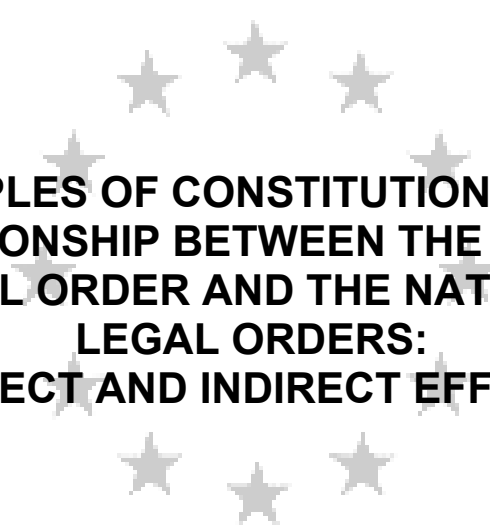


# The Law of the EUROPEAN UNION

Teaching Material



**PRINCIPLES OF CONSTITUTIONAL LAW:  
THE RELATIONSHIP BETWEEN THE COMMUNITY  
LEGAL ORDER AND THE NATIONAL  
LEGAL ORDERS:  
DIRECT AND INDIRECT EFFECT**

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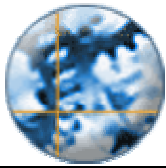
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## ***NOTE AND QUESTIONS***

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Direct Effect, more than any other legal doctrine, shaped the constitutional and political architecture of the Community

The next Assignments will be dedicated to the study of the Doctrine of Direct Effect of Community Law and its implications.

# **1 RELEVANT TREATY PROVISIONS**

## **Article 249**

In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety upon those to whom it is addressed.

Recommendations and opinions shall have no binding force.

## **Article 253**

Regulations, directives and decisions adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty.

## **Article 254**

1. Regulations, directives and decisions adopted in accordance with the procedure referred to in Article 251 shall be signed by the President of the European Parliament and by the President of the Council and published in the Official Journal of the European Union. They shall enter into force on the date specified in them or, in the absence thereof, on the 20th day following that of their publication.
2. Regulations of the Council and of the Commission, as well as directives of those institutions which are addressed to all Member States, shall be published in the Official Journal of the European Union. They shall enter into force on the date specified in them or, in the absence thereof, on the 20th day following that of their publication.
3. Other directives, and decisions, shall be notified to those to whom they are addressed and shall take effect upon such notification.

### **Article 255**

1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.
2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam.
3. Each institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents.

### **Article 256**

Decisions of the Council or of the Commission which impose a pecuniary obligation on persons other than States, shall be enforceable.

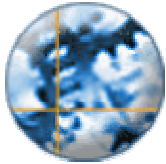
Enforcement shall be governed by the rules of civil procedure in force in the State in the territory of which it is carried out. The order for its enforcement shall be appended to the decision, without other formality than verification of the authenticity of the decision, by the national authority which the government of each Member State shall designate for this purpose and shall make known to the Commission and to the Court of Justice.

When these formalities have been completed on application by the party concerned, the latter may proceed to enforcement in accordance with the national law, by bringing the matter directly before the competent authority.

Enforcement may be suspended only by a decision of the Court of Justice. However, the courts of the country concerned shall have jurisdiction over complaints that enforcement is being carried out in an irregular manner.

## **2 DIRECT EFFECT OF PRIMARY LAW**

### **2.1 Case 26/62: van Gend & Loos**



#### **NOTE AND QUESTIONS**

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This is the leading case. Define with precision the issues at dispute, the position of the parties and the decision of the Court.

In particular:

1. What is the political importance of the legal dispute over admissibility and jurisdiction?
2. Reflect on the method of interpretation adopted by the Court: Compare this to the classical understanding of interpretation under international law. Does the Court beg the question (or load the dice) by its methodological approach?
3. There is a sharp disagreement between the Commission and the Advocate General in this case. It is critical to identify this disagreement and explain it. Note, too, that this debate between Advocate General and Commission is not reflected in the decision of the Court. Why not?
4. In what sense could it be said that the Court was "lucky" that the case came on a preliminary reference from The Netherlands?
5. In the "final analysis:" Is the Decision in van Gend en Loos as radical and innovative as it has been made out to be? Is it "legitimate"?
6. Each one of the following cases develops the doctrine of direct effect as set out in van Gend en Loos. Identify the developments and their implications.

**NV Algemene Transport- en Expeditie Onderneming van Gend & Loos**  
**v**  
**Netherlands Inland Revenue Administration**

**Case 26/62**

5 February 1963

Court of Justice

[1963] ECR 1

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

**Summary of the facts and procedure**

*[On September 9, 1960 Van Gend & Loos imported into the Netherlands from the Federal Republic of Germany a quantity of ureaformaldehyde. On the date of importation, the product in question was classified in heading 39.01-a-1 of the tariff of import duties listed in the 'Tariefbesluit' which entered into force on 1 March 1960. On this basis, the Dutch revenue authorities applied an ad valorem import duty of 8% to the importation in question.]*

*Van Gend & Loos lodged an objection with the Inspector of Customs and Excise. The company argued that on January 1, 1958, the date on which the EEC Treaty entered into force, aminoplasts in emulsion (which they contended included ureaformaldehyde) were classified under heading 279-a-2 of the tariff in the 'Tariefbesluit' of 1947, and charged with an ad valorem import duty of 3%. In the 'Tariefbesluit' which entered into force on March 1, 1960, heading 279-a-2 was replaced by heading 39.01-a. Instead of applying an import duty of 3% uniformly to all products under the old heading 279-a-2, a sub-division was created: 39.01-a-1, which contained only aminoplasts in aqueous emulsions, dispersions or solutions, and in respect of which import duty was fixed at 8%. For the other products in heading 39.01-a, which also had been included in the old heading 279-A-2, the import duty of 3% applied on January 1, 1958 was maintained. Van Gend & Loos argued that by thus increasing the import duty on ureaformaldehyde after the entry into force of the EEC Treaty, the Dutch Government infringed Article 12 of that Treaty, which provides that Member States shall refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other.*

*The objection of Van Gend & Loos was dismissed by the Inspector of Customs and Excise on the ground of inadmissibility, because it was not directed against the actual application of the tariff but against the rate. Van Gend & Loos appealed against this decision to the Tariefcommissie, who heard the case May 21, 1962. The Nederlandse administratie der belastingen argued that there had not in fact been any increase in the tariff applied to ureaformaldehyde, because when the EEC Treaty entered into force it was not charged under the heading 279-a-2 with a duty of only 3% but, because of its composition and intended application, was classified under heading 332 bis ('synthetic and other adhesives, not stated or included elsewhere') and charged with a duty of 10%.*

*The Tariefcommissie, without giving a formal decision on the question whether the product in question fell within heading 332 bis or heading 279-a-2 of the 1947 'Tariefbesluit', took the view that the arguments of the parties raised a question concerning the interpretation of the EEC Treaty. It therefore suspended the proceedings and, in conformity with the third paragraph of Article 177 of the Treaty, referred the following two questions to the Court of Justice:*



1. *Whether Article 12 of the EEC Treaty has direct application within the territory of a Member State, in other words, whether nationals of such a State can, on the basis of the Article in question, lay claim to individual rights which the courts must protect, and*
2. *In the event of an affirmative reply, whether the application of an import duty of 8% to the import into the Netherlands by the applicant in the main action of ureaformaldehyde originating in the Federal Republic of Germany represented an unlawful increase within the meaning of Article 12 of the EEC Treaty or whether it was in this case a reasonable alteration of the duty applicable before 1 March 1960, an alteration which, although amounting to an increase from the arithmetical point of view, is nevertheless not regarded as prohibited under the terms of Article 12?*

[...]

*Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted to the Court by the parties to the main action, by the Government of the Kingdom of Belgium, the Government of the Federal Republic of Germany, the Commission of the EEC and the Government of the Kingdom of the Netherlands.*

[...]

### **Arguments and Observations**

*The arguments contained in the observations submitted . . . may be summarized as follows:*

*A -- The first question*

*Admissibility*

[...]

*The Netherlands Government disputes whether an alleged infringement of the Treaty by a Member State can be submitted to the judgment of the Court by a procedure other than that laid down by Article 169 or 170, that is to say on the initiative of another Member State or of the Commission. It maintains in particular that the matter cannot be brought before the Court by means of the procedure of reference for a preliminary ruling under Article 177.*

*The Court, according to the Netherlands Government, cannot, in the context of the present proceedings, decide a problem of this nature, since it does not relate to the interpretation but to the application of the Treaty in a specific case.*

*The Belgian Government maintains that the first question is a reference to the Court of a problem of constitutional law, which falls exclusively within the jurisdiction of the Netherlands court.*

*That court is confronted with two international treaties both of which are part of the national law. It must decide under national law -- assuming that they are in fact contradictory -- which treaty prevails over the other or more exactly whether a prior national law of ratification prevails over a subsequent one.*

*This is a typical question of national constitutional law which has nothing to do with the interpretation of an Article of the EEC Treaty and is within the exclusive jurisdiction of the Netherlands court, because it can only be answered according to the constitutional principles and jurisprudence of the national law of the Netherlands.*

*The Belgian Government also points out that a decision on the first question referred to the Court is not only unnecessary to enable the Tariefcommissie to give its judgment but cannot even have any influence on the solution to the actual problem which it is asked to resolve.*

*In fact, whatever answer the Court may give, the Tariefcommissie has to solve the same problem: Has it the right to ignore the law of 16 December 1959 ratifying the Brussels protocol, because it conflicts with an earlier law of 5 December 1957 ratifying the Treaty establishing the EEC?*

*The question raised is not therefore an appropriate question for a preliminary ruling, since its answer cannot enable the court which has to adjudicate upon the merits of the main action to make a final decision in the proceedings pending before it.*

*The Commission of the EEC, on the other hand, observes that the effect of the provisions of the Treaty on the national law of Member States cannot be determined by the actual national law of each of them but by the Treaty itself. The problem is therefore without doubt one of interpretation of the Treaty.*

*Further the Commission calls attention to the fact that a finding of inadmissibility would have the paradoxical and shocking result that the rights of individuals would be protected in all cases of infringement of Community law except in the case of an infringement by a Member State.*

*On the substance*

*Van Gend & Loos answers in the affirmative the question whether the Article has internal effect.*

*It maintains in particular that:*

*-- Article 12 is applicable without any preliminary incorporation in the national legislation of Member States, since it only imposes a negative obligation;*

*-- it has direct effect without any further measures of implementation under Community legislation, as all the customs duties applied by Member States in their trade with each other were bound on 1 January 1957 (Article 14 of the Treaty);*

*-- although the Article does not directly refer to the nationals of Member States but to the national authorities, infringement of it adversely affects the fundamental principles of the Community, and individuals as well as the Community must be protected against such infringements;*

*-- it is particularly well adapted for direct application by the national court which must set aside the application of customs duties introduced or increased in breach of its provisions.*

*[...]*

*According to the Commission an analysis of the legal structure of the Treaty and of the legal system which it establishes shows on the one hand that the Member States did not only intend to undertake mutual commitments but to establish a system of Community law, and on the other hand that they did not wish to withdraw the application of this law from the ordinary jurisdiction of the national courts of law.*

*However, Community law must be effectively and uniformly applied throughout the whole of the Community.*

*The result is first that the effect of Community law on the internal law of Member States cannot be determined by this internal law but only by Community law, further that the national courts are bound to apply directly the rules of Community law and finally that the national court is bound to ensure that the rules of Community law prevail over conflicting national laws even if they are passed later.*

*The Commission observes in this context that the fact that a Community rule is, as regards its form, directed to the states does not of itself take away from individuals who have an interest in it the right to require it to be applied in the national courts.*

*As regards more particularly the question referred to the Court, the Commission is of the opinion that Article 12 contains a rule of law capable of being effectively applied by the national court.*

*It is a provision which is perfectly clear in the sense that it creates for Member States a specific unambiguous obligation relating to the extension of their internal law in a matter which directly affects their nationals and it is not affected or qualified by any other provision of the Treaty.*

*It is also a complete and self-sufficient provision in that it does not require on a Community level any new measure to give concrete form to the obligation which it defines.*

*The Netherlands Government draws a distinction between the question of the internal effect and that of the direct effect (or direct applicability), the first, according to it, being a pre-condition of the second.*

*It considers that the question whether a particular provision of the Treaty has an internal effect can only be answered in the affirmative, if all the essential elements, namely the intention of the contracting parties and the material terms of the provision under consideration, allows such a conclusion.*

*With regard to the intention of the parties to the Treaty the Netherlands Government maintains that an examination of the actual wording is sufficient to establish that Article 12 only places an obligation on Member States, who are free to decide how they intend to fulfil its obligation. A comparison with other provisions of the Treaty confirms this finding.*

*As Article 12 does not have internal effect it cannot, a fortiori, have direct effect.*

*Even if the fact that Article 12 places an obligation on Member States were to be considered as an internal effect, it cannot have direct effect in the sense that it permits the nationals of Member States to assert subjective rights which the courts must protect.*

*Alternatively the Netherlands Government argues that, so far as the necessary conditions for its direct application are concerned, the EEC Treaty does not differ from a standard international treaty. The conclusive factors in this respect are the intention of the parties and the provisions of the Treaty.*

*However the question whether under Netherlands constitutional law Article 12 is directly applicable is one concerning the interpretation of Netherlands law and does not come within the jurisdiction of the Court of Justice.*

*Finally the Netherlands Government indicates what the effect would be, in its view, of an affirmative answer to the first question put by the Tariefcommissie:*

*-- it would upset the system which the authors of the Treaty intended to establish;*

*-- it would create, with regard to the many provisions in Community regulations which expressly impose obligations on Member States, an uncertainty in the law of a kind which could call in question the readiness of these States to cooperate in the future;*

-- it would put in issue the responsibility of States by means of a procedure which was not designed for this purpose.

The Belgian Government maintains that Article 12 is not one of the provisions -- which are the exception in the Treaty -- having direct internal effect.

Article 12 does not constitute a rule of law of general application providing that any introduction of a new customs duty or any increase in an existing duty is automatically without effect or is absolutely void. It merely obliges Member States to refrain from taking such measures.

It does not create therefore a directly applicable right which nationals could invoke and enforce. It requires from Governments action at a later date to attain the objective fixed by the Treaty. A national court cannot be asked to enforce compliance with this obligation.

The German Government is also of the opinion that Article 12 of the EEC Treaty does not constitute a legal provision which is directly applicable in all Member States. It imposes on them an international obligation (in the field of customs policy) which must be implemented by national authorities endowed with legislative powers.

Customs duties applicable to a citizen of a Member State of the Community, at least during the transitional period, thus do not derive from the EEC Treaty or the legal measures taken by the institutions, but from legal measures enacted by Member States. Article 12 only lays down the provisions with which they must comply in their customs legislation.

Moreover the obligation laid down only applies to the other contracting Member States.

In German law a legal provision which laid down a customs duty contrary to the provisions of Article 12 would be perfectly valid.

Within the framework of the EEC Treaty the legal protection of nationals of Member States is secured, by provisions derogating from their national constitutional system, only in respect of those measures taken by the institutions of the Community which are of direct and individual concern to such nationals.

## *B -- The second question*

### *Admissibility*

[The observations of the Netherlands and Belgian Governments on the admissibility of the second question are noted by the Court in recital 20]

### *On the substance*

Van Gend & Loos repeats in detail the history of the classification of aminoplasts in the successive tariffs to show that the company was charged with a duty of 8% instead of 3% intentionally and not because of the inevitable effect of adapting the old tariff to the new. The Netherlands Government was therefore in breach of Article 12 of the EEC Treaty when it increased a customs duty applied in its trade with other Member States.

The Netherlands and Belgian Governments reply that, before that modification of the Benelux Tariff of 1958, ureaformaldehyde was not subject to an import duty of 3% laid down for heading 279-a-2 of the 'Tariefbesluit' of 1947, but to an import duty of 10% laid down for heading 332 bis (adhesives).

*In fact experience showed that the goods in question were usually used as glue and that as a general rule they could be used as such. Therefore the ministries concerned decided that the product in question was always to be taxed as glue and was to be included under heading 332 bis.*

*Although, when the intended application of the product in dispute was not sufficiently specified, the Tariefcommissie in certain cases classified it under heading 279-a-2, the authorities of the Benelux States charged it with an import duty of 10% from the date of the entry into force of the Brussels nomenclature, which put an end to any possible argument.*

*There can be no question, therefore, in this case, of an increase of a customs duty or of a derogation from the provisions of Article 12 of the Treaty.*

*[...]*

*The Commission of the EEC is of the opinion first that the prohibition in Article 12 relates to all goods which are capable of being the subject matter of trade between Member States (to the extent to which such trade relates to products complying with the conditions of Article 9(2)).*

*Article 12 not only aims at the general maintenance of customs duties applied by the various Member States in their relations with each other but also relates to each individual product. It allows no exception even partial or provisional.*

*The Commission then points out that, in the context of Article 12, regard must be had to the duty actually applied when the Treaty entered into force. This duty results from the whole of the provisions and customary practice of administrative law.*

*However, an isolated classification under another tariff heading is in itself insufficient proof that the duty of 10% chargeable under heading 332 bis is not in fact applied to aminoplasts.*

*In this case it is necessary to recognize a concept of prima facie legality: when there is an official interpretation by the competent administration and instructions in conformity with this interpretation have been given to executive officers to fix the detailed rules for levying a duty, that is the 'duty applied' within the meaning of Article 12 of the Treaty.*

*The Commission, therefore considers the duty of 10% as the duty applied on the entry into force of the Treaty. There has not therefore been in this case any increase contrary to Article 12.*

### 2.1.1 Opinion of AG Karl Roemer

[...]

#### ***II -- The first question***

##### *1. Admissibility*

[The Netherlands and Belgian Governments have thus drawn attention to two points bearing on the admissibility of the first question:]

1. It is not concerned with the interpretation of an Article of the Treaty, but with a problem under Netherlands constitutional law.
2. The answer to the first question has no effect upon the solution of the real difficulties in the Dutch case. Even if an affirmative reply is given to the question, the Netherlands court is still faced with the problem of deciding to which law of ratification (that relating to the EEC Treaty or that relating to the Brussels Agreement) it should give precedence.

[...]

With regard to the question whether the Tariefcommissie has submitted to the Court a problem of Dutch constitutional law the following observations may be made: it seems clear to me that the wording of the first question ('whether Article 12 . . . has direct application') gives the impression that the Court is faced with a task which goes beyond its jurisdiction under Article 177. It is impossible to clarify exhaustively the real legal effects of an international agreement on the nationals of a Member State without having regard to the constitutional law of that Member State.

But, on the other hand, it is clear that the question does not refer exclusively to problems of constitutional law. The effect of an international treaty depends in the first place on the legal force which its authors intended its individual provisions to have, whether they are to be merely programmes or declarations of intent, or obligations to act on the international plane or whether some of them are to have a direct effect on the legal system of Member States. If the examination is limited to this aspect, without reaching a conclusion on the question how national constitutional law incorporates the intended effects of the treaty into the national legal system, it comes within the field of interpretation of the Treaty. In spite of the unfortunate wording of the first question, it is possible to recognize in it an admissible request for an interpretation which the Court can extract without difficulty from the facts put forward and can deal with under Article 177.

On the second point

The second objection concerns the so called 'Relevance of the Decision', that is, the question whether the solution of a particular problem according to Community law is of any importance in reaching a decision in the national proceedings.

In my view the Court has, in principle, no jurisdiction to consider this preliminary question. As is shown by the wording of the second paragraph of Article 177 which must also apply to a reference under the third paragraph of that Article (' . . . if it considers that a decision on the question is necessary . . .'), the national courts have to this extent a certain freedom of evaluation. They form an idea how the national proceedings should be decided and ask themselves at what stage their method of evaluating the law and

the facts must be supplemented with the help of a binding interpretation of the Treaty under Article 177. This Court which, in principle, must not apply national law, may neither review nor rectify arguments based on national law, lest it be convicted of exceeding the limits of its jurisdiction. It should thus accept the determination made by the national court of those issues which seem to it to be necessary for its decision.

[...]

As regards this particular case, it must not be forgotten that after the first question has been positively answered another question follows. It may be that its examination leads to an interpretation of Article 12 according to which there is no conflict between the EEC Treaty and the Brussels Protocol, perhaps because Article 12 allows room for exceptional treatment in special cases. Further, we cannot estimate the importance that the Dutch court would attach to a conflict which might arise and how it would decide this issue. For all these reasons, it is not possible to deny the relevance of a decision in determining the issues in the national proceedings and to refuse to answer the first question.

