficient of 4 (on a scale of 1 to 20) proposed by the Commission seems adequately to reflect the seriousness of the infringement.
- 59 The Commission's proposal to multiply a basic amount by a coefficient of 11.4 based on the gross domestic product of the Kingdom of Spain and on the number of votes it has in the Council is an appropriate way of reflecting that Member State's ability to pay, while keeping the variation between Member States within a reasonable range (see *Commission v Greece*, paragraph 88).
- 60 Multiplying the basic amount of EUR 500 by a coefficient of 11.4 (for ability to pay), 4 (for the seriousness of the breach) and 1.5 (for the duration of the breach) gives an amount of EUR 34 200 per day, or EUR 12 483 000 per year. That amount is based on the consideration that 20% of the bathing areas concerned did not conform to the limit values in the Directive; it must therefore be divided by 20, to obtain an amount corresponding to 1% of areas not in conformity, that is, EUR 624 150 per year.
- 61 The particular circumstances of the case will therefore be properly taken into account if the amount of the penalty payment is fixed at EUR 624 150 per year and per 1% of bathing areas which do not conform to the limit values in the Directive.
- 62 Consequently, the Kingdom of Spain must be ordered to pay to the Commission, into the account 'European Community own resources', a penalty payment of EUR 624 150 per year and per 1% of bathing areas in Spanish inshore waters which have been found not to conform to the limit values laid down under the Directive for the year in question, as from the time when the quality of bathing water achieved in the first bathing season following delivery of this judgment is ascertained until the year in which the judgment in *Commission v Spain* is fully complied with.

[...]

3. REMEDIES AGAINST MEMBER STATES' VIOLATIONS: ART. 228 (EX 171) TEC



NOTE AND QUESTIONS

Paragraph 2 was added to Article 228 (then Article 171) by a Treaty of Maastricht amendment and has been followed up by a memorandum of the Commission (below).

1. What problem was Maastricht trying to resolve? What problems do you envisage in the application of article 228 (ex 171?) Does the Commission memorandum address these problems?

3.1. Memorandum on applying Article 171 [now 228] of the EC Treaty, by the European Commission

(96/C 242/07)

1. Article 171 of the EC Treaty as amended by the Treaty on European Union stipulates that penalties may be imposed on a Member State which has not complied with a judgment finding that it has failed to fulfil an obligation under the Treaty.

It is for the Court of Justice to take the final decision on the penalties to be imposed. The Commission, however, as the guardian of the Treaties, has a decisive part to play at an earlier stage in the proceedings in that it is responsible for initiating the Article 171 procedure and, where appropriate, bringing a case before the Court of Justice. It also gives its view on the actual amount of the lump sum or penalty payment.

2. As this is a new mechanism which supplements the existing procedure for failure to comply, the Commission, in a spirit of openness, believes that it must publicly state the criteria it means to apply in asking the Court to impose monetary penalties. In so doing, the Commission would stress that both the criteria selected and the way they are applied will be dictated by the need to ensure that Community law is effectively enforced. Once the general criteria set out below have been applied in individual cases and the Court of Justice itself has begun to hand down decisions on the matter, the Commission will be able to gradually refine its views, this Memorandum being only an initial approach to the question.
3. Under Article 171, if a Member State has failed to take the necessary measures to comply with a judgment of the Court of Justice within the time limit laid down in the reasoned opinion addressed to it by the Commission, the latter may bring the case before the Court of Justice. In so doing, the Commission specifies *'the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances'*

Within this procedure, the Commission has *discretion* in deciding whether to refer the case to

the Court but, if it does decide to do so, it is required to *give its view as to the penalty and the amount thereof when* lodging its application.

This does not, however, in the Commission's view, mean that it must ask for a penalty to be imposed in every case. Where circumstances warrant (e.g. where the infringement is minor or there is no risk of the offence being repeated), the Commission may refrain from asking for a penalty to be imposed; it must nevertheless state its reasons.

4. Article 171 offers a choice between two types of pecuniary sanction, a lump sum or a penalty payment. The basic object of the whole infringement procedure is to secure compliance as rapidly as possible, and the Commission considers that a penalty payment is the most appropriate instrument for achieving it.

This does not, however, mean that it will never ask for a lump sum to be imposed.

5. Decisions as to the amount of the penalty must be taken with an eye to its actual purpose, which is to ensure that Community law is effectively enforced. The Commission considers that the amount must be calculated on the basis of three fundamental criteria:

- the seriousness of the infringement,
- its duration,
- the need to ensure that the penalty itself is a deterrent to further infringements.

6. As regards seriousness, an infringement in the form of failure to comply with a judgment is always quite clearly serious. However, for the specific purpose of fixing the amount of the penalty, the Commission will also take account of two parameters closely linked to the underlying infringement which gave rise to the original judgment, viz the importance of the Community rules which have been infringed and the effects of the infringement on general and particular interests.

- 6.1. In assessing the importance of the Community provisions which have been infringed, the Commission will have regard to their nature and scope rather than to their standing in the hierarchy of norms. Thus, for example, an infringement of the principle of non-discrimination must always be regarded as very serious, regardless of whether it has come about through a breach of the principle laid down by the EC Treaty itself or of the principle as set out in a regulation or directive. Generally speaking, for example, attacks on fundamental rights and on the four fundamental freedoms enshrined in the Treaty should be regarded as serious and a penalty appropriate to that degree of seriousness should be imposed in such cases.

- 6.2. The effects of the infringement on general or particular interests will have to be gauged on a case-by-case basis. Examples of such effects would be a loss of own resources resulting from an infringement or the particularly damaging effects of pollution arising from an action in breach of Community law. Where the effects of an infringement on the general interest are concerned, its impact on the functioning of the community must be taken into account. Clearly, an unwarranted prohibition on the marketing in one Member State of goods manufactured in another has an immediate and obvious effect on the functioning of the common market, but other, less drastic measures, or even in some cases a failure by a Member State to act, may have just as much effect on the functioning of the Community.

- 6.3. More specifically, when taking the interests of individuals into account for the purpose of calculating the amount of a penalty, the Commission does not set out to obtain redress for the damage and loss suffered as a result of an infringement, since such redress may be obtained by commencing proceedings before the national courts. The Commission's purpose is rather to take into consideration the effects of an infringement from the point of view of the individual and the economic operators concerned; thus, for example, consequences are not the same where the breach concerns, either an individual case of misapplication (non-recognition of a diploma), or the failure to implement a directive on the mutual recognition of diplomas, which would prejudice the interests of an entire profession.

7. The Commission will also take account of the duration of an infringement in deciding the

amount of a penalty. In proceedings whose object is to establish that a judgment of the Court of Justice has not been complied with, the duration will, as a rule, be considerable.

8. From the point of view of the effectiveness of the penalty, it is important to set amounts such that the penalty has a deterrent effect. To impose purely symbolic penalties would negate the whole purpose of this addition to the infringement procedure and run counter to the ultimate objective of the procedure, which is to ensure that Community law is fully enforced.

A decision as to whether to ask for a penalty to be imposed will depend on the circumstances of the case, as stated at point 3. But, once it has been found that a penalty should be imposed, for it to have a deterrent effect it must be set at a higher figure if there is any risk of a repetition (or where there has been a repetition) of the failure to comply, in order to cancel out any economic advantage which the Member State responsible for the infringement might derive in the case in point.

3.2. Method of calculating the penalty payment's provided for pursuant to Article 171 [now 228] of the EC Treaty, by the European Commission

(No C 63/2 Official Journal of the European Communities 28. 2. 97)
(97/C 63/02)

1. INTRODUCTION

This document must be read in conjunction with the memorandum on applying Article 171 of the EC Treaty adopted by the Commission on 5 June 1996 (hereinafter 'the memorandum'), which it amplifies and extends.

Member States must be aware of how the financial penalties proposed by the Commission to the Court of Justice of the European Communities are to be calculated, and the method used must comply with the principles of proportionality and equal treatment for all the Member States. It is also important to have a clear and consistent method, since the Commission must explain to the Court how it determined the penalty proposed.

The method described here is confined to the calculation of the penalty payment, which the Commission considers the most appropriate means of securing compliance as rapidly as possible. The Commission intends to use the second subparagraph of Article 171 (2) to persuade the Member State concerned to regularize its position. However, this does not mean that it relinquishes the option of asking for a lump sum to be imposed or, where appropriate, of not asking for a penalty to be imposed.

The memorandum was the first outline of the approach which it intends to develop progressively in the application of the second subparagraph of Article 171 (2). Similarly this document represents the first stage in the definition of general criteria to determine the amount of the financial penalty, which will be defined on a case by case basis.