## *2. Examination of the first question*

I have already mentioned that the question is not happily phrased. But its meaning appears clear when looked at in the light of the constitutional law of the Netherlands. Article 66 of the Netherlands Constitution -- according to its interpretation in cases decided by its courts -- gives international agreements precedence over national law, if the provisions of such agreement have a general binding effect, that is, when they are directly applicable ('self-executing'). The question is, therefore, whether it can be inferred from the EEC Treaty that Article 12 has this legal effect or whether it only contains an obligation on the part of Member States not to enact laws to the contrary, the infringement of which would not result in the national laws being ineffective.

The opinions expressed in the course of the proceedings are not unanimous. The plaintiff in the Netherlands action and the Commission of the EEC maintain that Article 12 has a direct internal effect in that authorities and courts of Member States must apply it directly. According to this opinion the first question should receive an affirmative answer. The Dutch, Belgian and German Governments, on the other hand, see in Article 12 only an obligation on the part of Member States.

In its written observations and during the oral procedures, the Commission attempted to support its view by presenting a detailed analysis of the structure of the Community. Very impressively, it submitted that, judged by the international law of contract and by the general legal practice between States, the European Treaties represent a far-reaching legal innovation and that it would be wrong to consider them in the light only of the general principles of the law of nations.

It is right that these conclusions should have been reached in proceedings which raise the fundamental question of the relationship between Community law and national law.

Anyone familiar with Community law knows that in fact it does not just consist of contractual relations between a number of States considered as subjects of the law of nations. The Community has its own institutions, independent of the Member States, endowed with the power to take administrative measures and to make rules of law which directly create rights in favour of and impose duties on Member States as well as their authorities and citizens. This can be clearly deduced from Articles 187, 189, 191 and 192 of the Treaty.

The EEC Treaty contains in addition provisions which are clearly intended to be incorporated in national law and to modify or supplement it. Examples of such provisions are Articles 85 and 86 relating to competition (prohibition of certain agreements, prohibition of the abuse of dominant position in the Common Market States (Article 88), and the duty of national courts to cooperate with the Community institutions as regards decisions and their enforcement (Articles 177 and 192 of the Treaty; Articles 26

and 27 of the Protocol on the Statute of the Court of Justice). In this connection mention can be made of the provisions which are designed to produce direct effects at a later stage, for example the provisions under the Title of the Treaty devoted to the Free Movement of Persons, Services and Capital (Articles 48 and 60).

But on the other hand it must not be forgotten that many of the Treaty's provisions expressly refer to the obligations of Member States.

[From the first part of the Treaty which sets out the principles of the Community I would mention Article 5 which provides that Member States shall take all appropriate measures to ensure fulfilment of obligations arising out of the Treaty, or Article 8 which provides for a finding that the objectives specifically laid down for the first stage have in fact been attained and that certain obligations have been fulfilled. In the Title relating to the free movement of goods, Article 11 (obligations with regard to customs duties) and Article 37 (obligations relating to State monopolies) can be mentioned. Finally I might mention, without claiming to be exhaustive, Article 106 in which Member States undertake to authorize payments in a specified currency.

It can surely be inferred from the carefully phrased wording of the Treaty and also from its material content and its context that these provisions in fact only lay down an obligation on the part of Member States.

Further we find a series of provisions which, although drafted in a declaratory form, are clearly intended, having regard to their content and context, only to be obligations of Member States and not to have direct internal effect.

[These are the provisions on the abolition of customs duties on imports and on exports, the lowering of customs duties of a fiscal nature (Articles 13, 16,17), on the progressive introduction of the Common Customs Tariff (Article 23), on the conversion of import quotas into global quotas and on the increase of the latter (Article 33), on the adjustment of State monopolies of a commercial character (Article 37), on the abolition by progressive stages of restrictions on the freedom of establishment (Article 52), on the abolition of restrictions on the movement of capital (Article 67) and on the abolition of discrimination in transport (Article 79).]

By comparison, it is relatively rare to find in the wording of the Treaty the terms 'prohibition' or 'prohibited' as for example in Articles 7, 9, 30, 34, 80,85 and 86. And in some of these provisions, in particular in so far as they are not addressed to nationals, the text or the context makes it quite clear, by reference to regulations to be made later or to other implementing provisions, that they cannot have any direct legal effect (Articles 9, 30 and 34).

What is striking is that even in the provisions [sic] which contain the phrase 'incompatible with the Common Market' (Article 92, aids granted by States), there can be no question of direct application; for, according to Article 93, when the Commission finds that such regulations on aids are incompatible with the Treaty, it has the power to decide that the state concerned must abolish or alter them within a given time.

The first conclusion we can draw from this analysis is that large parts of the Treaty clearly contain only obligations of Member States, and do not contain rules having a direct internal effect.

It is accordingly within the framework of supranational law that ways of dealing with breaches of the Treaty have been devised. Under Article 169, the Commission gives a Member State which does not fulfil its obligations under the Treaty a time limit within which it can comply with the reasoned opinion of the Commission. Under Article 171 a State in this situation is required to take the necessary measures to comply with the judgment of the Court of Justice. If, for the purpose of Community law, it had been intended to make the direct application of the provisions of the Treaty, in the sense that they are to prevail



over national law, fundamental principle, the procedure for enforcing obedience could have been confined to a declaration of the nullity of measures taken contrary to the provisions of the Treaty. At least the provisions in Article 171, if not also the fixing of a time limit under Article 169, would be superfluous.

If we consider the place which Article 12 can occupy in this system, in this range of legal possibilities, it is useful to begin by recalling its wording. It reads as follows:

'Member States shall refrain from introducing between themselves any new customs duties or imports or exports or any charges having equivalent effect and from increasing those which they already apply in their trade with each other.'

It seems to me beyond doubt that the form of words chosen -- which moreover no one has called into question -- no more precludes the assumption of a legal obligation than does the similar wording of other Articles of the Treaty. To give Article 12 a lower legal status would not be in keeping with its importance in the framework of the Treaty. Further, I consider that the implementation of this obligation does not depend on other legal measures of the Community institutions, which allows us in a certain sense to speak of the direct legal effect of Article 12.

However, the crucial issue according to the question raised by the Tariefcommissie is whether this direct effect stops at the Governments of the Member States, or whether it should penetrate into the national legal field and lead to its direct application by the administrative authorities and courts of Member States. It is here that the real difficulties of interpretation begin.

In the first place what is remarkable is that the Member States are named as the addressees just as in other provisions which clearly only intend to impose obligations on states (Articles 13, 14, 16, 27 etc). They, the Member States, shall not introduce new customs duties or increase those which they already apply. It must be concluded from this that Article 12 does not have in mind administrative practice, that is, the conduct of the national administrative authorities.

But apart from designating those to whom it is addressed, Article 12 recalls the wording of other provisions which appear to me beyond any doubt only to lay down obligations for Member States, for they speak expressly of 'obligations' even if only in later paragraphs (see for instance Articles 31 and 37).

In this connexion it is also necessary to mention Article 95 which provides that no Member State shall impose directly or indirectly on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products and then continues in the third paragraph:

'Member States shall, not later than at the beginning of the second stage, repeal or amend any provisions existing when this Treaty enters into force which conflict with the preceding rules.'

It should further be noted that the wording of Article 12 does not contain such terms as 'prohibition', 'prohibited', 'inadmissible', 'without effect', which are found in other provisions of the Treaty. It is just when a provision is meant to be applied directly, that is, by the administrative authorities of Member States, that a precise indication of the intended legal effects is indispensable.

But above all we must consider whether, judged by its content, Article 12 appears to be adapted for direct application. We must bear in mind that, at least for the time being, Member States still retain to a large degree their legislative powers in customs matters. In certain Member States they lead to formal laws. The direct application of Article 12 would thus often take the form of a review of legislative acts by the administrative authorities and the courts of Member States, with the help of the provisions of Article 12.

If we look at the object of this provision it appears that, contrary to first impressions, it is very complex. It is therefore scarcely possible for its provisions to be applied in every case without creating problems.

Article 12 applies, *inter alia*, to charges having equivalent effect. We have seen recently in another case the difficulties which an exact definition of this concept can entail. Further, Article 12 refers to customs duties or charges having equivalent effect applied at a particular moment. In the practice of this Court we have learned that even the term 'applied' can raise considerable difficulties of interpretation. Finally the present proceedings themselves show what problems can be created by a finding of the existence of an increase in applied tariffs based on an alteration of custom nomenclature.

These difficulties emerge all the more clearly when it is realized that in customs law states are not only under a negative duty. Under the Treaty they are required by a continuous series of measures to adapt their customs law and regulations to the development of the Common Market. But if the customs system is continually changing, the supervision of the supplementary standstill provision of Article 12 is certainly not easy.

I find it difficult to understand how, in view of this, the Commission can expect that the direct application of Article 12 will bring about an increase in legal certainty.

Can it really be assumed that undertakings rely in their commercial operations on a particular interpretation and application of specific provisions of the Treaty or would they not find more reliable guidance in positive national customs provisions?

Even if these arguments alone provide sufficient reasons for rejecting the view that Article 12 has direct internal effect, the following additional arguments must be mentioned:

The position of the constitutional laws of the Member States, above all with regard to the determination of the relationship between supranational or international law and subsequent national legislation, is far from uniform.

If Article 12 is deemed to have a direct internal effect, the situation would arise that breaches of Article 12 would render the national customs laws ineffective and inapplicable in only a certain number of Member States. That appears to me to be the case in the Netherlands, the Constitution of which (Article 66) gives international agreements containing generally binding and directly applicable provisions a superior status to that of national law; in Luxembourg (where the courts, in the absence of explicit provisions in the Constitution, have arrived at essentially the same conclusion) [footnote by Advocate General omitted], and, it maybe, in France (perhaps because the relevant Article 55 of the Constitution of 4 October 1958 is not quite clear with regard to later laws and contains moreover a reservation that there must be reciprocal application) [footnote by Advocate General omitted].

On the other hand, it is certain that the Belgian Constitution does not include any provision dealing with the legal effect of international treaties in relation to national law. They seem, according to the case law of that country, to have the same status as national laws.

Similarly, there is no provision in the text of the Italian Constitution from which the supremacy of international law over national law can be inferred. The case law and the prevailing doctrine do not accord any superior status to treaties, at least in relation to later national laws.

Finally, with regard to German constitutional law, Article 24 of the Basic Law provides that the Federation may by legislation transfer sovereign rights to international institutions. Article 25 provides that the general rules of international law shall form an integral part of Federal law, and shall take precedence over legislation under that law and create rights and duties directly applicable to the inhabitants of the territory of the Federation. However, contrary to the views of certain authors [footnote by Advocate

General omitted], it cannot be inferred from case law that international treaties have supremacy over later national laws.

The authors of the Treaty were faced with this situation in the field of constitutional law when they drafted the legal texts of the Community. Having regard to this situation it is in my opinion doubtful whether the authors, when dealing with a provision of such importance to customs law, intended to produce the consequences of an uneven development of the law involved in the principle of direct application, consequences which do not accord with an essential aim of the Community.

But neither would a uniform development of the law be guaranteed in those States whose constitutional law gives international agreements precedence over national law.

The Treaty does not provide any machinery to ensure the avoidance of this danger. Article 177 only provides for a right and a duty to refer a question concerning the interpretation of the Treaty to the Court, but not on the other hand a question concerning the compatibility of national with Community law. It is therefore conceivable that national courts might refrain from making a reference to the Court of Justice for a preliminary ruling because they do not see any difficulties of interpretation, and then, however, come to different conclusions in their own interpretation of the Treaty. In this way variations in the application of the law could occur in the courts of the different States as well as in courts of the same State.

After all these considerations which are based upon an examination of the system of the Treaty taken as a whole, upon the wording, the content and the context of the provision to be interpreted, I come to the conclusion that Article 12 should be legally classified in the same way as the other rules relating to the customs union. Article 11 has a fundamental importance for all of them when it speaks explicitly of 'obligations with regard to customs duties', a phrase which excludes direct internal effect within the meaning of the first question. It is my conviction therefore that question No 1 of the Tariefcommissie should be answered in the negative.

### **III -- Question 2**

[Although the Advocate General's answer to the first question makes it unnecessary to examine the second question, he does so on the hypothesis that the Court determines Article 12 has direct effect.]

#### **1. Admissibility**

To begin with, just as with the first question, there arise certain problems regarding admissibility raised by the Belgian and Dutch Governments. In particular they submit that:

1. The second question is inadmissible because it concerns the application and not the interpretation of the Treaty;
2. The second question seeks to avoid the procedure of Articles 169 and 170 of the Treaty; individuals cannot complain indirectly of the behaviour of Member States; it is not admissible to bring an alleged infringement of the Treaty before the Court under Article 177.

On the first submission

On reading the text of the second question, it is impossible to avoid the impression that the Court is expected to apply the Treaty.

Article 177 of the Treaty -- so far as it is relevant in this case -- deals only with the interpretation of the Treaty. By interpretation is meant the general construction of the meaning of a provision, the sense and purpose of which are not clear from the wording. It is necessary to distinguish from this the application of

a provision in a specific case, that is, whether certain facts fall within a particular legal provision and the resulting evaluation of those facts. It is sometimes difficult to draw the line between interpretation and application especially if only part of a provision has to be construed and if -- which may appear to be useful in facilitating the task of the Court -- the court requiring a preliminary ruling clarifies the interpretation problem by a statement of the facts falling within the particular provision. . . .

The Court can, after considering the whole of the subject matter of the decision to apply for a preliminary ruling, deduce the substance and purpose of the question referred, and answer it in a general way within the framework of its jurisdiction. In any case we shall keep within the limits of the Court's jurisdiction and not enlarge on the direct application of the Treaty to a concrete case. Findings of fact are not necessary for this purpose. . . . The second question is therefore admissible in its entirety.

On the second submission

As regards the doubts which have arisen concerning the relation between the present proceedings and the procedure under Articles 169 and 170 of the Treaty, and the danger of circumventing that procedure, the following must be noted:

Article 169 governs the judicial finding of an infringement of the Treaty by Member States. It can be invoked by the Commission if the Member State concerned does not comply with the opinion of the Commission. Article 170 provides an analogous procedure, which is initiated by an application to the Court by another Member State, and indeed, in certain circumstances, without a previous reasoned opinion by the Commission.

In this case, if the Court deals with the second question within the limits of its jurisdiction, it can give only a general interpretation of Article 12, of its meaning and purpose, leaving it to the national court to draw the necessary conclusions from it. There must not be a single word in the operative part of the judgment and in the grounds of judgment concerning the conduct of a Member State and there must not be any finding that its conduct is compatible with the Treaty, or that it constitutes an infringement of it. The Court accordingly does not have to make an assessment, which could only be made under the procedure of Articles 169 and 170.

If the view were held that Articles 169 and 170 preclude national courts from holding that certain measures taken by the Member State to which they belong are ineffective because they infringe the provisions of the Treaty, this would challenge the very existence of treaty provisions which can be directly applied by the national courts. For direct applicability must mean that provisions endowed with this attribute can produce their effects without restrictions, even, should the occasion arise, in face of conflicting national law. It does not apply when a previous finding by this Court is necessary.

We must conclude that Articles 169 and 170 deal primarily with cases in which a provision of the Treaty is not directly applicable but contains simply an order addressed to Member States. In such a situation there is scope, legally and logically, for enforcement proceedings, that is, for proceedings having as their technical objective the alteration of the legal situation, but not where a conflict arises because, by virtue of its direct application, Community law can prevail over national law.

As the second question was only put in case the answer to the first was in the affirmative, that is to say in the event of its being acknowledged that Article 12 has direct internal effect, it is not possible to see in the answer to it an inadmissible way for the Court of Justice to circumvent Article 169.

[...]

## 2. *Examination of Question 2*

Having regard to the remarks on admissibility, this question must be construed in such a way that only pure problems of interpretation emerge.

According to the facts submitted by the Dutch court, this means that the Court of Justice has to define the criteria for determining whether there is a relevant increase of customs duties under Article 12. Starting with the wording of Article 12, the principal question in the Dutch proceedings is the interpretation of the terms 'apply' and 'increasing'.

[...]

[T]he Commission in the first place emphasizes the fact, which none of the parties has questioned, that the prohibition in Article 12 applies to each individual product. The text gives no indication to the contrary; in particular the use of the plural (customs duties) is instructive. Likewise it can be deduced from the other customs provisions of this Chapter that they apply to each product (Article 14), unless express mention is made of an aggregation of all customs measures (total customs receipts, Article 14).

Further, it cannot be denied that Article 12 has an absolute effect which allows no exceptions. Its function corresponds, in the field of customs duties, to that of Article 31 in the case of quantitative restrictions. In Case 7/61, the Court expressed its opinion on Article 31 and confirmed emphatically that it has absolute effect which permits no exception.

The Commission, in my opinion correctly, draws the conclusion from this fact that even difficulties which can be connected with a rearrangement of tariff nomenclature do not in principle make it possible to depart from the prohibition of Article 12. The Commission points out that even before the conclusion of the Treaty Member States were preoccupied with the problems of the transfer of customs tariffs into the Brussels nomenclature. They were therefore familiar with the difficulties. If, nevertheless, they omitted to include in Article 12 a reservation to that effect, the omission can only be an indication of the absolute effect of this Article.

[...]

The concept of 'applied customs duty' is [also critical to the resolution question].

Here too we can begin by referring to a judgment of this Court. In Case 10/61 the Court held that, for the purposes of Article 12 as much as for those of Article 14, it is the customs duty actually applied and not the duty legally applicable which is decisive. This view is founded on the recognition that it would be difficult for the Court to review national law (the legality of the existing customs practice) and also by the fact that the difference between a tariff 'legally applicable' and 'actually applied' frequently occurs in the Treaty, as is shown by Article 19.

I can see no reason to question the principle of that decision. But in this case certain special aspects of the problem have come to light which deserve consideration.

It has been argued that in certain cases a customs duty of only 3% was applied, on the basis of false customs declarations, to the type of products which are the subject matter of the customs decision in dispute. These cases present no difficulties. It seems to me obvious that such a practice must be disregarded in each case, even though we must concern ourselves with the actual practice and not the legally applicable customs duty, because the ratio legis according to which, so far as commercial arrangements are concerned, it is the practice of the customs administration which is decisive, cannot protect persons who rely on such practice, but whose conduct has been responsible for the incorrect

application of the customs tariff. False customs declarations can never form the basis of an authoritative practice for the purpose of the customs law of the Treaty.

Further the question has arisen what importance should be attributed after the entry into force of the Treaty to the decisions of the Tariefcommissie, which held that a customs duty of 3% and not 10% should be applied to the goods of the type with which we are concerned in these proceedings and that accordingly the practice of the Netherlands Revenue Authorities was illegal. . . .

[...]

[I]t can be established that all imports of ureaformaldehyde made by the applicant, and which, according to its own evidence, constituted the largest amount of this type of import into the Netherlands, was indeed charged provisionally with a duty of 10% but that as a result of judicial decisions a rectification was made which in fact restored the customs charge to 3% up to 1 March 1960.

We must now consider whether, by applying in a consistent manner the principles set out in Case 10/61, the Court can take into account only the customs practice which was in fact carried out until 1 January 1958. In my opinion this is not the case. In fact it must not be forgotten that the prominence given to the part played by customs practice is due primarily to the fact that the Court did not intend to undertake a review of the legality of the practice employed.

In this case the situation was clarified judicially by a national court not long after the entry into force of the Treaty. The initiative for clarification was an action brought several months before the Treaty entered into force and the final result was a rectification of the customs practice for the benefit of the economic interests involved, retroactive to 1 January 1958.

Thus as regards the facts of this case there is a distinction which we cannot ignore: The essential aim of the standstill provision of Article 12 is to prevent impediments to trade between Member States. This provision is based on practice, because in general economic transactions are actually geared to administrative practice. In our case the customs practice was for a long time disputed. But the dispute was settled in favour of the importers. Rectification of the practice by reason of the legal situation could not therefore in any way adversely affect commercial transactions.

If, therefore, when Article 12 is applied account is taken of a retroactive change in actual customs practice caused by a judgment given shortly after the Treaty entered into force, such a change cannot be regarded as an infringement of the standstill provision, but as an application of it which conforms to the general spirit of the Treaty.

Finally, there is still the question whether the customs practice of the Netherlands or of all the Benelux countries as at 1 January 1958 is taken as the determining factor. . . . Unlike Article 19, which mentions four customs territories and therefore includes the Benelux territory, Article 12 mentions Member States. From this the conclusion must be drawn that when interpreting the standstill rule in Article 12, which places the emphasis on the customs practice and not the legal situation, the factual situation in each Member State is the determining factor. . . .

[...]

To sum up, the following conclusions should be reached on the second question:

Article 12 has an absolute effect in respect of each individual product; it allows no exception either for the elimination of difficulties connected with rearrangement of nomenclature, or for the benefit of regional unions within the Community. The question whether the introduction of a new customs tariff brings with it increases of duties must be determined according to the customs tariff applied in fact to each individual

product on 1 January 1958. The determinative customs practice must be established without taking into account cases of false customs declarations. On the other hand regard must be had to the compulsory rectification of customs practice in the Netherlands shortly after the Treaty entered into force, resulting from the decision of an administrative court. Finally, the customs practice in each Member State is the determining factor.

#### ***IV -- Conclusion***

I propose that the Court should restrict its judgment to the first question and hold that Article 12 only contains an obligation on the part of the Member States.

## **2.1.2 Judgement of the Court of Justice**

### **I - PROCEDURE**

NO OBJECTION HAS BEEN RAISED CONCERNING THE PROCEDURAL VALIDITY OF THE REFERENCE TO THE COURT UNDER ARTICLE 177 OF THE EEC TREATY BY THE TARIEFKOMMISSIE, A COURT OR TRIBUNAL WITHIN THE MEANING OF THAT ARTICLE. FURTHER, NO GROUNDS EXIST FOR THE COURT TO RAISE THE MATTER OF ITS OWN MOTION.

### **II - THE FIRST QUESTION**

#### **A - JURISDICTION OF THE COURT**

THE GOVERNMENT OF THE NETHERLANDS AND THE BELGIAN GOVERNMENT CHALLENGE THE JURISDICTION OF THE COURT ON THE GROUND THAT THE REFERENCE RELATES NOT TO THE INTERPRETATION BUT TO THE APPLICATION OF THE TREATY IN THE CONTEXT OF THE CONSTITUTIONAL LAW OF THE NETHERLANDS, AND THAT IN PARTICULAR THE COURT HAS NO JURISDICTION TO DECIDE, SHOULD THE OCCASION ARISE, WHETHER THE PROVISIONS OF THE EEC TREATY PREVAIL OVER NETHERLANDS LEGISLATION OR OVER OTHER AGREEMENTS ENTERED INTO BY THE NETHERLANDS AND INCORPORATED INTO DUTCH NATIONAL LAW. THE SOLUTION OF SUCH A PROBLEM, IT IS CLAIMED, FALLS WITHIN THE EXCLUSIVE JURISDICTION OF THE NATIONAL COURTS, SUBJECT TO AN APPLICATION IN ACCORDANCE WITH THE PROVISIONS LAID DOWN BY ARTICLES 169 AND 170 OF THE TREATY.

HOWEVER IN THIS CASE THE COURT IS NOT ASKED TO ADJUDICATE UPON THE APPLICATION OF THE TREATY ACCORDING TO THE PRINCIPLES OF THE NATIONAL LAW OF THE NETHERLANDS, WHICH REMAINS THE CONCERN OF THE NATIONAL COURTS, BUT IS ASKED, IN CONFORMITY WITH SUBPARAGRAPH (A) OF THE FIRST PARAGRAPH OF ARTICLE 177 OF THE TREATY, ONLY TO INTERPRET THE SCOPE OF ARTICLE 12 OF THE SAID TREATY WITHIN THE CONTEXT OF COMMUNITY LAW AND WITH REFERENCE TO ITS EFFECT ON INDIVIDUALS. THIS ARGUMENT HAS THEREFORE NO LEGAL FOUNDATION.

THE BELGIAN GOVERNMENT FURTHER ARGUES THAT THE COURT HAS NO JURISDICTION ON THE GROUND THAT NO ANSWER WHICH THE COURT COULD GIVE TO THE FIRST QUESTION OF THE TARIEFKOMMISSIE WOULD HAVE ANY BEARING ON THE RESULT OF THE PROCEEDINGS BROUGHT IN THAT COURT.

HOWEVER, IN ORDER TO CONFER JURISDICTION ON THE COURT IN THE PRESENT CASE IT IS NECESSARY ONLY THAT THE QUESTION RAISED SHOULD CLEARLY BE CONCERNED WITH THE INTERPRETATION OF THE TREATY. THE CONSIDERATIONS WHICH MAY HAVE LED A NATIONAL COURT OR TRIBUNAL TO ITS CHOICE OF QUESTIONS AS WELL AS THE RELEVANCE WHICH IT ATTRIBUTES TO SUCH QUESTIONS IN THE CONTEXT OF A CASE BEFORE IT ARE EXCLUDED FROM REVIEW BY THE COURT OF JUSTICE. IT APPEARS FROM THE WORDING OF THE QUESTIONS REFERRED THAT THEY RELATE TO THE INTERPRETATION OF THE TREATY. THE COURT THEREFORE HAS THE JURISDICTION TO ANSWER THEM.

THIS ARGUMENT, TOO, IS THEREFORE UNFOUNDED.



## B - ON THE SUBSTANCE OF THE CASE

THE FIRST QUESTION OF THE TARIEF COMMISSIE IS WHETHER ARTICLE 12 OF THE TREATY HAS DIRECT APPLICATION IN NATIONAL LAW IN THE SENSE THAT NATIONALS OF MEMBER STATES MAY ON THE BASIS OF THIS ARTICLE LAY CLAIM TO RIGHTS WHICH THE NATIONAL COURT MUST PROTECT.

TO ASCERTAIN WHETHER THE PROVISIONS OF AN INTERNATIONAL TREATY EXTEND SO FAR IN THEIR EFFECTS IT IS NECESSARY TO CONSIDER THE SPIRIT, THE GENERAL SCHEME AND THE WORDING OF THOSE PROVISIONS.

THE OBJECTIVE OF THE EEC TREATY, WHICH IS TO ESTABLISH A COMMON MARKET, THE FUNCTIONING OF WHICH IS OF DIRECT CONCERN TO INTERESTED PARTIES IN THE COMMUNITY, IMPLIES THAT THIS TREATY IS MORE THAN AN AGREEMENT WHICH MERELY CREATES MUTUAL OBLIGATIONS BETWEEN THE CONTRACTING STATES. THIS VIEW IS CONFIRMED BY THE PREAMBLE TO THE TREATY WHICH REFERS NOT ONLY TO GOVERNMENTS BUT TO PEOPLES. IT IS ALSO CONFIRMED MORE SPECIFICALLY BY THE ESTABLISHMENT OF INSTITUTIONS ENDOWED WITH SOVEREIGN RIGHTS, THE EXERCISE OF WHICH AFFECTS MEMBER STATES AND ALSO THEIR CITIZENS. FURTHERMORE, IT MUST BE NOTED THAT THE NATIONALS OF THE STATES BROUGHT TOGETHER IN THE COMMUNITY ARE CALLED UPON TO COOPERATE IN THE FUNCTIONING OF THIS COMMUNITY THROUGH THE INTERMEDIARY OF THE EUROPEAN PARLIAMENT AND THE ECONOMIC AND SOCIAL COMMITTEE.

IN ADDITION THE TASK ASSIGNED TO THE COURT OF JUSTICE UNDER ARTICLE 177, THE OBJECT OF WHICH IS TO SECURE UNIFORM INTERPRETATION OF THE TREATY BY NATIONAL COURTS AND TRIBUNALS, CONFIRMS THAT THE STATES HAVE ACKNOWLEDGED THAT COMMUNITY LAW HAS AN AUTHORITY WHICH CAN BE INVOKED BY THEIR NATIONALS BEFORE THOSE COURTS AND TRIBUNALS. THE CONCLUSION TO BE DRAWN FROM THIS IS THAT THE COMMUNITY CONSTITUTES A NEW LEGAL ORDER OF INTERNATIONAL LAW FOR THE BENEFIT OF WHICH THE STATES HAVE LIMITED THEIR SOVEREIGN RIGHTS, ALBEIT WITHIN LIMITED FIELDS, AND THE SUBJECTS OF WHICH COMPRISE NOT ONLY MEMBER STATES BUT ALSO THEIR NATIONALS. INDEPENDENTLY OF THE LEGISLATION OF MEMBER STATES, COMMUNITY LAW THEREFORE NOT ONLY IMPOSES OBLIGATIONS ON INDIVIDUALS BUT IS ALSO INTENDED TO CONFER UPON THEM RIGHTS WHICH BECOME PART OF THEIR LEGAL HERITAGE. THESE RIGHTS ARISE NOT ONLY WHERE THEY ARE EXPRESSLY GRANTED BY THE TREATY, BUT ALSO BY REASON OF OBLIGATIONS WHICH THE TREATY IMPOSES IN A CLEARLY DEFINED WAY UPON INDIVIDUALS AS WELL AS UPON THE MEMBER STATES AND UPON THE INSTITUTIONS OF THE COMMUNITY.

WITH REGARD TO THE GENERAL SCHEME OF THE TREATY AS IT RELATES TO CUSTOMS DUTIES AND CHARGES HAVING EQUIVALENT EFFECT IT MUST BE EMPHASIZED THAT ARTICLE 9, WHICH BASES THE COMMUNITY UPON A CUSTOMS UNION, INCLUDES AS AN ESSENTIAL PROVISION THE PROHIBITION OF THESE CUSTOMS DUTIES AND CHARGES. THIS PROVISION IS FOUND AT THE BEGINNING OF THE PART OF THE TREATY WHICH DEFINES THE 'FOUNDATIONS OF THE COMMUNITY'. IT IS APPLIED AND EXPLAINED BY ARTICLE 12.

THE WORDING OF ARTICLE 12 CONTAINS A CLEAR AND UNCONDITIONAL PROHIBITION WHICH IS NOT A POSITIVE BUT A NEGATIVE OBLIGATION. THIS OBLIGATION, MOREOVER, IS NOT QUALIFIED BY ANY RESERVATION ON THE PART OF STATES WHICH WOULD MAKE ITS IMPLEMENTATION CONDITIONAL UPON A POSITIVE LEGISLATIVE MEASURE ENACTED UNDER NATIONAL LAW. THE VERY NATURE OF THIS PROHIBITION MAKES IT IDEALLY ADAPTED TO PRODUCE DIRECT EFFECTS IN THE LEGAL RELATIONSHIP BETWEEN MEMBER STATES AND THEIR SUBJECTS.

THE IMPLEMENTATION OF ARTICLE 12 DOES NOT REQUIRE ANY LEGISLATIVE INTERVENTION ON THE PART OF THE STATES. THE FACT THAT UNDER THIS ARTICLE IT IS THE MEMBER STATES WHO ARE MADE THE SUBJECT OF THE NEGATIVE OBLIGATION DOES NOT IMPLY THAT THEIR NATIONALS CANNOT BENEFIT FROM THIS OBLIGATION.

IN ADDITION THE ARGUMENT BASED ON ARTICLES 169 AND 170 OF THE TREATY PUT FORWARD BY THE THREE GOVERNMENTS WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT IN THEIR STATEMENTS OF CASE IS MISCONCEIVED. THE FACT THAT THESE ARTICLES OF THE TREATY ENABLE THE COMMISSION AND THE MEMBER STATES TO BRING BEFORE THE COURT A STATE WHICH HAS NOT FULFILLED ITS OBLIGATIONS DOES NOT MEAN THAT INDIVIDUALS CANNOT PLEAD THESE OBLIGATIONS, SHOULD THE OCCASION ARISE, BEFORE A NATIONAL COURT, ANY MORE THAN THE FACT THAT THE TREATY PLACES AT THE DISPOSAL OF THE COMMISSION WAYS OF ENSURING THAT OBLIGATIONS IMPOSED UPON THOSE SUBJECT TO THE TREATY ARE OBSERVED, PRECLUDES THE POSSIBILITY, IN ACTIONS BETWEEN INDIVIDUALS BEFORE A NATIONAL COURT, OF PLEADING INFRINGEMENTS OF THESE OBLIGATIONS.

A RESTRICTION OF THE GUARANTEES AGAINST AN INFRINGEMENT OF ARTICLE 12 BY MEMBER STATES TO THE PROCEDURES UNDER ARTICLE 169 AND 170 WOULD REMOVE ALL DIRECT LEGAL PROTECTION OF THE INDIVIDUAL RIGHTS OF THEIR NATIONALS. THERE IS THE RISK THAT RECOURSE TO THE PROCEDURE UNDER THESE ARTICLES WOULD BE INEFFECTIVE IF IT WERE TO OCCUR AFTER THE IMPLEMENTATION OF A NATIONAL DECISION TAKEN CONTRARY TO THE PROVISIONS OF THE TREATY.

THE VIGILANCE OF INDIVIDUALS CONCERNED TO PROTECT THEIR RIGHTS AMOUNTS TO AN EFFECTIVE SUPERVISION IN ADDITION TO THE SUPERVISION ENTRUSTED BY ARTICLES 169 AND 170 TO THE DILIGENCE OF THE COMMISSION AND OF THE MEMBER STATES .

IT FOLLOWS FROM THE FOREGOING CONSIDERATIONS THAT, ACCORDING TO THE SPIRIT, THE GENERAL SCHEME AND THE WORDING OF THE TREATY, ARTICLE 12 MUST BE INTERPRETED AS PRODUCING DIRECT EFFECTS AND CREATING INDIVIDUAL RIGHTS WHICH NATIONAL COURTS MUST PROTECT.

### III - THE SECOND QUESTION

#### A - THE JURISDICTION OF THE COURT

ACCORDING TO THE OBSERVATIONS OF THE BELGIAN AND NETHERLANDS GOVERNMENTS, THE WORDING OF THIS QUESTION APPEARS TO REQUIRE, BEFORE IT CAN BE ANSWERED, AN EXAMINATION BY THE COURT OF THE TARIFF CLASSIFICATION OF UREA FORMALDEHYDE IMPORTED INTO THE NETHERLANDS, A CLASSIFICATION ON WHICH VAN GEND & LOOS AND THE INSPECTOR OF CUSTOMS AND EXCISE AT ZAANDAM HOLD DIFFERENT OPINIONS WITH REGARD TO THE 'TARIEFBESLUIT' OF 1947. THE QUESTION CLEARLY DOES NOT CALL FOR AN INTERPRETATION OF THE TREATY BUT CONCERNS THE APPLICATION OF NETHERLANDS CUSTOMS LEGISLATION TO THE CLASSIFICATION OF AMINOPLASTS, WHICH IS OUTSIDE THE JURISDICTION CONFERRED UPON THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES BY SUBPARAGRAPH (A) OF THE FIRST PARAGRAPH OF ARTICLE 177.

THE COURT HAS THEREFORE NO JURISDICTION TO CONSIDER THE REFERENCE MADE BY THE TARIEF COMMISSIE.

HOWEVER, THE REAL MEANING OF THE QUESTION PUT BY THE TARIEF COMMISSIE IS WHETHER, IN LAW, AN EFFECTIVE INCREASE IN CUSTOMS DUTIES CHARGED ON A GIVEN PRODUCT AS A RESULT NOT OF AN INCREASE IN THE RATE BUT OF A NEW CLASSIFICATION

OF THE PRODUCT ARISING FROM A CHANGE OF ITS TARIFF DESCRIPTION CONTRAVENES THE PROHIBITION IN ARTICLE 12 OF THE TREATY.

VIEWS IN THIS WAY THE QUESTION PUT IS CONCERNED WITH AN INTERPRETATION OF THIS PROVISION OF THE TREATY AND MORE PARTICULARLY OF THE MEANING WHICH SHOULD BE GIVEN TO THE CONCEPT OF DUTIES APPLIED BEFORE THE TREATY ENTERED INTO FORCE.

THEREFORE THE COURT HAS JURISDICTION TO GIVE A RULING ON THIS QUESTION.

#### B - ON THE SUBSTANCE

IT FOLLOWS FROM THE WORDING AND THE GENERAL SCHEME OF ARTICLE 12 OF THE TREATY THAT, IN ORDER TO ASCERTAIN WHETHER CUSTOMS DUTIES OR CHARGES HAVING EQUIVALENT EFFECT HAVE BEEN INCREASED CONTRARY TO THE PROHIBITION CONTAINED IN THE SAID ARTICLE, REGARD MUST BE HAD TO THE CUSTOMS DUTIES AND CHARGES ACTUALLY APPLIED AT THE DATE OF THE ENTRY INTO FORCE OF THE TREATY.

FURTHER, WITH REGARD TO THE PROHIBITION IN ARTICLE 12 OF THE TREATY, SUCH AN ILLEGAL INCREASE MAY ARISE FROM A RE-ARRANGEMENT OF THE TARIFF RESULTING IN THE CLASSIFICATION OF THE PRODUCT UNDER A MORE HIGHLY TAXED HEADING AND FROM AN ACTUAL INCREASE IN THE RATE OF CUSTOMS DUTY.

IT IS OF LITTLE IMPORTANCE HOW THE INCREASE IN CUSTOMS DUTIES OCCURRED WHEN, AFTER THE TREATY ENTERED INTO FORCE, THE SAME PRODUCT IN THE SAME MEMBER STATE WAS SUBJECTED TO A HIGHER RATE OF DUTY.

THE APPLICATION OF ARTICLE 12, IN ACCORDANCE WITH THE INTERPRETATION GIVEN ABOVE, COMES WITHIN THE JURISDICTION OF THE NATIONAL COURT WHICH MUST ENQUIRE WHETHER THE DUTIABLE PRODUCT, IN THIS CASE UREA-FORMALDEHYDE ORIGINATING IN THE FEDERAL REPUBLIC OF GERMANY, IS CHARGED UNDER THE CUSTOMS MEASURES BROUGHT INTO FORCE IN THE NETHERLANDS WITH AN IMPORT DUTY HIGHER THAN THAT WITH WHICH IT WAS CHARGED ON 1 JANUARY 1958.

THE COURT HAS NO JURISDICTION TO CHECK THE VALIDITY OF THE CONFLICTING VIEWS ON THIS SUBJECT WHICH HAVE BEEN SUBMITTED TO IT DURING THE PROCEEDINGS BUT MUST LEAVE THEM TO BE DETERMINED BY THE NATIONAL COURTS.

[...]

#### THE COURT

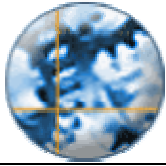
IN ANSWER TO THE QUESTIONS REFERRED TO IT FOR A PRELIMINARY RULING BY THE TARIEFCOMMISSIE BY DECISION OF 16 AUGUST 1962, HEREBY RULES:

1. ARTICLE 12 OF THE TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY PRODUCES DIRECT EFFECTS AND CREATES INDIVIDUAL RIGHTS WHICH NATIONAL COURTS MUST PROTECT.
2. IN ORDER TO ASCERTAIN WHETHER CUSTOMS DUTIES OR CHARGES HAVING EQUIVALENT EFFECT HAVE BEEN INCREASED CONTRARY TO THE PROHIBITION CONTAINED IN ARTICLE 12 OF THE TREATY, REGARD MUST BE HAD TO THE DUTIES AND CHARGES ACTUALLY APPLIED BY THE MEMBER STATE IN QUESTION AT THE DATE OF THE ENTRY INTO FORCE OF THE TREATY.

SUCH AN INCREASE CAN ARISE BOTH FROM A RE-ARRANGEMENT OF THE TARIFF RESULTING IN THE CLASSIFICATION OF THE PRODUCT UNDER A MORE HIGHLY TAXED HEADING AND FROM AN INCREASE IN THE RATE OF CUSTOMS DUTY APPLIED.

3. THE DECISION AS TO COSTS IN THESE PROCEEDINGS IS A MATTER FOR THE TARIEF COMMISSIE.

## 2.2 Case 57/65: Lütticke



### NOTE AND QUESTIONS

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*In this case the Court dealt with the question of direct effect of Article 95 of the EEC Treaty.*

**Alfons Lütticke GmbH v. Hauptzollamt Saarlouis**

**Case 57/65**

16 June 1966

Court of Justice

[1966] ECR 205

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

#### **Summary of the facts and procedure**

*The plaintiff, Alfons Lutticke GmbH, in October 1963 imported into Germany some whole milk powder and was charged, in addition to the customs duty, 1,323.80 DM as a turnover equalization tax. ('Umsatzausgleichsteuer'). The plaintiff filed an administrative complaint objecting to the charge noting that domestic whole milk powder had been exempted from the turnover tax since February 1, 1956 and milk, the base product had been exempt since June 30, 1961. Lutticke claimed that the discriminatory application of the turnover tax was prohibited by Article 95 of the EEC Treaty. After losing at the initial stage, Lutticke appealed to the Finanzgericht des Saarlandes which took the view that the resolution of the dispute rested on whether the provisions of Article 95 of the Treaty had direct effect.*

*The Court held that Article 95 produced direct effects and could be relied on by an individual, stating that:*

#### **Judgement:**

[...]