The penalty to be paid by the Member State is the sum of the amounts due in respect of each day's delay in implementing a judgment of the Court, beginning from the day on which the Court's second judgment was brought to the attention of the Member State concerned and ending when the latter complies with the judgment.

It constitutes marginal Community revenue.

The amount of the daily penalty is calculated as follows:

- a uniform flat-rate amount is multiplied by two coefficients, one reflecting the seriousness of the infringement and the other the duration,
- the result is multiplied by a special factor (n) reflecting the ability to pay of the Member State concerned and the number of votes it has in the Council.

2. SETTING THE UNIFORM FLAT-RATE AMOUNT

The uniform flat-rate amount is defined as the basic amount to which weightings will be applied. It is the penalty for violating the principle of legality and the sole jurisdiction of the Court which applies in all cases pursuant to Article 171. It has been determined in such a way that:

- the Commission retains a broad discretion when applying the coefficients,
- the amount is reasonable and tolerable for all the Member States,
- the amount is high enough to maintain pressure on whichever Member State is concerned.

The amount has been set at ECU 500 per day.

[...]

4. TAKING THE MEMBER STATE'S ABILITY TO PAY INTO ACCOUNT

The amount of the penalty payment should ensure that the penalty is proportionate and, at the same time, has a deterrent effect. This deterrent effect should be sufficient to ensure that:

- the Member State decides to regularize its position and bring the infringement to an end (the penalty must, therefore, outweigh the advantage gained by the Member State from the infringement),
- the Member State will not repeat the infringement.

The need for the penalty to have a deterrent effect precludes any purely symbolic penalty. The penalty must exert sufficient pressure on the Member State for it to regularize its position. The penalty must be effective.

The deterrent effect is achieved by applying a special factor n which is a geometric mean based on the Member State's gross domestic product (GDP) and the weighting of votes in the Council. The factor (n) combines the ability of each Member State to pay, as measured by its GDP, with the number of votes it has in the Council. The resulting formula gives a reasonable degree of variation between Member States (from 1,0 to 26,4).

n is equivalent to:

Belgium: 6,2 Denmark: 3,9 Germany: 26,4 Greece: 4,1 Spain: 11,4 France: 21,1 Ireland: 2,4 Italy: 17,7 Luxembourg: 1,0 Netherlands: 7,6 Austria: 5,1 Portugal: 3,9 Finland: 3,3 Sweden: 5,2 United Kingdom: 17,8.

The amount of the daily penalty is arrived at by multiplying the flat-rate by the coefficients for the seriousness and duration of the infringement and by the special (invariable) factor n for the Member State in question. The Commission reserves the right to adapt this factor if the actual situation or the weighting of votes in the Council changes.

The method of calculation can be summarized in the following general formula:

$$Pd = (Fr \times Cs \times Cd) \times n$$

where Pd = daily penalty payment; Fr = flat-rate amount; Cs = seriousness coefficient; Cd = duration coefficient; n = factor taking into account the Member State's ability to pay.

3.3. 21st annual report on monitoring the application of Community law

Bruxelles, le 30.12.2004, COM(2004) 839

In exercising its exclusive function as guardian of the Treaties, the Commission shall ensure and monitor the uniform application of Community law by the Member States as set out in Article 211 of the EC Treaty. Article 226 EC provides that the Commission can take action against a Member State for adopting or maintaining legislation or rules which are contrary to the fundamental principles of Community law as enshrined in the Treaties.

The White Paper on European Governance³ published by the Commission in 2001 emphasises that the primary responsibility for applying Community law lies with national administrations and courts in the Member States. Cooperation between the administrative bodies in the Member States and the Commission is a crucial element in the effective monitoring of the application of Community law. This duty of cooperation is formally enshrined in Article 10 EC.

The primary objective of infringement proceedings, particularly in the pre-litigation stage, is to encourage the Member States to comply voluntarily with Community law as quickly as possible. At all stages of the pre-litigation stage the Commission seeks to promote contact between its departments and the national administrations. Furthermore, the Commission has aimed to boost cooperation with the Member States by means of complementary or alternative methods to resolve problems.