THE FIRST PARAGRAPH OF ARTICLE 95 SETS FORTH, AS A GENERAL AND PERMANENT RULE OF COMMUNITY LAW THAT MEMBER STATES SHALL NOT IMPOSE ON THE PRODUCTS OF OTHER MEMBER STATES ANY INTERNAL TAXATION IN EXCESS OF THAT IMPOSED ON SIMILAR

DOMESTIC PRODUCTS. SUCH A SYSTEM, OFTEN ADOPTED BY THE TREATY TO ENSURE THE EQUAL TREATMENT OF NATIONALS WITHIN THE COMMUNITY UNDER NATIONAL LEGAL SYSTEMS, CONSTITUTES IN FISCAL MATTERS THE INDISPENSABLE FOUNDATION OF THE COMMON MARKET. IN ORDER TO FACILITATE THE ADAPTATION OF NATIONAL LEGAL SYSTEMS TO THIS RULE, THE THIRD PARAGRAPH OF ARTICLE 95 ALLOWS MEMBER STATES A PERIOD OF GRACE LASTING UNTIL THE BEGINNING OF THE SECOND STAGE OF THE TRANSITIONAL PERIOD, THAT IS TO SAY, UNTIL 1 JANUARY 1962, TO REPEAL OR AMEND ANY 'PROVISIONS EXISTING WHEN THIS TREATY ENTERS INTO FORCE WHICH CONFLICT WITH THE PRECEDING RULES'. ARTICLE 95 THUS CONTAINS A GENERAL RULE PROVIDED WITH A SIMPLE SUSPENSORY CLAUSE WITH REGARD TO PROVISIONS EXISTING WHEN IT ENTERED INTO FORCE. FROM THIS IT MUST BE CONCLUDED THAT ON THE EXPIRY OF THE SAID PERIOD THE GENERAL RULE EMERGES UNCONDITIONALLY INTO FULL FORCE.

THE QUESTIONS RAISED BY THE FINANZGERICHT MUST BE CONSIDERED IN THE LIGHT OF THE FOREGOING CONSIDERATIONS.

THE FIRST PARAGRAPH OF ARTICLE 95 CONTAINS A PROHIBITION AGAINST DISCRIMINATION, CONSTITUTING A CLEAR AND UNCONDITIONAL OBLIGATION. WITH THE EXCEPTION OF THE THIRD PARAGRAPH THIS OBLIGATION IS NOT QUALIFIED BY ANY CONDITION, OR SUBJECT, IN ITS IMPLEMENTATION OR EFFECTS, TO THE TAKING OF ANY MEASURE EITHER BY THE INSTITUTIONS OF THE COMMUNITY OR BY THE MEMBER STATES. THIS PROHIBITION IS THEREFORE COMPLETE, LEGALLY PERFECT AND CONSEQUENTLY CAPABLE OF PRODUCING DIRECT EFFECTS ON THE LEGAL RELATIONSHIPS BETWEEN THE MEMBER STATES AND PERSONS WITHIN THEIR JURISDICTION. THE FACT THAT THIS ARTICLE DESCRIBES THE MEMBER STATES AS BEING SUBJECT TO THE OBLIGATION OF NON - DISCRIMINATION DOES NOT IMPLY THAT INDIVIDUALS CANNOT BENEFIT FROM IT.

WITH REGARD TO THE THIRD PARAGRAPH OF ARTICLE 95, IT INDEED IMPOSES AN OBLIGATION ON THE MEMBER STATES TO ' REPEAL ' OR ' AMEND ' ANY PROVISIONS WHICH CONFLICT WITH THE RULES SET OUT IN THE PRECEDING PARAGRAPHS. THE SAID OBLIGATION HOWEVER LEAVES NO DISCRETION TO THE MEMBER STATES WITH REGARD TO THE DATE BY WHICH THESE OPERATIONS MUST HAVE BEEN CARRIED OUT, THAT IS TO SAY, BEFORE 1 JANUARY 1962 . AFTER THIS DATE IT IS SUFFICIENT FOR THE NATIONAL COURT TO FIND, SHOULD THE CASE ARISE, THAT THE MEASURES IMPLEMENTING THE CONTESTED NATIONAL RULES OF LAW WERE ADOPTED AFTER 1 JANUARY 1962 IN ORDER TO BE ABLE TO APPLY THE FIRST PARAGRAPH DIRECTLY IN ANY EVENT . THUS THE PROVISIONS OF THE THIRD PARAGRAPH PREVENT THE APPLICATION OF THE GENERAL RULE ONLY WITH REGARD TO IMPLEMENTING MEASURES ADOPTED BEFORE 1 JANUARY 1962, AND FOUNDED UPON PROVISIONS EXISTING WHEN THE TREATY ENTERED INTO FORCE.

[...]

## 2.3 Case 36/74: Walrave and Koch

B.N.O. Walrave and L.J.N. Koch

v

Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie et Federación Española Ciclismo.

Case 36/74

Court of Justice

24 October 1974

[1974] ECR 1405

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

### Summary of the facts and procedure

*Plaintiffs in the main action, both of whom are Dutch, to offer their services for remuneration to act as pacemakers on motorcycles in medium distance cycle races with so-called stayers, who cycle in the lee of the motorcycle. They provide these services under agreements with the stayers, the cycling associations or sponsors outside the sport. These competitions include the world championships, the rules of which, made by the first defendant, include a provision that 'as from 1973 the pacemaker must be of the same nationality as the stayer'. Plaintiffs contend that this provision is incompatible with the Treaty of Rome in so far as it prevents a pacemaker of one Member State from offering his services to a stayer of another Member State and have brought an action against the three defendants for a declaration that the rule is void and an order that the defendants allow teams made up of the plaintiffs and stayers who are not of Dutch nationality to take part in the world championships provided that such stayers are nationals of another Member State.*

### Judgement:

1. By order dated 15 May 1974 filed at the Court Registry on 24 May 1974, the Arrondissementsrechtbank Utrecht referred under Article 177 of the EEC Treaty various questions relating to the interpretation of the first paragraph of Article 7, Article 48 and the first paragraph of Article 59 of the EEC Treaty and of Regulation No 1612/68 of the Council of 15 October 1968 [citation omitted] on freedom of movement for workers within the Community.
2. The basic question is whether these Articles and Regulation must be interpreted in such a way that the provision in the rules of the Union Cycliste Internationale relating to medium-distance world cycling championships behind motorcycles, according to which 'L'entraîneur doit être de la nationalité de coureur' (the pacemaker must be of the same nationality as the stayer) is incompatible with them.

[...]

4. Having regard to the objectives of the Community, the practice of sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty.
5. When such activity has the character of gainful employment or remunerated service it comes more particularly within the scope, according to the case, of Articles 48 to 51 or 59 to 66 of the Treaty.
6. These provisions, which give effect to the general rule of Article 7 of the Treaty, prohibit any discrimination based on nationality in the performance of the activity to which they refer.

[...]

13. Basically [the questions raised] relate to the applicability of [Articles 7, 48 and 49] to legal relationships which do not come under public law, the determination of their territorial scope in the light of rules of sport emanating from a world-wide federation and the direct applicability of a certain of those provisions.
14. The main question in respect of all the Articles referred to is whether the rules of an international sporting federation can be regarded as incompatible with the Treaty.
15. It has been alleged that the prohibitions in these Articles refer only to restrictions which have their origin in acts of an authority and not to those resulting from legal acts of persons or associations who do not come under public law.
16. Articles 7, 48, 59 have in common the prohibition, in their respective spheres of application, of any discrimination on grounds of nationality.
17. Prohibition of such discrimination does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services.
18. The abolition as between Member States of obstacles to freedom of movement for persons and to freedom to provide services, which are fundamental objectives of the Community contained in Article 3 (c) of the Treaty, would be compromised if the abolition of barriers of national origin could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations which do not come under public law.
19. Since, moreover, working conditions in the various Member States are governed sometimes by means of provisions laid down by law or regulation and sometimes by agreements and other acts concluded or adopted by private persons, to limit the prohibitions in question to acts of a public authority would risk creating inequality in their application.
20. Although the third paragraph of Article 60, and Articles 62 and 64, specifically relate, as regards the provision of services, to the abolition of measures by the State, this fact does not defeat the general nature of the terms of Article 59, which makes no distinction between the source of the restrictions to be abolished.
21. It is established, moreover, that Article 48, relating to the abolition of any discrimination based on nationality as regards gainful employment, extends likewise to agreements and rules which do not emanate from public authorities.
22. Article 7 (4) of Regulation No 1612/68 in consequence provides that the prohibition on discrimination shall apply to agreements and any other collective regulations concerning employment.



23. The activities referred to in Article 59 are not to be distinguished by their nature from those in Article 48, but only by the fact that they are performed outside the ties of a contract of employment.
24. This single distinction cannot justify a more restrictive interpretation of the scope of the freedom to be ensured.
25. It follows that the provisions of Articles 7, 48 and 59 of the Treaty may be taken into account by the national court in judging the validity or the effects of a provision inserted in the rules of a sporting organization.
26. The national court then raises the question of the extent to which the rule on non-discrimination may be applied to legal relationships established in the context of the activities of a sporting federation of world-wide proportions.
27. The Court is also invited to say whether the legal position may depend on whether the sporting competition is held within or outside the Community.
28. By reason of the fact that it is imperative, the rule on non-discrimination applies in judging all legal relationships in so far as these relationships, by reason either of the place where they are entered into or of the place where they take effect, can be located within the territory of the Community.
29. It is for the national judge to decide whether they can be so located, having regard to the facts of each particular case, and, as regards the legal effect of these relationships, to draw the consequences of any infringement of the rule on non-discrimination.
30. Finally, the national court has raised the question whether the first paragraph of Article 59, and possibly the first paragraph of article 7, of the Treaty have direct effects within the legal orders of the member States.
31. As has been shown above, the objective of Article 59 is to prohibit in the sphere of the provision of services, inter alia, any discrimination on the grounds of the nationality of the person providing the services.
32. In the sector relating to services, Article 59 constitutes the implementation of the non-discrimination rule formulated by Article 7 for the general application of the Treaty and by Article 48 for gainful employment.
33. Thus, as has already been ruled (Judgment of 3 December 1974 in Case 33/74, Van Binsbergen) Article 59 comprises, as at the end of the transitional period, an unconditional prohibition preventing, in the legal order of each Member State, as regards the provision of services -- and in so far as it is a question of nationals of Member States -- the imposition of obstacles or limitations based on the nationality of the person providing the services.
34. It is therefore right to reply to the question raised that as from the end of the transitional period the first paragraph of Article 59, in any event in so far as it refers to the abolition of any discrimination based on nationality, create individual rights which national courts must protect.

[...]

## 2.4 Case 43/75: Defrenne v Sabena

Gabrielle Defrenne  
v  
Société anonyme belge de navigation aérienne Sabena

Case 43/75

Court of Justice

8 April 1976

[1976] ECR 455

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

### Summary of the facts and procedure

*Gabrielle Defrenne was employed as an air hostess by Sabena from December 10, 1951 to February 15, 1968. She brought an action before the Tribunal du travail of Brussels on 13 March 1968 for compensation for the loss she had suffered in terms of salary, allowance on termination of service and pension as a result of the fact that air hostesses and male members of the air crew performing identical duties did not receive equal pay. Following a judgement dismissing her claims, Defrenne appealed to the Cour du Travail of Brussels. The court decided, pursuant to Article 177 of the EEC Treaty, to stay the proceedings until the Court of Justice had given a preliminary ruling on the following questions:*

*1. Does Article 119 of the Treaty of Rome introduce directly into the national law of each Member State of the European Community the principle that men and women should receive equal pay for equal work and does it, therefore, independently of any national provision, entitle workers to institute proceedings before national courts in order to ensure its observance, and if so as from what date?*

*2. Has Article 119 become applicable in the internal law of the Member States by virtue of measures adopted by the authorities of the European Economic Community (if so, which, and as from what date?) or must the national legislature be regarded as alone competent in this matter?*

### Written observations submitted to the Court

[...]

*The Government of the United Kingdom considers that...*

*(a) The obligation imposed on the Member States by Article 119 does not satisfy the criteria of clarity and precision evolved by the Court.*

*Article 119 does not contain a comprehensive definition of the principle of equal pay for equal work. The very use of the word 'principle' indicates that it is concerned with a concept of a very general nature. It is for this reason that Article 1 of Council Directive No 75/117 of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [citation omitted] includes a definition of the principle, thereby supplying some clarity and precision which was considered to be lacking in the text of the Article itself.*

*[...]*

*This directive left it to each Member State to work out, by means of national legislation, the practical details of implementing the principle. This issue can be only determined by some form of legislative, as distinct from judicial, process.*

*In addition, Article 119 does not make it clear whether the comparison between the pay of men and women workers is to be made within the context of a particular employment or across the whole range of a particular trade. Similarly, it does not settle the question whether the special benefits received by women workers from their employers by reason of their employment, in relation to such matters as pregnancy, are to be excluded in operating the principle of equal pay, or whether in some circumstances such a benefit may fall within the ambit of 'any other consideration'.*

*[...]*

*(c) The need for legislative action on the part of the Member States appears from the formulation of the obligation imposed on them by Article 119 in the form of a general statement of principle. Directive No 75/117 acknowledged this need; in Article 8 it requires Member States to put into force the legislation necessary to comply with the directive within one year of its notification and thus to ensure the application of the general principle contained in Article 119. In the absence of such national implementing legislation an obligation of the kind contained in Article 119 is incomplete and cannot properly be completed by interpretative judicial decisions.*

*(d) The reply to the first question must therefore be in the negative.*

*(e) In this context it is necessary to bear in mind that the attribution of direct effects to Article 119 may have harmful consequence on the satisfactory operation of the law as a whole. It risks creating uncertainty or confusion in the national and the Community orders into conflict. No matter how faithfully the Member State has tried to apply a general principle such as that contained in Article 119, there is always room for argument whether the national legislation conforms precisely with the principle. The uncertainty of the law can, moreover, only be dispelled by a ruling of the Court of Justice and, in the meanwhile, individuals will have arranged their affairs in accordance with their national law. Furthermore, a provision of the Treaty which is declared to be directly applicable has had direct effects in all the Member States ever since its entry into force. The national law of each Member State therefore runs the risk of being called in question retroactively. The retroactive alteration of the law conflicts with certain general principles which should also form part of the legal order of the Community.*

*(f) The consequences which the retroactive attribution of direct effects to Article 119 could have on the position of employers may be so great as to affect the economies of the Member States. Certain agreements, dating back to 1 January 1973 or even, as regards the original Member States, to 1 January 1962, could be thrown into doubt; certain relationships of long standing would have to be readjusted. In the United Kingdom the Equal Pay Act 1970 gives employers until the end of 1975 to phase in equal pay. A decision attributing direct applicability to Article 119 could throw the social and economic situation in the United Kingdom into confusion.*

*[...]*

*The Government of Ireland maintains that:*

*(a) The text of Article 119 itself does not permit the construction that it produces a direct effect in domestic law so as to create rights and obligations between employers and employees. If the authors of the Treaty had wished it to be otherwise, Article 119 should not have been addressed to the Member States. It would have been sufficient to provide that as from the end of the first stage, men and women in the Community should receive equal pay for equal work and, in so far as Member States had any obligation under the Article, it was merely an implied obligation to take the necessary steps to support its implementation.*

*(b) An analysis of the decision of the court of Justice in the matter of direct applicability shows that, essentially, the Court has held those provisions of the EEC Treaty to be directly applicable whose aim is to ensure the attainment of the 'fundamental freedoms' provided for by the Treaty, in particular the free movement of goods, persons and services, by means of the abolition of restrictions or the prohibition of fresh restrictions. Their object is to benefit the Community as a whole, rather than a particular class of persons. Their realization is closely linked to the basic tasks and activities of the Community, as set out in Articles 2 and 3 as amplified in Article 7 of the Treaty. In no instance do they involve direct intervention in contractual relationships between individual persons.*

*By contrast, the legal effect of the interpretation of Article 119 as a provision which is directly applicable between persons would be in the field of private law, particularly in the law of contract arising from the employer/employee relationship, rather than in public law. There is thus a fundamental distinction to be drawn between Article 119 and the other provisions which the Court has held to be directly applicable.*

*Unlike the latter, Article 119 is pursuing a social objective which is limited to a specified class of persons, that is, women workers. However desirable it may be, this objective must be regarded in the light of, and subject to, the basic tasks and activities of the Community as set out in Articles 2 and 3 of the Treaty.*

*As Article 119 is in an essentially different category from that of the other articles which the Court of Justice has held to be directly applicable the case-law of this Court is of no assistance in answering the first question.*

*(c) Council directive No 75/117, especially Articles 6 and 8, confirm that the implementation of Article 119 requires special, and different, measures in different Member States, and also a period of adjustment, particularly in the case of the new Member States. The possibility of the direct applicability of Article 119 as between employer and employee has been rejected by the authors of the EEC Treaty and the Accession Treaty. Article 119 was deliberately worded in such a way as to avoid direct effects.*

*(d) This view is confirmed by the consequences which would follow from a contrary interpretation. The direct applicability of Article 119 as from 1 January 1973, the date of its accession to the Communities, would certainly involve for Ireland a financial burden which many employers would be unable to bear. For the Irish State as an employer the burden of meeting claims by female state employees for 'equal pay' from the date of accession would exceed the entire allocation to Ireland from the Community's Regional Fund from the period 1975 to 1977.*

*[...]*

#### **Replies to question raised by the Court**

*Following the submission of the written observations, ... the Court ... request[ed] the Government of the United Kingdom, the Government of Ireland and the Commission to give written replies to several questions before the opening of the oral procedure.*

*As regards the repercussions of attributing direct effects to Article 119 on the financial stability of undertaking, the Government of the United Kingdom maintains that the cumulative effects of the resulting increases in labour costs would seriously aggravate the problems of controlling inflation. The financial implications vary in terms of the proportion of women doing 'equal work' with men, the difference between men's rates and women's rates for equal work, liquidity problems and the proportion of labour costs to total costs. The footwear and food industries, laundries, retail distribution and the clothing industry have a particularly high proportion of women doing equal work. The highest differential between men's rates and women's rates exist in the textile, clothing, footwear, biscuit manufacturing and engineering industries. Many firms, in various sectors, have serious cash-flow problems. The proportion of labour costs to total costs is particularly high in the shipbuilding, instrument engineering, clothing, paper and printing and pottery industries. The clothing industry is thus running a particularly high potential risk. Discrimination in rates of pay between men and women is not limited to any particular type of occupation. The overall increase in labour costs as a result of introducing equal pay is likely to be of the order of 3.5% of the national wages and salaries bill, which was intended to be spread over 5 years, ending in 1975.*

*The Government of Ireland maintains that to attribute direct effects to Article 119 retroactively to 1 January 1973 would be to impose a burden on the Irish economy which it is not in a position to support. The attribution of direct effects in even a limited area, that is, only in relations between individual persons and Member States, would involve extremely heavy financial obligations. As regards the private sector it appears that these obligations cannot be directly estimated. They must, however, affect privately-owned companies and small firms, the activities of the textile, clothing and footwear, food processing, light engineering and paper and printing industries in particular, as well as sections of the retail trade. In many of the sectors referred to the majority of the work force would have a claim for equal pay. The average figure for the order of increase in wage and salary bills involved in the immediate implementation of equal pay for men and women in manufacturing industry would be 5%. It would be higher in the most sensitive sectors. Article 6 of the EEC Treaty imposes a duty on all the institutions of the Community, including the Court of Justice, to take care not to prejudice the internal financial stability of the Member States.*

*As regards the question of direct effect, it must be noted that neither concept of 'equal pay' nor that of 'equal work' is sufficiently precise for Article 119 to be regarded as directly applicable. The fact that this provision may be applied in the public sector in no way affects its interpretation. It cannot be clear and precise in one sector and not in another. Furthermore, such a difference would lead to flagrant discrimination in favour of the public sector. The employees in the public sector would hold their right directly under Article 119, whilst those in the private sector would hold theirs under the national implementing rules. In their capacity as employers the Member States are not subject to any more compelling obligations than the employers in the private sector.*

[...]