The undertaking of monitoring the application of Community law is vital in terms of the rule of law generally, but it also helps to make the principle of a Community based on the rule of law a tangible reality for Europe's citizens and economic operators. The numerous complaints received by the citizens of the Member States constitute a vital means of detecting infringements of Community law. The Commission has reinforced the instruments and facilities both for registering complaints and for dealing with them more quickly. Accordingly, a form is available on-line⁴. In addition to this, the Secretariat General of the Commission is developing a new Internet-based tool to facilitate the filing of a complaint.

The 21st Annual Report, including the annexed documents of the services of the Commission, gives an account on the Commission's activities in connection with monitoring the application of Community law in 2003. The objective of the report is twofold:

- to provide the Member States, the general public and economic operators with an overview of the ongoing work directed to ensuring the benefits of a Community based on the rule of law;
- to inform the European Parliament of the ways in which the Commission exercises the authority conferred upon it by the Treaties to ensure the correct application of Community law.

1.1. Statistics for 2003

3927 infringement cases were running on 31.12.2003. Among these were: 1855 cases in motion for which proceedings have been commenced, 999 cases for which a reasoned opinion has been

³ European Governance – A White Paper, COM(2001)428

⁴ http://europa.eu.int/comm/secretariat_general/sgb/lexcomm/form_en.pdf.

sent, 411 cases which have been referred to the Court of Justice, 69 cases for which Article 228 proceedings have been commenced. (See Annex II, table 2.3)

The total volume of infringement cases initiated by the Commission is up 15%, from 2356 in 2002, to 2709 in 2003.

The statistics for 2003 reflect a decrease in the number of complaints registered by the Commission from 1431 in 2002 to 1290 in 2003, indicating a decrease of 9.85%. The 2003 figures fairly correspond to the levels registered between 1999 and 2001, thus the increase of complaints in 2002 may be seen as a deviation. Complaints still form the bulk of infringement procedures initiated by the Commission against the Member States. The principal sectors concerned are environment (493 complaints), internal market (314 complaints) and taxation and customs (119 complaints). 1158 cases were active on 31.12.2003.

The number of cases initiated by the Commission on the basis of its own investigations decreased in 2003, dropping from 318 in 2002 to 253 in 2003, a decrease of 20.44%.

The number of proceedings for failure to notify has almost doubled compared to the figures of 2001 and 2002. The statistics for 2003 show an increase of 92.1% from the previous year (from 607 cases to 1166). The figures for 2003 cover not only implementing measures for directives that have not been notified by the Member States but also cases for failure to notify the technical norms specified in Directive 98/34/CE (goods). The caseload here depends not only on the internal discipline which the Member States impose on themselves to act within the time-limits that they themselves have accepted, but also on a rising number of directives in force.

On 31 December 2003, 524 out of the 1166 cases were still on-going. The same figure for 2002 was 71 cases.

The Commission has called for greater effectiveness in the monitoring of transposition itself and the conformity of the national transposition measures. Action has been taken to improve communication between the Commission and the Member States. In many cases Member States are required to include a "concordance table" with the communication of transposition measures.

In order to facilitate further the transposition of E.U. directives into the legal systems of the Member States, the Secretariat General has begun to develop a database designed to allow the electronic notification of national execution measures to the Commission. This project is due to enter into production in May 2004.

1552 letters of formal notice were issued in 2003, a vast increase of 56%, compared to 995 letters issued in 2002. However, the number of reasoned opinions showed a less dramatic increase from 487 in 2002 to 533 in 2003, which represents an increase of 9,4%. Whereas 48.94% of formal notices in 2002 led to reasoned opinions, this figure was only 34.34% under 2003 indicating an increase in the number of cases being settled at the formal notice stage.

The number of cases referred to the Court of Justice rose from 180 in 2002 to 215 in 2003, an increase of 19.4%. This increase must be seen against the increased volume of reasoned opinions issued under 2003. 48.36% of the cases opened in 2003 were still pending on 31 December 2003. The number of terminations of decisions was 2329.

[...]