#### **Judgement:**

1. By a judgment of 23 April 1975, received at the Court Registry on 2 May 1975, the Cour du travail, Brussels, referred to the Court under Article 177 of the EEC Treaty two questions concerning the effect and implementation of Article 119 of the Treaty regarding the principle that men and women should receive equal pay for equal work.
2. These questions arose within the context of an action between an air hostess and her employer, Sabena S.A., concerning compensation claimed by the applicant in the main action on the ground that, between 15 February 1963 and 1 February 1966, she suffered as a female worker discrimination in terms of pay as compared with male colleagues who were doing the same work as 'cabin steward'.

3. According to the judgment containing the reference, the parties agree that the work of an air hostess is identical to that of a cabin steward and in these circumstances the existence of discrimination in pay to the detriment of the air hostess during the period in question is not disputed.

The first question (direct effect of Article 119)

4. The first question asks whether Article 119 of the Treaty introduces 'directly into the national law of each Member State of the European Community the principle that men and women should receive equal pay for equal work and does it therefore, independently of any national provision, entitle workers to institute proceedings before national courts in order to ensure its observance?'
5. If the answer to this question is in the affirmative, the question further enquires as from what date this effect must be recognized.
6. The reply to the final part of the first question will therefore be given with the reply to the second question.
7. The question of the direct effect of Article 119 must be considered in the light of the nature of the principle of equal pay, the aim of this provision and its place in the scheme of the Treaty.
8. Article 119 pursues a double aim.
9. First, in the light of the different stages of the development of social legislation in the various Member States, the aim of Article 119 is to avoid a situation in which undertakings established in States which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-Community competition as compared with undertakings established in States which have not yet eliminated discrimination against women workers as regards pay.
10. Secondly, this provision forms part of the social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples, as is emphasized by the Preamble to the Treaty.
11. This aim is accentuated by the insertion of Article 119 into the body of a chapter devoted to social policy whose preliminary provision, Article 117, marks 'the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained'.
12. This double aim, which is at once economic and social, shows that the principle of equal pay forms part of the foundations of the Community.
13. Furthermore, this explains why the Treaty has provided for the complete implementation of this principle by the end of the first stage of the transitional period.
14. Therefore, in interpreting this provision, it is impossible to base any argument on the dilatoriness and resistance which have delayed the actual implementation of this basic principle in certain Member States.
15. In particular, since Article 119 appears in the context of the harmonization of working conditions while the improvement is being maintained, the objection that the terms of this article may be observed in other ways than by raising the lowest salaries may be set aside.

16. Under the terms of the first paragraph of Article 119, the Member States are bound to ensure and maintain 'the application of the principle that men and women should receive equal pay for equal work'.
17. The second and third paragraphs of the same article add a certain number of details concerning the concepts of pay and work referred to in the first paragraph.
18. For the purposes of the implementation of these provisions a distinction must be drawn within the whole area of application of Article 119 between, first, direct and overt discrimination which may be identified solely with the aid of the criteria based on equal work and equal pay referred to by the article in question and, secondly, indirect and disguised discrimination which can only be identified by reference to more explicit implementing provisions of a Community or national character.
19. It is impossible not to recognize that the complete implementation of the aim pursued by Article 119, by means of the elimination of all discrimination, direct or indirect, between men and women workers, not only as regards individual undertakings but also entire branches of industry and even of the economic system as a whole, may in certain cases involve the elaboration of criteria whose implementation necessitates the taking of appropriate measures at Community and national level.
20. This view is all the more essential in the light of the fact that the Community measures on this question, to which reference will be made in answer to the second question, implement Article 119 from the point of view of extending the narrow criterion of 'equal work', in accordance in particular with the provisions of Convention No 100 on equal pay concluded by the International Labour Organization in 1951, Article 2 of which establishes the principle of equal pay for work 'of equal value'.
21. Among the forms of direct discrimination which may be identified solely by reference to the criteria laid down by Article 119 must be included in particular those which have their origin in legislative provisions or in collective labour agreements and which may be detected on the basis of a purely legal analysis of the situation.
22. This applies even more in cases where men and women receive unequal pay for equal work carried out in the same establishment or service, whether public or private.
23. As is shown by the very findings of the judgment making the reference, in such a situation the court is in a position to establish all the facts which enable it to decide whether a woman worker is receiving lower pay than a male worker performing the same tasks.
24. In such situation, at least, Article 119 is directly applicable and may thus give rise to individual rights which the courts must protect.

[...]

27. The terms of Article 119 cannot be relied on to invalidate this conclusion.
28. First of all, it is impossible to put forward an argument against its direct effect based on the use in this article of the word 'principle', since, in the language of the Treaty, this term is specifically used in order to indicate the fundamental nature of certain provisions, as is shown, for example, by the heading of the first part of the Treaty which is devoted to 'Principles' and by Article 113, according to which the commercial policy of the Community is to be based on 'uniform principles'.

29. If this concept were to be attenuated to the point of reducing it to the level of a vague declaration, the very foundations of the Community and the coherence of its external relations would be indirectly affected.
30. It is also impossible to put forward arguments based on the fact that Article 119 only refers expressly to 'Member States'.
31. Indeed, as the Court has already found in other contexts, the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in the performance of the duties thus laid down.
32. The very wording of Article 119 shows that it imposes on States a duty to bring about a specific result to be mandatorily achieved within a fixed period.
33. The effectiveness of this provision cannot be affected by the fact that the duty imposed by the Treaty has not been discharged by certain Member States and that the joint institutions have not reacted sufficiently energetically against this failure to act.
34. To accept the contrary view would be to risk raising the violation of the right to the status of a principle of interpretation, a position the adoption of which would not be consistent with the task assigned to the Court by Article 164 of the Treaty.

[...]

38. Furthermore it is not possible to sustain any objection that the application by national courts of the principle of equal pay would amount to modifying independent agreements concluded privately or in the sphere of industrial relations such as individual contracts and collective labour agreements.
39. In fact, since Article 119 is mandatory in nature, the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals.
40. The reply to the first question must therefore be that the principle of equal pay contained in Article 119 may be relied upon before the national courts and that these courts have a duty to ensure the protection of the rights which this provision vests in individuals, in particular as regards those types of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public.

The second question (implementation of Article 119 and powers of the Community and of the Member States)

41. The second question asks whether Article 119 has become 'applicable in the internal law of the Member States by virtue of measures adopted by the authorities of the European Economic Community', or whether the national legislature must 'be regarded as alone competent in this matter'.
42. In accordance with what has been set out above, it is appropriate to join to this question the problem of the date from which Article 119 must be regarded as having direct effect.



43. In the light of all these problems it is first necessary to establish the chronological order of the measures taken on a Community level to ensure the implementation of the provision whose interpretation is requested.
44. Article 119 itself provides that the application of the principle of equal pay was to be uniformly ensured by the end of the first stage of the transitional period at the latest.
45. The information supplied by the Commission reveals the existence of important differences and discrepancies between the various States in the implementation of this principle.
46. Although, in certain Member States, the principle had already largely been put into practice before the entry into force of the Treaty, either by means of express constitutional and legislative provisions or by social practices established by collective labour agreements, in other States its full implementation has suffered prolonged delays.
47. In the light of this situation, on 30 December 1961, the eve of the expiry of the time-limit fixed by Article 119, the Member States adopted a Resolution concerning the harmonization of rates of pay of men and women which was intended to provide further details concerning certain aspects of the material content of the principle of equal pay, while delaying its implementation according to a plan spread over a period of time.
48. Under the terms of that Resolution all discrimination, both direct and indirect, was to have been completely eliminated by 31 December 1964.

[...]

53. For its part, in order to hasten the full implementation of Article 119, the Council on 10 February 1975 adopted Directive No 75/117 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [citation omitted].
54. This Directive provides further details regarding certain aspects of the material scope of Article 119 and also adopts various provisions whose essential purpose is to improve the legal protection of workers who may be wronged by failure to apply the principle of the equal pay laid down by Article 119.
55. Article 8 of this Directive allows the Member States a period of one year to put into force the appropriate laws, regulations and administrative provisions.
56. It follows from the express terms of Article 119 that the application of the principle that men and women should receive equal pay was to be fully secured and irreversible at the end of the first stage of the transitional period, that is, by 1 January 1962.
57. Without prejudice to its possible effects as regards encouraging and accelerating the full implementation of Article 119, the Resolution of the Member States of 30 December 1961 was ineffective to make any valid modification of the time-limit fixed by the Treaty.
58. In fact, apart from any specific provisions, the Treaty can only be modified by means of the amendment procedure carried out in accordance with Article 236.
59. Moreover, it follows from the foregoing that, in the absence of transitional provisions, the principle contained in Article 119 has been fully effective in the new Member States since the entry into force of the Accession Treaty, that is, since 1 January 1973.

[...]

64. As has been shown in the reply to the first question, no implementing provision, whether adopted by the institutions of the Community or by the national authorities, could adversely affect the direct effect of Article 119.
65. The reply to the second question should therefore be that the application of Article 119 was to have been fully secured by the original Member States as from 1 January 1962, the beginning of the second stage of the transitional period, and by the new Member States as from 1 January 1973, the date of entry into force of the Accession Treaty.
66. The first of these time-limits was not modified by the Resolution of the Member States of 30 December 1961.
67. As indicated in reply to the first question, Council Directive No 75/117 does not prejudice the direct effect of Article 119 and the period fixed by that Directive for compliance therewith does not affect the time-limits laid down by Article 119 of the EEC Treaty and the Accession Treaty.
68. Even in the areas in which Article 119 has no direct effect, that provision cannot be interpreted as reserving to the national legislature exclusive power to implement the principle of equal pay since, to the extent to which such implementation is necessary, it may be relieved by a combination of Community and national measures.

#### The temporal effect of this judgment

69. The Governments of Ireland and the United Kingdom have drawn the Court's attention to the possible economic consequences of attributing direct effect to the provisions of Article 119, on the ground that such a decision might, in many branches of economic life, result in the introduction of claims dating back to the time at which such effect came into existence.
70. In view of the large number of people concerned such claims, which undertakings could not have foreseen, might seriously affect the financial situation of such undertakings and even drive some of them to bankruptcy.
71. Although the practical consequences of any judicial decision must be carefully taken into account, it would be impossible to go so far as to diminish the objectivity of the law and compromise its future application on the ground of the possible repercussions which might result, as regards the past, from such a judicial decision.
72. However, in the light of the conduct of several of the Member States and the views adopted by the Commission and repeatedly brought to the notice of the circles concerned, it is appropriate to take exceptionally into account the fact that, over a prolonged period, the parties concerned have been led to continue with practices which were contrary to Article 119, although not yet prohibited under their national law.
73. The fact that, in spite of the warnings given, the Commission did not initiate proceedings under Article 169 against the Member States concerned on grounds of failure to fulfil an obligation was likely to consolidate the incorrect impression as to the effects of Article 119.
74. In these circumstances, it is appropriate to determine that, as the general level at which pay would have been fixed cannot be known, important considerations of legal certainty affecting all the interests involved, both public and private, make it impossible in principle to reopen the question as regards the past.

75. Therefore, the direct effect of Article 119 cannot be relied on in order to support claims concerning pay periods prior to the date of this judgment, except as regards those workers who have already brought legal proceedings or made an equivalent claim.

[...]

On those grounds, THE COURT [...] hereby rules:

1. The principle that men and women should receive equal pay, which is laid down by Article 119, may be relied on before the national courts. These courts have a duty to ensure the protection of the rights which that provision vests in individuals, in particular in the case of those forms of discrimination which have their origin in legislative provisions or collective labour agreements, as well as where men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public.
2. The application of Article 119 was to have been fully secured by the original Member States as from 1 January 1962, the beginning of the second stage of the transitional period, and by the new Member States as from 1 January 1973, the date of entry into force of the Accession Treaty. The first of these time-limits was not modified by the Resolution of the Member States of 30 December 1961.
3. Council Directive No 75/117 does not prejudice the direct effect of Article 119 and the period fixed by that Directive for compliance therewith does not affect the time-limits laid down by Article 119 of the EEC Treaty and the Accession Treaty.
4. Even in the areas in which Article 119 has no direct effect, that provision cannot be interpreted as reserving to the national legislature exclusive power to implement the principle of equal pay since, to the extent to which such implementation is necessary, it may be achieved by a combination of Community and national provisions.
5. Except as regards those workers who have already brought legal proceedings or made an equivalent claim, the direct effect of Article 119 cannot be relied on in order to support claims concerning pay periods prior to the date of this judgment.

### **3 DIRECT EFFECT OF DIRECTIVES**

#### **3.1 Article 249 (ex 189) TEC**



#### **NOTE AND QUESTIONS**

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*Why would it seem from the language of Article 249 (ex 189) that Directives may not produce direct effects?*

#### **Article 249**

In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety upon those to whom it is addressed.

Recommendations and opinions shall have no binding force.

*Compare the text of Article 249 with Article I-33 of the Draft Constitution.*

## **Article I-33**

### **The legal acts of the Union**

1. To exercise the Union's competences the institutions shall use as legal instruments, in accordance with Part III, European laws, European framework laws, European regulations, European decisions, recommendations and opinions.

A European law shall be a legislative act of general application. It shall be binding in its entirety and directly applicable in all Member States.

A European framework law shall be a legislative act binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

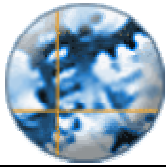
A European regulation shall be a non-legislative act of general application for the implementation of legislative acts and of certain provisions of the Constitution. It may either be binding in its entirety and directly applicable in all Member States, or be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A European decision shall be a non-legislative act, binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

Recommendations and opinions shall have no binding force.

2. When considering draft legislative acts, the European Parliament and the Council shall refrain from adopting acts not provided for by the relevant legislative procedure in the area in question.

### 3.2 Case 41/74: van Duyn



#### **NOTE AND QUESTIONS**

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*The Court gives direct effect to directives in this case. How does it justify this legally in the face of the language of Article 249 (ex 189).*

**Yvonne van Duyn v Home Office**

**Case 41/74**

4 December 1974

Court of Justice

[1974] ECR 1337

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

#### **Summary of the facts and procedure**

*The Church of Scientology is a body established in the United States of America, which functioned in the United Kingdom through a college at East Grinstead, Sussex. The British Government regarded the activities of the Church of Scientology as contrary to public policy, and on July 25, 1968, the Minister of Health announced that the Government was taking certain steps to curb its growth. One of those steps taken was refusal to issue work permits and employment vouchers to foreign nationals for work at Scientology establishments. However, no legal restrictions were placed upon the practice of Scientology in the United Kingdom nor upon British nationals wishing to become members of or take employment with the Church of Scientology.*

*Miss van Duyn, a Dutch national, was offered employment as a secretary with the Church of Scientology at its college at East Grinstead. With the intention of taking up that offer she arrived at Gatwick Airport on May 9, 1973, but was refused leave to enter the United Kingdom. Relying on the Community rules on freedom of movement of workers and especially on Article 48 of the EEC Treaty, Regulation 1612/68 and Article 3 of Directive 64/221, Miss van Duyn claimed that the refusal of leave to enter was unlawful and seeks a declaration from the High Court that she was entitled to stay in the United Kingdom for the purpose of employment and to be given leave to enter the United Kingdom.]*

## **Submissions of the Parties**

### *II -- Written observations submitted to the Court*

*[...]*

#### *On the Second Question*

*Miss van Duyn submits that Article 3 of Directive 64/221 is directly applicable. She observes that the Court has already held that, in principle, directives are susceptible of direct application. She refers to the judgments of the Court of 6 October 1970 in *Grad v Finanzamt Traunstein* (Case No 9/70, *Recueil* 1970, p. 825) and of 17 December 1970 in *Spa SACE v Italian Ministry of Finance* (Case No 33/70, *Recueil* 1970, p. 1213).*

*She submits that the criterion as to whether a directive is directly applicable is identical with the criterion adopted in the case of articles in the Treaty itself, and she observes that the Court had not felt itself constrained to hold that a given article in the Treaty is not directly applicable merely because in its formal wording it imposes an obligation on a Member State. She refers to the judgments of the Court of 19 December 1968 in *Salgoil v Italian Ministry* (Case No 13/68, *Recueil* 1968, p. 661) and of 16 June 1966 in *Lutticke GmbH v Hauptzollamt Sarrelouis* (Case No 57/65, *Recueil* 1966, p. 293).*

*Miss van Duyn further submits that a directive which directly affects an individual is capable of creating direct rights for that individual where its provisions are clear and unconditional and where, as to the result to be achieved, it leaves no substantial measure of discretion to the Member State. Provided that these criteria are fulfilled it does not matter.*

- (a) whether the provision in the directive consists of a positive obligation to act or of a negative prohibition, or*
- (b) that the Member State has a choice of form and methods to be adopted in order to achieve the stated result.*

*As to (a), it is implicit in the Court's judgments in the cases of *Lutticke* and *Salgoil* (already cited) that an article of the Treaty which imposes a positive obligation on a Member State to act is capable of direct applicability and the same reasoning is valid in relation to directives.*

*As to (b), she notes that Article 189 of the Treaty expressly draws a distinction in relation to directives between binding effect of the result to be achieved and the discretionary nature of the methods to be adopted.*

*She contends that the provisions of Article 3 fulfil the criteria for direct applicability. She refers to the preamble to the Directive which envisages a direct applicability when it states: 'whereas, in each Member State, nationals of other Member States should have adequate legal remedies available to them in respect of the administration in such matters . . . ' (i.e. when a Member State invokes grounds of public policy, public security or public health in matters connected with the movement or residence of foreign nationals).*

*The only 'adequate legal remedy' available to an individual is the right to invoke the provisions of the Directive before the national courts. A decision to this effect would undoubtedly strengthen the legal protection of individual citizens in the national courts.*

*The Commission submits that a provision in a directive is directly applicable when it is clear and unambiguous.*

[...]

*The Commission observes that a Community Regulation has the same weight with immediate effect as national legislation whereas the effect of a directive is similar to that of those provisions of the Treaty which create obligations for the Member States. If provisions of a directive are legally clear and unambiguous, leaving only a discretion to the national authorities for their implementation, they must have an effect similar to those Treaty provisions which the Court has recognized as directly applicable.*

*It therefore submits that*

- (a) the executive of a Member State is bound to respect Community law*
- (b) if a provision in a directive is not covered by an identical provision in national law, but left, as to the result to be achieved, to the discretion of the national authority, the discretionary power of that authority is reduced by the Community provision*
- (c) in these circumstances and given that to comply with a directive it is not always indispensable to amend national legislation it is clear that the private individual must have the right to prevent the national authority concerned from exceeding its powers under Community law to the detriment of that individual.*

*According to the Commission, Article 3 is one of the provisions of Directive 64/221 having all the characteristics necessary to have direct effect in the Member State to which it is addressed. And it further recalls that the difficulty of applying the rules in a particular case does not derogate from their general application.*

[...]

*As the British authorities have not adopted the wording of Article 3 of the Directive to achieve the required result, the Commission submits, by virtue of Article 189 of the Treaty and in the light of the case-law of the Court, that Article 3 is a directly applicable obligation which limits the wide discretion given to immigration officers under Rule 65 in the 'Statement of Immigration Rules.' The commission proposes the following answer to the question: Where a provision is legally clear and unambiguous as is Article 3 of Directive 64/221, such a provision is directly applicable so as to confer on individuals rights enforceable by them in the Courts of a Member State.*

*The United Kingdom recalls that Article 189 of the EEC Treaty draws a clear distinction between regulations and directives, and that different effects are ascribed to each type of provision. It therefore submits that prima facie the Council in not issuing a regulation must have intended that the Directive should have an effect other than that of a regulation and accordingly should not be binding in its entirety and not be directly applicable in all Member States.*

[...]

#### **Judgement:**

1. By order of the Vice-Chancellor of 1 March 1974, lodged at the Court on 13 June, the Chancery Division of the High Court of Justice of England, referred to the Court, under Article 177 of the EEC Treaty, three questions relating to the interpretation of certain provisions of Community law concerning freedom of movement for workers.

[...]



#### First question

4. By the first question, the Court is asked to say whether Article 48 of the EEC Treaty is directly applicable so as to confer on individuals rights enforceable by them in the courts of a Member State.
5. It is provided, in Article 48 (1) and (2), that freedom of movement for workers shall be secured by the end of the transitional period and that such freedom shall entail 'the abolition of any discrimination based on nationality between workers of Member States as regards employment, remuneration and other conditions of work and employment.'
6. These provisions impose on Member States a precise obligation which does not require the adoption of any further measure on the part either of the Community institutions or of the Member States and which leaves them, in relation to its implementation, no discretionary power.
7. Paragraph 3, which defines the rights implied by the principle of freedom of movement for workers, subjects them to limitations justified on grounds of public policy, public security or public health. The application of these limitations is, however, subject to judicial control, so that a Member State's right to invoke the limitations does not prevent the provisions of Article 48, which enshrine the principle of freedom of movement for workers, from conferring on individuals rights which are enforceable by them and which the national courts must protect.
8. The reply to the first question must therefore be in the affirmative.

#### Second question

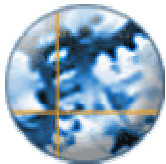
9. The second question asks the Court to say whether Council Directive No 64/221 of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health is directly applicable so as to confer on individuals rights enforceable by them in the courts of a Member State.
10. It emerges from the order making the reference that the only provision of the Directive which is relevant is that contained in Article 3 (1) which provides that 'measures taken on grounds of public policy or public security shall be based exclusively on the personal conduct of the individual concerned.'
11. The United Kingdom observes that, since Article 189 of the Treaty distinguishes between the effects ascribed to regulations, directives and decisions, it must therefore be presumed that the Council, in issuing a directive rather than making a regulation, must have intended that the directive should have an effect other than that of a regulation and accordingly that the former should not be directly applicable.
12. If, however, by virtue of the provisions of Article 189 regulations are directly applicable and, consequently, may by their very nature have direct effects, it does not follow from this that other categories of acts mentioned in that Article can never have similar effects. It would be incompatible with the binding effect attributed to a directive by Article 189 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law. Article 177, which empowers national courts to refer to the Court questions concerning the validity and interpretation of all acts of the Community institutions, without distinction, implies furthermore that these acts may be invoked by

individuals in the national courts. It is necessary to examine, in every case, whether the nature, general scheme and wording of the provisions in question are capable of having direct effects on the relations between Member States and individuals.

13. By providing that measures taken on grounds of public policy shall be based exclusively on the personal conduct of the individual concerned, Article 3 (1) of Directive No 64/221 is intended to limit the discretionary power which national laws generally confer on the authorities responsible for the entry and expulsion of foreign nationals. First, the provision lays down an obligation which is not subject to any exception or condition and which, by its very nature, does not require the intervention of any act on the part either of the institutions of the Community or of Member States. Secondly, because Member States are thereby obliged, in implementing a clause which derogates from one of the fundamental principles of the Treaty in favour of individuals, not to take account of factors extraneous to personal conduct, legal certainty for the persons concerned requires that they should be able to rely on this obligation even though it has been laid down in a legislative act which has no automatic direct effect in its entirety.
14. If the meaning and exact scope of the provision raise questions of interpretation, these questions can be resolved by the courts, taking into account also the procedure under Article 177 of the Treaty.
15. Accordingly, in reply to the second question, Article 3 (1) of Council Directive No 64/221 of 25 February 1964 confers on individuals rights which are enforceable by them in the courts of a Member State and which the national courts must protect.

[...]

### 3.3 Case 148/78: Ratti



#### **NOTE AND QUESTIONS**

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*The Court, and especially the Advocate General, change direction and find a new rationale for direct effect of Directives: While reading the Ratti and Becker case identify and explain the new rationale and its implication for the difference between Regulations and Directives.*

#### **3.3.1 Judgement of the Court of Justice**

##### **Criminal proceedings against Tullio Ratti**

**Case 148/78**

5 April 1979

Court of Justice

[1979] ECR 1629

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

1. By an order of 8 May 1978, received at the Court on 21 June 1978, the Pretura Penale, Milan, referred several questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty on the interpretation of two Council directives on the approximation of the laws, regulations and administrative provisions of the Member States, the first, No 73/173/EEC of 4 June 1973 on the classification, packaging and labelling of dangerous preparations (solvents) [citation omitted] and the second, No 77/728/EEC of 7 November 1977 on the classification, packaging and labelling of paints, varnishes, printing inks, adhesives and similar products [citation omitted].
2. Those questions are raised in the context of criminal proceedings against the head of an undertaking which produces solvents and varnishes, on a charge of having infringed certain provisions of the Italian Law No 245 of 5 March 1963 [citation omitted] which require manufacturers of products containing benzene, toluene and xylene to affix to the containers of those products labels indicating, not only the fact that those substances are present, but also their total percentage and, separately, the percentage of benzene.

3. As far as solvents are concerned, that legislation ought, at the material time, to have been amended in order to comply with Directive No 73/173 of 4 June 1973, the provisions of which Member States were supposed to incorporate into their internal legal orders by 8 December 1974 at the latest, an obligation which the Italian Government has not fulfilled.
4. That amendment would have resulted in the repeal of the provision of the Italian Law which the accused is charged with contravening and would consequently have altered the conditions for applying the criminal sanctions contained in the law in question.
5. As regards the packaging and labelling of varnishes, Directive No 77/728 of 7 November 1977 had, at the material time, been adopted by the Council, but by virtue of Article 12 thereof Member States have until 9 November 1979 to bring into force the laws, regulations and administrative provisions necessary to comply therewith.
6. The incorporation of the provisions of that directive into the internal Italian legal order must likewise result in the repeal of the provisions of the Italian law which the accused is charged with contravening.
7. As regards the packaging and labelling of both the solvents and the varnishes produced by his undertaking, the accused complied, in the one case, with the provisions of Directive No 73/173 (solvents), which the Italian Government had failed to incorporate into its internal legal order, and, in the other case, with the provisions of Directive No 77/728 (varnishes), which Member States must implement by 9 November 1979.
8. The replies to the questions submitted, the first four of which concern Directive No 73/173, while the fifth concerns Directive No 77/728, must enable the national court to decide whether the penalties prescribed by Italian Law No 245 for an infringement of its provisions may be applied in the case in question.

A -- The interpretation of Directive No 73/173

9. This directive was adopted pursuant to Article 100 of the Treaty and Council Directive No 67/548/EEC of 27 June 1967. . . on dangerous substances, in order to ensure the approximation of the laws, regulations and administrative provisions of the Member States on the classification, packaging and labelling of dangerous preparations (solvents).
10. That directive proved necessary because dangerous substances and preparations were subject to rules in the Member States which displayed considerable differences, particularly as regards labelling, packaging and classification according to the degree of risk presented by the said products.
11. Those differences constituted a barrier to trade and to the free movement of goods and directly affected the establishment and functioning of the market in dangerous preparations such as solvents used regularly in industrial, farming and craft activities, as well as for domestic purposes.
12. In order to eliminate those differences the directive made a number of express provisions concerning the classification, packaging and labelling of the products in question (Article 2 (1), (2) and (3) and Articles 4, 5 and 6).
13. As regards Article 8, to which the national court referred in particular, and which provides that Member States may not prohibit, restrict or impede on the grounds of classification, packaging or labelling the placing on the market of dangerous preparations which satisfy the requirements of the directive, although it lays down a general duty, it has no independent value, being no more than the

necessary complement of the substantive provisions contained in the aforesaid articles and designed to ensure the free movement of the products in question.

14. The Member States were under a duty to implement Directive No 73/173, in accordance with Article 11 thereof, within 18 months of its notification.
15. All the Member States were so notified on 8 June 1973.
16. The period of 18 months expired on 8 December 1974 and up to the time when the events material in the case occurred the provisions of the directive had not been implemented within the Italian internal legal order.
17. In those circumstances the national court, finding that "there was a manifest contradiction between the Community rules and internal Italian law", wondered "which of the two sets of rules should take precedence in the case before the court" and referred to the Court the first question, asking as follows:

"Does Council Directive 73/173/EEC of 4 June 1973, in particular Article 8 thereof, constitute directly applicable legislation conferring upon individuals personal rights which the national courts must protect?"
18. This question raises the general problem of the legal nature of the provisions of a directive adopted under Article 189 of the Treaty.
19. In this regard the settled case-law of the Court. . . lays down that, whilst under Article 189 regulations are directly applicable and, consequently, by their nature capable of producing direct effects, that does not mean that other categories of acts covered by that article can never produce similar effects.
20. It would be incompatible with the binding effect which Article 189 ascribes to directives to exclude on principle the possibility of the obligations imposed by them being relied on by persons concerned.
21. Particularly in cases in which the Community authorities have, by means of directive, placed Member States under a duty to adopt a certain course of action, the effectiveness of such an act would be weakened if persons were prevented from relying on it in legal proceedings and national courts prevented from taking it into consideration as an element of Community law.
22. Consequently a Member State which has not adopted the implementing measures required by the directive in the prescribed periods may not rely, as against individuals, on its own failure to perform the obligations which the directive entails.
23. It follows that a national court requested by a person who has complied with the provisions of a directive not to apply a national provision incompatible with the directive not incorporated into the internal legal order of a defaulting Member State, must uphold that request if the obligation in question is unconditional and sufficiently precise.
24. Therefore the answer to the first question must be that after the expiration of the period fixed for the implementation of a directive a Member State may not apply its internal law -- even if it is provided with penal sanctions -- which has not yet been adapted in compliance with the directive, to a person who has complied with the requirements of the directive.

25. In the second question the national court asks, essentially, whether, in incorporating the provisions of the directive on solvents into its internal legal order, the State to which it is addressed may prescribe "obligations and limitations which are more precise and detailed than, or at all events different from, those set out in the directive", requiring in particular information not required by the directive to be affixed to the containers.
26. The combined effect of Articles 3 to 8 of Directive No 73/173 is that only solvents which "comply with the provisions of this directive and the annex thereto" may be placed on the market and that Member States are not entitled to maintain, parallel with the rules laid down by the said directive for imports, different rules for the domestic market.
27. Thus it is a consequence of the system introduced by Directive No 73/173 that a Member State may not introduce into its national legislation conditions which are more restrictive than those laid down in the directive in question, or which are even more detailed or in any event different, as regards the classification, packaging and labelling of solvents and that this prohibition on the imposition of restrictions not provided for applies both to the direct marketing of the products on the home market and to imported products.
28. The second question submitted by the national court must be answered in that way.

[...]

B -- The interpretation of Council Directive No 77/728/EEC of 7 November 1977

39. In a fifth question the national court asks whether Council Directive No 77/728 of 7 November 1977, in particular Article 9 thereof, is immediately and directly applicable with regard to the obligations imposed on Member States to refrain from action as from the date of notification of that directive in a case where a person, acting upon a legitimate expectation, has complied with the provisions of that directive before the expiry of the period within which the Member State must comply with the said directive.
40. The objective of that directive is analogous to that of Directive No 73/173 in that it lays down similar rules for preparations intended to be used as paints, varnishes, printing inks, adhesives and similar products, and containing dangerous substances.
41. Article 12 of that directive provides that Member States must implement it within 24 months of its notification, which took place on 9 November 1977.
42. That period has not yet expired and the States to which the directive was addressed have until 9 November 1979 to incorporate the provisions of Directive No 77/728 into their internal legal orders.
43. It follows that, for the reasons expounded in the grounds of the answer to the national court's first question, it is only at the end of the prescribed period and in the event of the Member State's default that the directive -- and in particular Article 9 thereof -- will be able to have the effects described in the answer to the first question.
44. Until that date is reached the Member States remain free in that field.
45. If one Member State has incorporated the provisions of a directive into its internal legal order before the end of the period prescribed therein, that fact cannot produce any effect with regard to other Member States.

46. In conclusion, since a directive by its nature imposes obligations only on Member States, it is not possible for an individual to plead the principle of "legitimate expectation" before the expiry of the period prescribed for its implementation.
47. Therefore the answer to the fifth question must be that Directive No 77/728 of the Council of the European Communities of 7 November 1977, in particular Article 9 thereof, cannot bring about with respect to any individual who has complied with the provisions of the said directive before the expiration of the adaptation period prescribed for the Member State any effect capable of being taken into consideration by national courts.

[...]

### 3.3.2 Opinion of AG Reischl

#### **Criminal proceedings against Tullio Ratti**

##### **Case 148/78**

20 Februar 1979

AG Opinion

[1979] ECR 1629

[...]

My opinion of [the] questions [submitted by the Pretura] is as follows:

1. As regards the legal effects of Directive No 73/173, which should have been followed by internal implementing measures by the end of 1974 -- which did not happen in Italy -- it must first of all be pointed out, with regard to the formulation of the question, that it is certainly inappropriate to speak of the direct applicability of a directive. That term is used in Article 189 of the Treaty only for regulations, that is to say, for directly applicable Community legislation, which may also create legal relations between individuals. However, it is clear from the Treaty and has also been emphasized again and again in the case-law that a clear distinction must be drawn between regulations and directives, the latter creating obligations only for the Member States. So under no circumstances can one say -- as the defendant in the main action has said -- that directives may also have the content and effects of a regulation; at most directives may produce similar effects [citations omitted]. The essence of such effects is that in certain cases, which however constitute the exception to the rule, Member States which do not comply with their obligations under the directive are unable to rely on provisions of the internal legal order which are illegal from the point of view of Community law, so that individuals become entitled to rely on the directive as against the defaulting State and acquire rights thereunder which the national courts must protect. So in such cases one should more properly speak -- and that has always happened in the case-law -- only of the direct effect [of] directives. Consequently the first question of the Pretura must be understood in this amended sense.

The conditions in which such direct effect can be recognized have already been laid down with sufficient clarity in the case-law of the Court. . . . According to those cases the decisive test is whether it may be said from the nature, general scheme and wording of a directive that it imposes clear, complete and precise obligations on the Member States, does not lay down any conditions other than precisely defined ones and does not leave the Member States any margin of discretion in the performance of the obligations.

With the guidance afforded by those criteria it is easy to judge to which provisions of Directive No 73/173 which, as I have already said, the Member States should have complied with some time ago, direct effect may be attributed.

This certainly applies to Articles 1 and 2 [and 4 through 6]. . . .

As regards Article 8, to which the question refers in particular, there too the wording of the provision seems to argue in favour of direct effect. However, the Commission is in my opinion right to point



out that basically that provision has no significance of its own, but merely contains confirmation of the principle, deducible from other provisions of the directive and from its general purpose, that products conforming to the directive may be freely marketed and trade in them may not be impeded. Therefore it is necessary to ascertain whether other provisions of the directive have direct effect, since such effect can be ascribed to Article 8 only in conjunction with other provisions of the directive.

[...]

2. With regard to the second question the Commission rightly pointed out that Directive No 73/173 aims to secure total harmonization. That can be deduced from Article 3, from the last paragraph of Article 4 and from Article 8. Accordingly -- disregarding Article 7, which permits limited exceptions which have no relevance to this case -- it is not permissible for a Member State to maintain, as regards the home market, derogative regulations in general and in particular to apply to the classification, packaging and labelling of solvents conditions more restrictive than those of the directive. As regards imports from other Member States, the maintenance of regulations in derogation from the directive should certainly be considered contrary to the principle of the free movement of goods, which of course is supposed to be guaranteed by Article 8 if the requirements of the directive and annex thereto are satisfied.

[...]

5. Lastly we must determine whether Directive No 77/228 of 7 November 1977, Article 12 of which, as I have already said, provides that Member States must introduce the necessary laws, regulations and administrative provisions by November 1979 at the latest, has direct effect before that date, from the date of its notification in fact, since Article 9 thereof provides that:

"Member States shall not prohibit, restrict or impede, on the grounds of classification, packaging or labelling as defined in this directive, the placing on the market of dangerous preparations which satisfy the requirements of this directive and the annexes thereto."

That is correct in the view of the accused in the main action because the said article merely imposes on the Member States an obligation to refrain from action, which leaves absolutely no margin of discretion and requires no legislative measures. He relies in this context . . . on the protection of the legitimate expectation of undertakings which have complied with the directive before expiry of the aforesaid period. Apart from that, he considers any other interpretation intolerable because, with regard to imports from Member States which have already implemented the directive, it would constitute an obstacle to the free movement of goods.

The problems raised can be approached by establishing in the first place that Directive No 77/228 contains provisions which correspond to those of Directive No 73/173 and therefore, because they are clear and complete and leave the Member States no margin of discretion, judging from the manner in which their contents are set out, satisfy the requirements for direct effect. . . . However, it is important to remember a point which I emphasized at the beginning of my opinion, namely that, as far as directives are concerned, direct effect is hardly an automatic consequence, but merely a reflex effect: it occurs when a Member State does not comply with its obligations and consists in the fact that the State is deprived of the possibility of relying as against individuals and undertakings on its failure to comply with Community law. Accordingly the fact that a directive becomes binding on its notification is not sufficient to produce that legal consequence, rather is it the expiry of the period laid down in the directive for the adaptation of national law which is material. But since that has not occurred in the present case and since therefore the Italian State cannot be accused of a failure to fulfil its obligations which would also justify the institution of proceedings under Article 169 of the EEC Treaty, it is not possible at present to ascribe direct effect to the said provisions.

Having first established that, we must ask ourselves -- and this constitutes the real problem of the fifth question -- whether a different solution may apply as regards the obligation contained in the aforesaid Article 9. Such a line is argued strongly by the accused in the main action. In particular he submits that a rational interpretation of Article 12 of the directive would hold that the period laid down therein applies only to Member States' obligations to take action, hence only when it appears necessary to amend internal law and account must be taken of the fact that the undertakings affected thereby need time to adjust to the new legal provisions. That, says the defendant, surely cannot be relevant as regards the obligation to refrain from action contained in Article 9.

However, I am no more persuaded of the correctness of that point of view than were the Council and the Commission.

In fact Article 12 cannot be interpreted so narrowly as the accused in the main action submits; it concerns not only provisions which affect the conduct of undertakings and other legal persons and which clearly require a period of adjustment. Article 12 embraces the entire conduct required of Member States by the directive and so must doubtless be taken to apply to Article 9 also. Here too one may properly speak of an obligation on Member States to take action because it is necessary for them to amend their law -- in the present case the provisions of the Law of 15 March 1963, in particular its criminal provisions - not least in the interest of legal certainty and clarity.

[Moreover, considerations of principle -- direct effect is not the rule in the case of directives -- raise doubts about the attempt to isolate particular provisions of a directive in order to ascribe direct effect to them earlier than would otherwise be the case. In any event my conviction is that Article 9 of Directive No 77/728 does not permit that. In this respect I would recall something which I have pointed out with regard to Article 8, the corresponding provision of Directive No 73/173. In the same way Article 9 of Directive No 77/728 likewise has no independent value. It is, so to speak, nothing more than a reflection of the other provisions of the directive which impose obligations to take action. The stipulations which it contains seem obvious in view of the tenor and purpose of the directive; however, that legal consequence can be achieved only on attainment of the objective of harmonization, as is made explicit in certain provisions of the directive. Therefore direct effect cannot properly be ascribed to Article 9 in isolation, but only in conjunction with the other provisions of the directive which contain obligations to take action. But if direct effect is excluded in the case of those provisions because the period prescribed in Article 12 has not yet expired, the same must apply as regards Article 9.]

The foregoing applies to domestic marketing in the same way as to imports from other Member States.

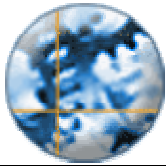
As regards the first point it is certainly not possible to plead the protection of the legitimate expectation of individuals who prematurely adapted their conduct in accordance with the provisions of the directive. To hold otherwise would be to mistake the legal nature of directives: they create obligations, not for individuals, but only for Member States, and, as has already been shown, individuals may acquire rights under directives only when Member States have failed to comply with their obligations.

Admittedly as regards imports from other member countries it seems natural to hold that internal measures contrary to Article 30 of the Treaty can no longer be justified under Article 36 of the Treaty when a Community standard has already been laid down by means of a directive and that standard is already being observed in other member countries. But that would be to misunderstand the basic purpose of the directive, which is to bring about through harmonization the removal of obstacles to the free movement of goods, meaning that the obstacles to the free movement of goods are to disappear only with the unification of the law. So, where a directive prescribes a period for that harmonization, it follows that internal provisions may be retained during that time and they may be justified under Article 36 of the Treaty, since Member States remain competent to act thereunder in the meantime.

[...]

In this respect, however, considerations of legal certainty are relevant, for that principle requires that internal provisions cease to be applied only when they have been replaced by provisions conforming to the directive or the period prescribed in the directive has expired. Besides, it should not be overlooked that to hold otherwise and to accept the argument put forward by the accused in the main action would lead to discrimination in favour of imports from other Member States, because of course only they could rely on Articles 30 and 36 of the EEC Treaty, whereas domestic marketing operated in accordance with the directive, could still be prohibited.