Table 2.3.1. Dossiers en cours au 21/12/2003 pour lesquels la procédure d'infraction a été ouverte ; par Etat membre

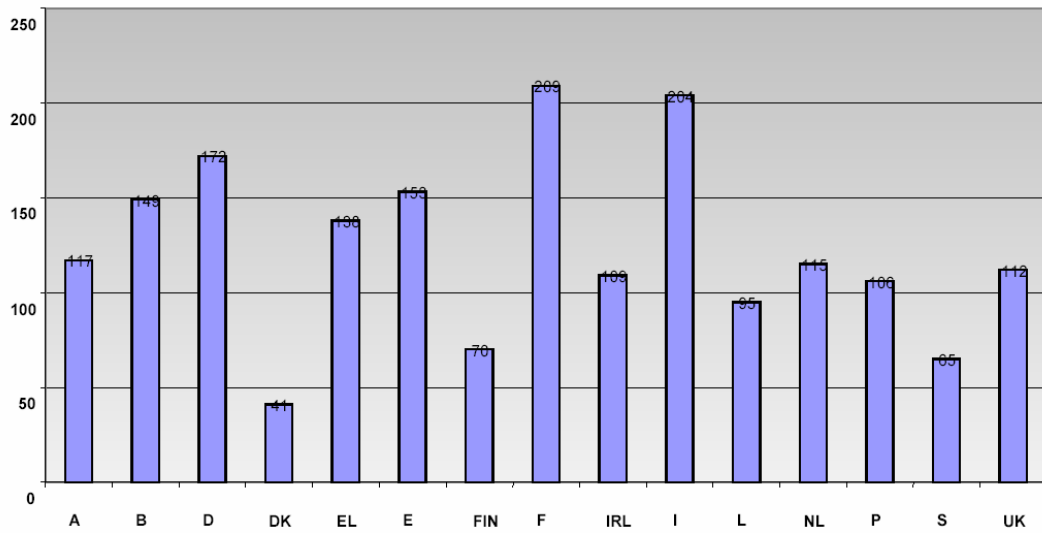


Table 2.3.2. Dossiers en cours au 31/12/2003 pour lesquels un avis motive a été envoyé, Par Etat membre

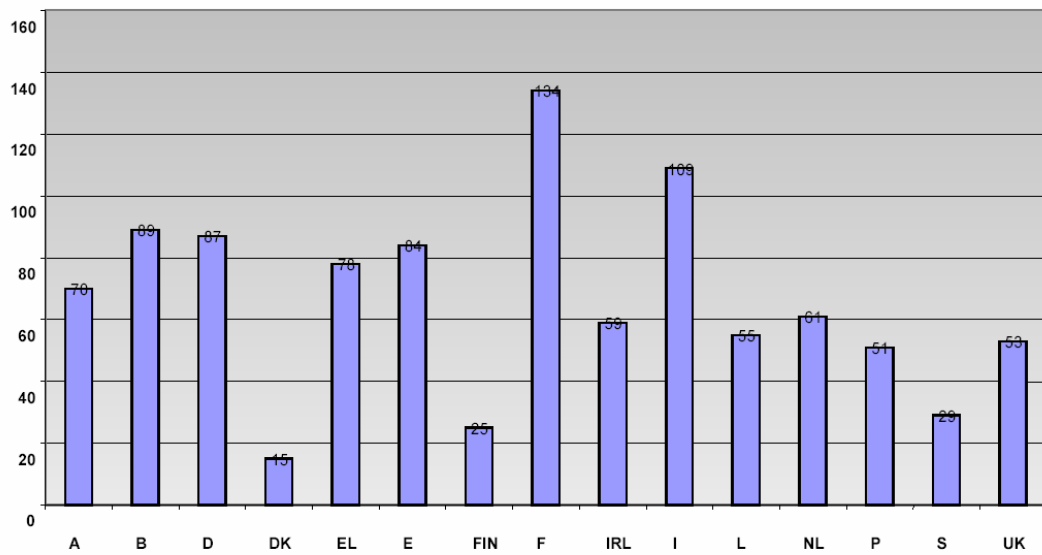
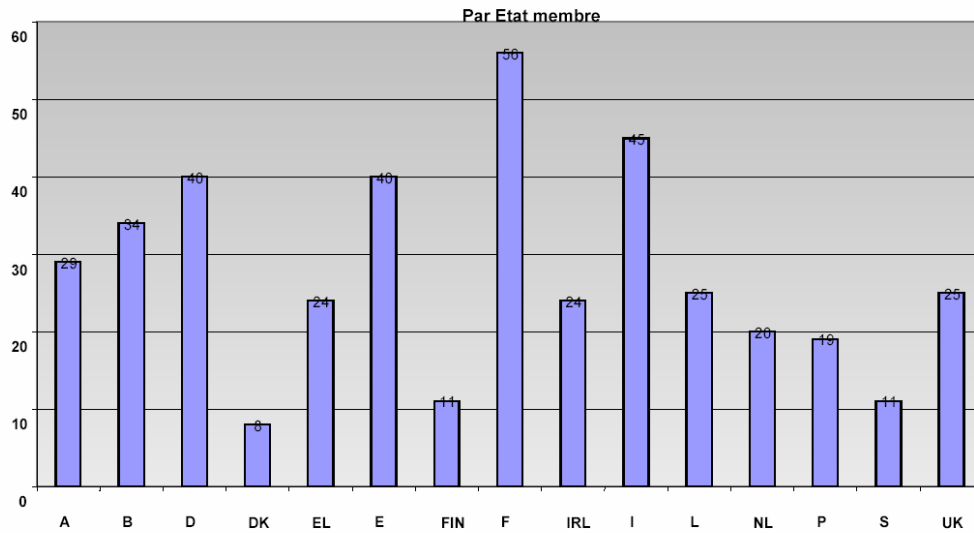
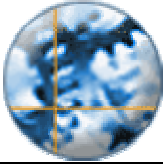


Table 2.3.3. Dossiers en cours au 31/12/2003 pour lesquels une saisine de la Cour a été effectuée.



Ranking	Member States	Directives whose deadline for implementation has passed by the reference date	Directives for which measures of implementation have been notified	Percentages of notifications
1	Denmark	2400	2380	99,17%
2	Spain	2415	2394	99,13%
3	Finland	2393	2363	98,75%
4	Ireland	2411	2376	98,55%
5	United Kingdom	2394	2357	98,45%
6	Austria	2400	2357	98,21%
7	Sweden	2382	2338	98,15%
8	Portugal	2436	2390	98,11%
9	Netherlands	2399	2345	97,75%
10	Belgium	2452	2394	97,63%
11	Italy	2406	2345	97,46%
12	France	2398	2336	97,41%
13	Germany	2398	2334	97,33%
14	Luxembourg	2401	2333	97,17%
15	Greece	2401	2332	97,13%
	average EC	2406	2358	98,03%

3.4. Treaty establishing a Constitution for Europe



NOTE AND QUESTIONS

In the view of the members of the Convention on the future of Europe the present system of machinery for sanctions for cases of failure to comply with judgments of the ECJ is not efficient enough, as it might take years before a pecuniary sanction is imposed on States which the Court has found against.

Therefore they tried to find means to bring about greater efficiency and simplicity in the machinery for sanctions for failure to comply with a judgment of the Court. To that end, there was a suggestion to strengthen the sanctions machinery provided for in Article 228 TEC, by abolishing the two stages prior to referral to the Court for the implementation of sanctions, i.e. the stage of "formal notice" to the State in question and the stage of the Commission's "reasoned opinion", or at least one of these stages.

The text of the new Article 228 (Constitution Article III-362) proposes simplifying the preliminary procedure by abolishing the reasoned opinion stage.

The newly introduced Paragraph 3 is the result of a suggestion submitted by the Commission. It grants the Commission the possibility of initiating before the Court both (in the same procedure) proceedings for failure to fulfil an obligation pursuant to Article 226 TEC and an application to impose a sanction. If, at the Commission's request, the Court imposes the sanction in the same judgment, the sanction would apply after a certain period had elapsed from the date the judgment was delivered, if the defending State did not comply with the Court's ruling. This would enable the procedure for sanctions in cases of "non-communication" of a national transposition measure to be considerably simplified and speeded up.

A distinction is made in practice between cases of "non-communication" (when the Member State has not taken any transposition measure) and cases of incorrect transposition (when the transposition measures taken by the Member State do not, in the Commission's view, comply with the directive (or framework law). The proposed arrangements would not apply in the second case.

Read the text of Article III-362 of the Treaty establishing a Constitution for Europe (below) and, based on what you have learnt from the previous readings, consider if the amendments can indeed bring greater efficiency.

Article III-362

1. If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Constitution, that State shall be required to take the necessary measures to comply with the judgment of the Court.
2. **If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment referred to in paragraph 1, it may bring the case before the Court of Justice of the European Union after giving that State the opportunity to submit its observations.** It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

This procedure shall be without prejudice to Article III-361.

3. **When the Commission brings a case before the Court of Justice of the European Union pursuant to Article III-360 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a European framework law, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.**

If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment.

(emphasis added)