### 3.4 Case 8/81: Becker



#### **NOTE AND QUESTIONS**

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In Becker the Court faced the question of whether an individual can rely on a provision of a directive which has not been incorporated into national law against the Member State which had failed to implement the directive.

#### **Ursula Becker v Finanzamt Münster-Innenstadt**

##### **Case 8/81**

19 January 1982

Court of Justice

[1982] ECR 53

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

#### **Summary of the facts and procedure**

*On May 17, 1977 the Council adopted the Sixth Council Directive, 77/338/EEC, concerning the harmonization of Member States' laws concerning turnover taxes. Article 13 B of the Directive required Member States to exempt from the value added tax transactions involving "the granting and the negotiation of credit." The final expiry date for enacting the implementing legislation was January 1, 1979.*

*In the Federal Republic of Germany, the implementing legislation providing the exemption came into effect on January 1, 1980. Mrs. Becker, a self-employed credit negotiator, however, claimed the exemptions on her tax returns as of January 1, 1979, the date by which the Member States were to have implemented the Directive. The Finanzamt [Tax Office] rejected these returns and assessed Mrs. Becker the value added tax. She subsequently appealed to the Finanzgericht after her objection was overruled by the Finanzamt.*

*On appeal, the Finanzamt argued that Germany had not implemented the Directive providing the exemption by January 1, 1979, and that Article 13 B could not be directly applicable. All the Member States shared Germany's view with regard to the direct applicability of Article 13 B. The Finanzgericht referred the question regarding the direct applicability of Article 13 B of the Directive to the Court of Justice.*

*In its ruling, the Court noted that under Article 189 of the EEC Treaty, it is the Member State's obligation to incorporate a directive into national law by the expiry date. The Court, however, stated that the binding nature of directives would be undermined if, as a matter of principle, a person could not rely on a directive against a Member State which had failed to incorporate the directive into national law. Consequently, the Court, in the following three recitals, held that a provision, although not incorporated into national law, may be relied on by an individual against a Member State:*

**Judgement:**

[...]

23. Particularly in cases in which the Community authorities have, by means of a directive, placed Member States under a duty to adopt a certain course of action, the effectiveness of such a measure would be diminished if persons were prevented from relying upon it in proceedings before a court and national courts were prevented from taking into consideration as element of Community law.
24. Consequently, a Member State which has not adopted the implementing measures required by the directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligations which the directive entails.
25. Thus, wherever the provisions of a directive appear as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which the individuals are able to assert against the State.

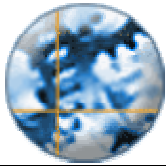
[...]

*The Court held that Article 13 B was sufficiently precise in that it specified the exempt service.*

*The Court also held that even if a directive, is not directly applicable in its entirety, an individual may rely on a provision of the directive as long as the provision is severable from the rest of the directive. The Court reasoned that to hold otherwise would allow Member States to annul "even those effects which certain provisions of a directive are capable of producing. . . ."*

*The Court then rejected several other arguments put forth by Germany. The Court, in considering the first of these arguments, held that although the directive gave discretion to the Member States to lay down "conditions" under which the exemption was to be granted in order to avoid abuses of the provision, Member States may not benefit from their failure to lay down conditions. Finally, the Court rejected Germany's contention that the provision in question permits Member States to provide the taxpayer with the option to waive the exemption. The Court simply noted that such an option, if granted, is to be exercised by the taxpayer, not the Member State.*

### 3.5 Case 102/79: Commission v Belgium



#### **NOTE AND QUESTIONS**

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The Commission brought an action under Article 169 seeking a declaration that Belgium had failed to fulfil its obligations under the Treaty by not incorporating into national law, within the prescribed time, eleven Council Directives dealing with the approximation of the laws of Member States relating to motor vehicles, and to agricultural or forestry tractors. By November 22, 1976, all the directives in question should have been implemented. Belgium did not contest the fact that it had not implemented the directives, but argued that it had fulfilled its obligations under the treaty by implementing the directives through administrative practice.

#### **Commission of the European Communities v Kingdom of Belgium**

##### **Case 102/79**

6 May 1980

Court of Justice

[1980] ECR 1473

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

#### **Judgement:**

[...]

4. First, the defendant Government contends that the object of the directives, namely the elimination of certain barriers to intra-Community trade, has been fully achieved in Belgium by virtue of administrative practice; since Belgian requirements in this field are less strict than the Community rules there is no obstacle to the importation of vehicles and tractors which comply with those rules.
5. The Belgian Government thinks that this way of viewing the implementation of the directives is fully in accord with the requirements of Article 189, the third paragraph of which confers on Member States "the choice of form and methods" in regard to the implementation of the directives. The legal procedures by which directives are put into force therefore vary from case to case and may consist of "anything from a statute down to a simple departmental memorandum".
6. The Belgian Government further contends that the directives in question undoubtedly fall into the category of provisions regarded as "directly applicable": the rules laid down by the Council are plain and precise and no margin of discretion in regard to the technical methods of implementing them is

left to Member States. In these circumstances, it was really only because the Belgian Government was anxious to provide legal certainty that, under pressure from the Commission, it subsequently commenced legislative procedures for the purpose of implementing the directives in question but they are still not finished.

7. These arguments advanced by the Belgian Government call for a restatement of, on the one hand, the scope of the obligation imposed on the Member States by the third paragraph of Article 189 and, on the other, of the use of the freedom given them in regard to the choice of form and methods, bearing in mind the objective of the directives in question.
8. The particular directives which the Belgian State is accused of not implementing were adopted on the basis of two framework directives, Directive Nos 70/156 and 74/150 [...], on the approximation of the laws of the Member States in the field under consideration, whilst the framework directive on tractors is itself the subject-matter of the action. The preamble to both these framework directives points out that the different technical requirements applied in this field by the Member States have the effect of hindering trade within the Community (first recital). It is for the purpose of eliminating these hindrances that the directives make provision for a system of "EEC type-approval" in regard to different types of vehicles which is put into effect by issuing "certificates of conformity" for each vehicle. [...] Finally, under Article 15 of both directives, the Member states "shall put into force provisions containing the requirements necessary in order to comply" with the directive and shall communicate to the Commission "the texts of the main provisions of national law" which they adopt in the field covered by the directive.
9. The 11 specific directives which Belgium is accused of not implementing were adopted under the two general directives just examined. Their object is to enable the "EEC type-approval procedure" laid down by the two framework directives to be established through partial and specific measures and they therefore form part of the legal system set up by those two directives. Like the framework directives, each separate directive has a provision in the final article requiring Member States to take the appropriate implementing measures under their national law.
10. It is apparent the whole of these provisions and from the nature of the measures which they prescribe that the directives in question are meant to be turned into provisions of national law which have the same legal force as those which apply in the Member States in regard to the checking and type-approval of motor vehicles or tractors. Consequently a Member State has not discharged the obligation imposed upon it by the third paragraph of Article 189 of the Treaty if, for the purpose of fulfilling the requirements under the directives in question, it simply relies on existing practices or even just the tolerance which is exercised by the administration.
11. The argument of the Belgian Government based on the "optional" nature of the directives in question has no relevance since the binding effect of the directive from which Member States are not permitted to derogate is meant to abolish all obstacles to the freedom of movement likely to arise in regard to products originating from other Member States as a result of the application of technical rules which are different from Community rules. It is therefore essential in this regard that each Member State should implement the directives in question in a way which fully meets the requirements of clarity and certainty in legal situations which directives seek for the benefit of manufacturers established in other Member States. Mere administrative practices, which by their nature can be changed as and when the authorities please and which are not publicized widely enough cannot in these circumstances be regarded as proper fulfilment of the obligation imposed by Article 189 on Member States to which the directives are addressed.
12. The justification based on the "direct applicability" of the directives in question cannot be accepted either. The effect of the third paragraph of Article 189 is that Community directives must be implemented by appropriate implementing measures carried out by the Member States. Only in specific circumstances, in particular where a Member State has failed to take the implementing measures required or has adopted measures which do not conform to a directive, has the Court of

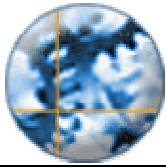
Justice recognized the right of persons affected thereby to rely in law on a directive as against a defaulting Member State [citing the Ratti case]. This minimum guarantee arising from the binding nature of the obligation imposed on the Member States by the effect of the directives under the third paragraph of Article 189 cannot justify a Member State's absolving itself from taking in due time implementing measures sufficient to meet the purpose of each directive. As stated above, these measures must consist in this case in provisions equivalent to those which are applied under the national legal system for the purpose of securing observance of requirements which are described as "mandatory" in the preamble to the two framework directives. [...]

13. It follows that the arguments advanced by the Belgian Government must be dismissed.
14. The Belgian Government secondly argues that, being anxious to ensure legal clarity, it has in the meantime commenced the procedures necessary to incorporate the directives into national rules but the completion of these procedures has been delayed owing to legal arguments about the legislative or regulatory procedure applicable and, furthermore, by internal political problems.
15. It need only be observed, as the Court has repeatedly stated, for example in its judgement of 11 April 1978 (Commission v. Italian Republic, Case 100/77 ECR 879), that a Member State cannot rely upon domestic difficulties or provisions of its national legal system, even its constitutional system, for the purpose of justifying a failure to comply with obligations and time-limits contained in Community directives.
16. Additional justification for judging the case in this manner is provided by Article 15 of both general directives, Nos 70/156 of 6 February 1970 and 74/150 of 4 March 1974 which provide in identical terms that "Member States shall put into force provisions containing the requirements 'necessary' in order to comply with this directive within 18 months of its notification and shall forthwith inform the Commission thereof". Since both directives are framework directives this provision may be read as meaning that Member States to which they are addressed have a duty to anticipate the steps needed under their respective legislative systems in order to put into force within the required time-limits the separate directives whose subject-matter is plainly identified in the annex to each of the said directives.
17. In these circumstances the arguments put forward by the Belgian Government concerning the problems which it encountered when implementing the directives in question cannot be accepted.
18. It follows from the foregoing that the Court must declare that the Kingdom of Belgium has failed in its obligations.

[...]



### 3.6 Case 21/78: Delkvist



#### **NOTE AND QUESTIONS**

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*What is the new issue that is raised in Delkvist? Is there a doctrinal evolution in the case?*

#### **Knud Oluf Delkvist v Anklagemyndigheden**

##### **Case 21/78**

29 November 1978

Court of Justice

[1978] ECR 2327

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

1. By an order of 10 February 1978, which was received at the Court on 24 February 1978, Københavns Byret (Copenhagen City Court) referred to the Court under Article 177 of the EEC Treaty several questions on the interpretation and validity of Article 2 (1) (a) of Council Directive No 74/562/EEC of 12 November 1974 on admission to the occupation of road passenger transport operator in national and international transport operations [citation omitted], in particular the concept of "good repute" contained in that article.
2. These questions were raised in the context of an action concerning the rejection by the competent Danish authority on 29 December 1976 of an application by a road passenger transport operator (tourist category) for the renewal of his transport licence.
3. The grounds for that rejection were that the applicant's previous record showed that he had several convictions for theft and burglary and that his criminal conduct provided grounds for considering that there was imminent danger of misuse of his position as a passenger transport operator.
4. The competent Danish authority applied the provisions of Article 78 (2) of the Danish Penal Code (Straffelov), according to which a person may be prohibited on grounds of criminal conduct from engaging in an occupation which requires special public authorization or approval only if the criminal conduct provides grounds for considering that there is imminent danger of misuse of the position or occupation which he wishes to keep or take up.

5. For the purpose of harmonizing the legislation of the Member States in the matter of transport, on 12 November 1974 the Council adopted Directive No 74/562/EEC on admission to the occupation of road passenger transport operator in national and international transport operations.

6. Article 2 of that directive provides that:

"(1) Natural persons or undertakings wishing to engage in the occupation of road passenger transport operator shall:

(a) be of good repute;

(2) Pending co-ordination at a later date, each Member State shall determine the provisions relating to good repute which must be satisfied by the applicant and, where appropriate, the natural persons referred to in paragraph (1).

[...]

7. Article 6 (1) provides that the Member States shall, after consulting the Commission, implement the directive before 1 January 1977.

8. Kobenhavns Byret has referred the following questions to the Court for a preliminary ruling:

1. Is the Council directive of 12 November 1974 lawful, valid, directly binding on Danish courts and applicable to relations between a Danish national and the Danish public authorities?

2. Does the Council directive of 12 November 1974 cover a legal situation such as the present case?

3. If Question 2 is answered in the affirmative an answer to the following preliminary question is requested, namely must it be considered that the Council directive of 12 November 1974 has amended Article 78 (2) and (3) of the Penal Code in that the stipulation in that provision that criminal conduct may only entail loss of civil rights if such conduct provides grounds for considering that there is imminent danger of misuse of the position of the person concerned has been superseded wholly or in part so that the provision relating to good repute in the Council directive has been substituted for the provision in Article 78 (2) and (3) of the Penal Code?

4. (a) Does Article 78 (2) and (3) of the Danish Penal Code, which is worded in negative terms, namely that a person can be deprived of the right to engage in an occupation which requires specific public authorization or approval only if his conduct provides grounds for considering that there is imminent danger of misuse of his position or occupation, satisfy the requirements relating to good repute which, according to the Council directive, the Member States must lay down for persons in this situation since the Member States, pending co-ordination at a later date, remain free themselves to lay down a more detailed definition of the requirement relating to good repute?

(b) Is the present case covered by the transitional provisions in Article 4 (1) so that, because the applicant was authorized before 1 January 1978 under the Danish provisions to engage in the occupation of road passenger transport operator within Denmark, he is exempt from the requirement to furnish proof that he fulfils inter alia the requirement relating to good repute contained in Article 2 (1) (a)?

5. If the answer to Question 4 (b) is in the affirmative, does this imply that the case can be decided by Kobenhavns Byret without regard to the provisions laid down in the Council directive of 12 November 1974 or does Article 5 (2), concerning the duty of Member States to withdraw

authorizations when the conditions in Article 2 (1) (a) (b) and (c) are no longer satisfied, mean that it is in any event necessary to fix requirements relating to the good repute of the applicant?

The first part of Question 1

9. The Council directive was adopted in accordance with Article 75 of the Treaty for the implementation of a common transport policy.
10. The aim pursued in the directive, namely the introduction of common rules for admission to the occupation of road passenger transport operator in national and international transport operations in order to ensure that road passenger transport operators are better qualified, in the interests of users, transport operators and the economy as a whole, is unquestionably in accordance with the objectives of the said Article 75.
11. Therefore the answer to the first part of Question 1 must be that consideration of the directive has disclosed no factor of such a kind as to affect its validity.

Questions 3 and 4 (a)

12. It will be convenient to deal with Questions 3 and 4 (a) before the others.
13. Article 2 (2) of the directive provides that pending co-ordination at a later date, each Member State shall determine the provisions relating to good repute which must be satisfied by the applicant.
14. That provision leaves the Member States a wide margin of discretion as to the requirements relating to good repute imposed on applicants wishing to engage in the occupation of road passenger transport operator.
15. A provision of national law whereby an applicant who has a criminal conviction may be regarded as not being of good repute if the criminal conduct provides grounds for considering that there is imminent danger of misuse of his occupation cannot be regarded as exceeding the margin of discretion left to a Member State.
16. Therefore the answer to Questions 3 and 4 (a) should be that a statutory provision such as Article 78 of the Danish Penal Code is to be regarded as a provision validly enacted by the State within the limits of the directive.

Question 4 (b)

17. Article 4 (1) of the directive provides that: "Natural persons and undertakings furnishing proof that before 1 January 1978 they were authorized under national regulations in a Member State to engage in the occupation of road passenger transport operator in national and/or international transport operations shall be exempt from the requirement to furnish proof that they satisfy the provisions laid down in Article 2".
18. Question 4 (b) raises the general issue of the effects of a directive adopted under Article 189 of the Treaty.
19. On this issue, the Court has already held, in its judgment of 1 February 1977 in Case 51/76 (*Nederlandse Ondernemingen* [1977] ECR 113) *inter alia*, that if, by virtue of the provisions of Article 189, regulations are directly applicable and, consequently, may by their very nature have direct effects, it does not follow from this that other categories of acts mentioned in that article can never have similar effects.

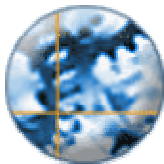
20. It would be incompatible with the binding effect attributed to a directive by Article 189 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned.
21. In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the effectiveness of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law.
22. Therefore it is to be inferred that even if national law does not contain any provision analogous to Article 4 of the directive, a national authority cannot, subject to application of Article 5 of the directive, require an applicant wishing to engage in the occupation of road passenger transport operator to furnish proof that he satisfies the requirements relating to good repute, if he furnishes proof that he was authorized to engage in that occupation before 1 January 1978.

#### Question 5

23. However, Article 5 (2) of the directive provides that Member States shall ensure that the competent authorities withdraw the authorization to pursue the occupation of passenger transport operator if they establish that the provisions of Article 2 (1) (a), (b) or (c) are no longer satisfied. In that case however, they are to allow sufficient time for a substitute to be appointed.
24. If the authorities consider that applicants do not fulfil the requirements relating to good repute, they must therefore refuse them renewal of their transport licence, but when transport operators coming within Article 4 (1) of the directive are the subject of verification, they cannot be obliged to furnish special proof.
25. Therefore the answer to Question 5 must be that although persons who before 1 January 1978 had obtained authorization to engage in the occupation of road passenger transport operator are exempt from the requirement themselves to furnish proof that they satisfy the requirement relating to good repute laid down in Article 2 (1) (a) of the directive, the national authorities nevertheless remain competent to verify in each case that the said requirement is fulfilled.
26. The answers given make it unnecessary to reply to the other questions.

[...]

### 3.7 Case C-129/96: Inter-Environment Wallonie



#### **NOTE AND QUESTIONS**

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*Can Direct Effect be an excuse for non-implementation of a directive? Why not?*

#### **Inter-Environnement Wallonie ASBL v Région Wallonne**

**C-129/96,**

18 December 1997

Court of Justice

[1997] ECR I-07411

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

1. By judgment of 29 March 1996, received at the Court on 23 April 1996, the Belgian Conseil d'État referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Articles 5 and 189 of the EEC Treaty and Article 1(a) of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p. 32).
2. Those questions were raised in proceedings brought by Inter-Environnement Wallonie, a non-profit-making association, for annulment of the Order of the Walloon Regional Executive of 9 April 1992 on toxic or hazardous waste ('the Order').

The relevant Community provisions

3. The object of Directive 75/442 is to approximate the laws of the Member States on the disposal of waste. It has been amended by Directive 91/156.

[...]

7. Article 11 of Directive 75/442, as amended, provides an exception to the requirement of a permit:

'1. Without prejudice to Council Directive 78/319/EEC of 20 March 1978 on toxic and dangerous waste [OJ 1978 L 84, p. 43], as last amended by the Act of Accession of Spain and Portugal, the following may be exempted from the permit requirement imposed in Article 9 or Article 10:

(a) establishments or undertakings carrying out their own waste disposal at the place of production; and

(b) establishments or undertakings that carry out waste recovery.

This exemption may apply only:

- if the competent authorities have adopted general rules for each type of activity laying down the types and quantities of waste and the conditions under which the activity in question may be exempted from the permit requirements,

and

- if the types or quantities of waste and methods of disposal or recovery are such that the conditions imposed in Article 4 are complied with.

2. The establishments or undertakings referred to in paragraph 1 shall be registered with the competent authorities.

[...]

8. Article 4 of Directive 75/442, as amended, provides:

'Member States shall take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment, and in particular:

- without risk to water, air, soil and plants and animals,
- without causing a nuisance through noise or odours,
- without adversely affecting the countryside or places of special interest.

...

9. According to the first indent of Article 2(1) of Directive 91/156, the Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with that directive not later than 1 April 1993 and forthwith to inform the Commission thereof. The second indent provides: 'When Member States adopt these measures, the measures shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.'

10. Article 1(3) of Council Directive 91/689/EEC of 12 December 1991 on hazardous waste (OJ 1991 L 377, p. 20) refers, for the definition of waste, to Directive 75/442. Article 1(4) defines 'hazardous waste'.

11. Article 3 of Directive 91/689 provides:

'1. The derogation referred to in Article 11(1)(a) of Directive 75/442/EEC from the permit requirement for establishments or undertakings which carry out their own waste disposal shall not apply to hazardous waste covered by this Directive.

2. In accordance with Article 11(1)(b) of Directive 75/442/EEC, a Member State may waive Article 10 of that Directive for establishments or undertakings which recover waste covered by this Directive:

- if the Member State adopts general rules listing the type and quantity of waste and laying down specific conditions (limit values for the content of hazardous substances in the waste, emission limit values, type of activity) and other necessary requirements for carrying out different forms of recovery, and

- if the types or quantities of waste and methods of recovery are such that the conditions laid down in Article 4 of Directive 75/442/EEC are complied with.'
12. Article 11 of Directive 91/689 repealed Council Directive 78/319/EEC of 20 March 1978 on toxic and dangerous waste (OJ 1978 L 84, p. 43) with effect from 12 December 1993. However, Article 1 of Council Directive 94/31/EC of 27 June 1994 amending Directive 91/689 (OJ 1994 L 168, p. 28) deferred the repeal of Directive 78/319 until 27 June 1995.

#### The relevant national provisions

[...]

'waste: all substances or objects in the categories set out in Annex I which the holder discards or intends or is required to discard'.

14. Article 5(1) of the Order provides:

'Authorization is required for the setting-up and running of an installation intended specifically for the collection, pre-treatment, disposal or recovery of toxic or dangerous waste which is not an integral part of an industrial production process ...'.

15. The preamble to the Order makes particular reference to the Decree, Directive 75/442, as amended, and to Directives 78/319 and 91/689. Article 86 of the Order states that it is to come into force on the day of its publication in the *Moniteur Belge*. Publication took place on 23 June 1992.

#### Facts of the case in the main proceedings

16. By application lodged on 21 August 1992, Inter-Environnement Wallonie requested the Belgian Conseil d'État to annul the Order in its entirety or, in the alternative, certain of its provisions.
17. In its order for reference, the Conseil d'État has already ruled on five of the six pleas raised by Inter-Environnement Wallonie and has annulled various provisions in the Order.
18. In its remaining plea, Inter-Environnement Wallonie maintains that Article 5(1) of the Order infringes, in particular, Article 11 of Directive 75/442, as amended, and Article 3 of Directive 91/689, inasmuch as it excludes from the permit system the operations of setting up and running an installation intended specifically for the collection, pre-treatment, disposal or recovery of toxic or dangerous waste, where that installation forms 'an integral part of an industrial production process'.
19. In the first part of that plea, Inter-Environnement Wallonie claims that Article 11 of Directive 75/442, as amended, in conjunction with Article 3 of Directive 91/689, allows exemptions from the permit requirement for undertakings carrying out waste recovery only on the conditions laid down by those provisions and only where those undertakings are registered with the competent authorities.
20. On that point, the Conseil d'État considers that Article 5(1) of the Order is indeed contrary to Article 11 of Directive 75/442, as amended, in conjunction with Article 3 of Directive 91/689.
21. Finding that the Order was adopted at a time when the period allowed by the directive for its transposition had not yet expired, the Conseil d'État questions to what extent a Member State may, during that period, adopt a measure contrary to the directive. It adds that a negative reply to that question, as proposed by Inter-Environnement Wallonie, would be incompatible with the rule that the validity of a measure is to be assessed at the time of its adoption.

[...]

24. In those circumstances, the Conseil d'État has referred the following questions to the Court for a preliminary ruling:

'(1) Do Articles 5 and 189 of the EEC Treaty preclude Member States from adopting a provision contrary to Directive 75/442/EEC of 15 July 1975 on waste, as amended by Directive 91/156/EEC of 18 March 1991, before the period for transposing the latter has expired?

Do those same Treaty articles preclude Member States from adopting and bringing into force legislation which purports to transpose the abovementioned directive but whose provisions appear to be contrary to the requirements of that directive?

[...]

#### Question 1

35. By its first question, the national court is in substance asking whether Articles 5 and 189 of the EEC Treaty preclude the Member States from adopting measures contrary to Directive 91/156 during the period prescribed for its transposition.
36. According to Inter-Environnement Wallonie, it follows from the primacy of Community law and from Article 5 of the Treaty that, even where a Member State decides to transpose a Community directive before the end of the period prescribed therein, such transposition must be consistent with the directive. Consequently, since it chose to transpose Directive 91/156 on 9 April 1992, the Région Wallonne should have complied with that directive.
37. The Commission endorses that position and maintains that Articles 5 and 189 of the Treaty preclude Member States from adopting a provision contrary to Directive 91/156 during the period prescribed for its transposition. It states that in this respect it is irrelevant whether or not a particular measure is specifically intended to transpose the directive.
38. On the other hand, the Belgian, French and United Kingdom Governments consider that until the period prescribed for transposition of a directive has expired, the Member States remain free to adopt national rules which are at variance with it. The United Kingdom Government adds, however, that it would be contrary to Articles 5 and 189 of the Treaty for a Member State to adopt measures which would have the effect of making it impossible or excessively difficult for that State to transpose the directive correctly into national law.
39. The Netherlands Government is of the opinion that the adoption of a directive means that the Member States are no longer free to undertake anything which might make it more difficult to achieve the result prescribed. None the less, it considers that a Member State cannot be regarded as being in breach of Articles 5 and 189 of the Treaty where, as in the present case, it is not certain that the national provisions are inconsistent with the directive concerned.
40. It should be recalled at the outset that the obligation of a Member State to take all the measures necessary to achieve the result prescribed by a directive is a binding obligation imposed by the third paragraph of Article 189 of the Treaty and by the directive itself (Case 51/76 *Verbond van Nederlandse Ondernemingen v Inspecteur der Invoerrechten en Accijnzen* [1977] ECR 113, paragraph 22; Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723, paragraph 48, and Case 72/95 *Kraaijeveld and Others v Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403, paragraph 55). That duty to take all appropriate measures, whether general or particular, is binding on all the authorities of Member States

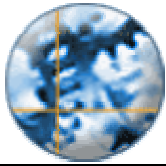


including, for matters within their jurisdiction, the courts (see Case C-106/89 *Marleasing v Comercial Internacional de Alimentación* [1990] ECR I-4135, paragraph 8, and *Kraaijeveld*, cited above, paragraph 55).

41. The next point to note is that, in accordance with the second paragraph of Article 191 of the EEC Treaty, applicable at the material time, '[d]irectives and decisions shall be notified to those to whom they are addressed and shall take effect upon such notification'. It follows from that provision that a directive has legal effect with respect to the Member State to which it is addressed from the moment of its notification.
42. Here, and in accordance with current practice, Directive 91/156 itself laid down a period by the end of which the laws, regulations and administrative provisions necessary for compliance are to have been brought into force.
43. Since the purpose of such a period is, in particular, to give Member States the necessary time to adopt transposition measures, they cannot be faulted for not having transposed the directive into their internal legal order before expiry of that period.
44. Nevertheless, it is during the transposition period that the Member States must take the measures necessary to ensure that the result prescribed by the directive is achieved at the end of that period.
45. Although the Member States are not obliged to adopt those measures before the end of the period prescribed for transposition, it follows from the second paragraph of Article 5 in conjunction with the third paragraph of Article 189 of the Treaty and from the directive itself that during that period they must refrain from taking any measures liable seriously to compromise the result prescribed.
46. It is for the national court to assess whether that is the case as regards the national provisions whose legality it is called upon to consider.
47. In making that assessment, the national court must consider, in particular, whether the provisions in issue purport to constitute full transposition of the directive, as well as the effects in practice of applying those incompatible provisions and of their duration in time.
48. For example, if the provisions in issue are intended to constitute full and definitive transposition of the directive, their incompatibility with the directive might give rise to the presumption that the result prescribed by the directive will not be achieved within the period prescribed if it is impossible to amend them in time.
49. Conversely, the national court could take into account the right of a Member State to adopt transitional measures or to implement the directive in stages. In such cases, the incompatibility of the transitional national measures with the directive, or the non-transposition of certain of its provisions, would not necessarily compromise the result prescribed.
50. The answer to the first question must therefore be that the second paragraph of Article 5 and the third paragraph of Article 189 of the EEC Treaty, and Directive 91/156, require the Member States to which that directive is addressed to refrain, during the period laid down therein for its implementation, from adopting measures liable seriously to compromise the result prescribed.

[...]

## **4 VERTICAL AND HORIZONTAL DIRECT EFFECT; “INDIRECT” EFFECT**

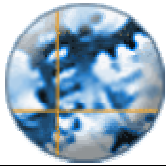


### **NOTE AND QUESTIONS**

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1. Define vertical and horizontal direct effect.
2. What arguments can you think of in favour of horizontal direct effect?
3. What is the Court's position?
4. Note the evolution between the ECJ's decisions and the opinions of AG on the issue of vertical and horizontal direct effect of directive. Read carefully the excerpt from the opinion of AG Lenz in Faccini Dori who after AG Van Gerven in Marshall II and AG Jacobs in C-316/93, pleads for recognition of horizontal direct effect of directives. Read especially point 72 of AG Lenz' opinion having in mind the main counterargument to recognize this horizontal direct effect, according to which, if this is indeed recognized directives will just be like regulations. Do you agree with this last argument?

## 4.1 Case 152/84: Marshall I



### **NOTE AND QUESTIONS**

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1. In this case and in the Foster British Gas case the Court developed a broad notion of who the addressee of a vertically applicable directive is. Why?
2. What are the weaknesses of this concept, if any?

#### **M. H. Marshall v Southampton and South-West Hampshire Area Health Authority**

##### **Case 152/84**

26 February 1986

Court of Justice

[1986] ECR 723

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

- 1 By an order of 12 March 1984, which was received at the Court on 19 June 1984, the Court of appeal of England and Wales referred to the Court for a preliminary ruling under article 177 of the EEC Treaty two questions on the interpretation of Council directive no 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (Official Journal 1976, L 39, p. 40).
- 2 The questions were raised in the course of proceedings between miss m. H. Marshall (hereinafter referred to as 'the appellant') and Southampton and South-West Hampshire area Health Authority (teaching) (hereinafter referred to as 'the respondent') concerning the question whether the appellant's dismissal was in accordance with section 6 (4) of the sex discrimination act 1975 and with Community law.
- 3 The appellant, who was born on 4 February 1918, was employed by the respondent from June 1966 to 31 March 1980. From 23 May 1974 she worked under a contract of employment as senior dietician.

- 4 On 31 March 1980, that is to say approximately four weeks after she had attained the age of 62, the appellant was dismissed, notwithstanding that she had expressed her willingness to continue in the employment until she reached the age of 65, that is to say until 4 February 1983.
- 5 According to the order for reference, the sole reason for the dismissal was the fact that the appellant was a woman who had passed' the retirement age' applied by the respondent to women.
- 6 In that respect it appears from the documents before the Court that the respondent has followed a general policy since 1975 that' the normal retirement age will be the age at which social security pensions become payable'. The Court of appeal States that, although that policy was not expressly mentioned in the appellant's contract of employment, it none the less constituted an implied term thereof.
- 7 Sections 27 (1) and 28 (1) of the social security act 1975, the United Kingdom legislation governing pensions, provide that State pensions are to be granted to men from the age of 65 and to women from the age of 60. However, the legislation does not impose any obligation to retire at the age at which the State pension becomes payable. Where an employee continues in employment after that age, payment of the State pension or of the pension under an occupational pension scheme is deferred.
- 8 However, the respondent was prepared, in its absolute discretion, to waive its general retirement policy in respect of a particular individual in particular circumstances and it did in fact waive that policy in respect of the appellant by employing her for a further two years after she had attained the age of 60.
- 9 In view of the fact that she suffered financial loss consisting of the difference between her earnings as an employee of the respondent and her pension and since she had lost the satisfaction she derived from her work, the appellant instituted proceedings against the respondent before an industrial tribunal. She contended that her dismissal at the date and for the reason indicated by the respondent constituted discriminatory treatment by the respondent on the ground of sex and, accordingly, unlawful discrimination contrary to the sex discrimination act and Community law.
- 10 The industrial tribunal dismissed the appellant's claim in so far as it was based on infringement of the sex discrimination act, since section 6 (4) of that act permits discrimination on the ground of sex where it arises out of' provision in relation to retirement'; the industrial tribunal took the view that the respondent' s general policy constituted such provision. however, the claim that the principle of equality of treatment laid down by directive no 76/207 had been infringed was upheld by the industrial tribunal.
- 11 On appeal to the employment appeal tribunal that decision was confirmed as regards the first point but was set aside as regards the second point on the ground that, although the dismissal violated the principle of equality of treatment laid down in the aforementioned directive, an individual could not rely upon such violation in proceedings before a United Kingdom Court or tribunal.
- 12 The appellant appealed against that decision to the Court of appeal. Observing that the respondent was constituted under section 8 (1) a (b) of the National Health Service act 1977 and was therefore an' emanation of the State', the Court of appeal referred the following questions to the Court of Justice for a preliminary ruling:  
  
'(1) whether the respondent' s dismissal of the appellant after she had passed her 60th birthday pursuant to the policy (followed by the respondent) and on the grounds only that she was a woman who had passed the normal retiring age applicable to women was an act of discrimination prohibited by the equal treatment directive.

(2) if the answer to (1) above is in the affirmative, whether or not the equal treatment directive can be relied upon by the appellant in the circumstances of the present case in national Courts or tribunals notwithstanding the inconsistency (if any) between the directive and section 6 (4) of the sex discrimination act.'

[...]

#### The second question

- 39 Since the first question has been answered in the affirmative, it is necessary to consider whether article 5 (1) of directive no 76/207 may be relied upon by an individual before national Courts and tribunals.
- 40 The appellant and the Commission consider that that question must be answered in the affirmative. They contend in particular, with regard to articles 2 (1) and 5 (1) of directive no 76/207, that those provisions are sufficiently clear to enable national Courts to apply them without legislative intervention by the Member States, at least so far as overt discrimination is concerned.
- 41 In support of that view, the appellant points out that directives are capable of conferring rights on individuals which may be relied upon directly before the Courts of the Member States; national Courts are obliged by virtue of the binding nature of a directive, in conjunction with article 5 of the EEC Treaty, to give effect to the provisions of directives where possible, in particular when construing or applying relevant provisions of national law (judgment of 10 April 1984 in case 14/83 von Colson and Kamann v Land Nordrhein-Westfalen (1984) ECR 1891). Where there is any inconsistency between national law and Community law which cannot be removed by means of such a construction, the appellant submits that a national Court is obliged to declare that the provision of national law which is inconsistent with the directive is inapplicable.
- 42 The Commission is of the opinion that the provisions of article 5 (1) of directive no 76/207 are sufficiently clear and unconditional to be relied upon before a national Court. They may therefore be set up against section 6 (4) of the sex discrimination act, which, according to the decisions of the Court of appeal, has been extended to the question of compulsory retirement and has therefore become ineffective to prevent dismissals based upon the difference in retirement ages for men and for women.
- 43 The respondent and the United Kingdom propose, conversely, that the second question should be answered in the negative. They admit that a directive may, in certain specific circumstances, have direct effect as against a Member State in so far as the latter may not rely on its failure to perform its obligations under the directive. However, they maintain that a directive can never impose obligations directly on individuals and that it can only have direct effect against a Member State qua public authority and not against a Member State qua employer. As an employer a State is no different from a private employer. It would not therefore be proper to put persons employed by the State in a better position than those who are employed by a private employer.
- 44 With regard to the legal position of the respondent's employees the United Kingdom States that they are in the same position as the employees of a private employer. Although according to United Kingdom constitutional law the health authorities, created by the national health service act 1977, as amended by the health services act 1980 and other legislation, are crown bodies and their employees are crown servants, nevertheless the administration of the national health service by the health authorities is regarded as being separate from the government's central administration and its employees are not regarded as civil servants.
- 45 Finally, both the respondent and the United Kingdom take the view that the provisions of directive no 76/207 are neither unconditional nor sufficiently clear and precise to give rise to direct effect.

The directive provides for a number of possible exceptions, the details of which are to be laid down by the Member States. Furthermore, the wording of article 5 is quite imprecise and requires the adoption of measures for its implementation.

- 46 It is necessary to recall that, according to a long line of decisions of the Court (in particular its judgment of 19 January 1982 in case 8/81 *Becker v Finanzamt Münster-Innenstadt* (1982) ECR 53), wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State where that State fails to implement the directive in national law by the end of the period prescribed or where it fails to implement the directive correctly.
- 47 That view is based on the consideration that it would be incompatible with the binding nature which article 189 confers on the directive to hold as a matter of principle that the obligation imposed thereby cannot be relied on by those concerned. From that the Court deduced that a Member State which has not adopted the implementing measures required by the directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligations which the directive entails.
- 48 With regard to the argument that a directive may not be relied upon against an individual, it must be emphasized that according to article 189 of the EEC Treaty the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national Court, exists only in relation to 'each Member State to which it is addressed'. It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person. It must therefore be examined whether, in this case, the respondent must be regarded as having acted as an individual.
- 49 In that respect it must be pointed out that where a person involved in legal proceedings is able to rely on a directive as against the State he may do so regardless of the capacity in which the latter is acting, whether employer or public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with Community law.
- 50 It is for the national Court to apply those considerations to the circumstances of each case; the Court of appeal has, however, stated in the order for reference that the respondent, Southampton and South West Hampshire area Health Authority (teaching), is a public authority.
- 51 The argument submitted by the United Kingdom that the possibility of relying on provisions of the directive against the respondent qua organ of the State would give rise to an arbitrary and unfair distinction between the rights of State employees and those of private employees does not justify any other conclusion. Such a distinction may easily be avoided if the Member State concerned has correctly implemented the directive in national law.
- 52 Finally, with regard to the question whether the provision contained in article 5 (1) of directive no 76/207, which implements the principle of equality of treatment set out in article 2 (1) of the directive, may be considered, as far as its contents are concerned, to be unconditional and sufficiently precise to be relied upon by an individual as against the State, it must be stated that the provision, taken by itself, prohibits any discrimination on grounds of sex with regard to working conditions, including the conditions governing dismissal, in a general manner and in unequivocal terms. The provision is therefore sufficiently precise to be relied on by an individual and to be applied by the national Courts.

[...]

- 56 Consequently, the answer to the second question must be that article 5 (1) of Council directive no 76/207 of 9 February 1976, which prohibits any discrimination on grounds of sex with regard to

working conditions, including the conditions governing dismissal, may be relied upon as against a State authority acting in its capacity as employer, in order to avoid the application of any national provision which does not conform to article 5 (1).

[...]

## 4.2 Case 188/89: Foster British Gas

**Foster (A.) and Others v British Gas plc**

**Case 188/89**

12 July 1990

Court of Justice

[1990] ECR I-3313

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

- 1 By an order of 4 May 1989, which was received at the Court on 29 May 1989, the House of Lords referred to the Court for a preliminary ruling under article 177 of the EEC Treaty a question on the interpretation of Council directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (Official Journal 1976 I 39, p. 40).
- 2 That question was raised in proceedings between A. Foster, G. A. H. M. Fulford-Brown, J. Morgan, M. Roby, e. M. Salloway and p. Sullivan (hereinafter referred to as 'the appellants in the main proceedings '), women who were formerly employed by the British Gas Corporation (hereinafter referred to as the 'BGC'), and British gas PLC (hereinafter referred to as the 'respondent in the main proceedings'), the successor to the rights and liabilities of the BGC, in respect of their compulsory retirement from the BGC.
- 3 By virtue of the gas act 1972, which governed the BGC at the material time, the BGC was a statutory corporation responsible for developing and maintaining a system of gas supply in Great Britain, and had a monopoly of the supply of gas.
- 4 The members of the BGC were appointed by the competent secretary of state. He also had the power to give the BGC directions of a general character in relation to matters affecting the national interest and instructions concerning its management.
- 5 The BGC was obliged to submit to the secretary of state periodic reports on the exercise of its functions, its management and its programmes. Those reports were then laid before both houses of parliament. Under the gas act 1972 the BGC also had the right, with the consent of the secretary of state, to submit proposed legislation to parliament.
- 6 The BGC was required to run a balanced budget over two successive financial years. The secretary of state could order it to pay certain funds over to him or to allocate funds to specified purposes.
- 7 The BGC was privatized under the gas act 1986. Privatization resulted in the establishment of British gas PLC, the respondent in the main proceedings, to which the rights and liabilities of the BGC were transferred with effect from 24 August 1986.



- 8 The appellants in the main proceedings were required to retire by the BGC on various dates between 27 December 1985 and 22 July 1986, on attaining the age of 60. These retirements reflected a general policy pursued by the BGC, that of requiring its employees to retire upon reaching the age at which they were entitled to a state pension pursuant to British legislation, that is to say 60 years of age for women and 65 for men.
- 9 The appellants in the main proceedings, who wished to continue to work, brought proceedings for damages before the British Courts asserting that their retirement by the BGC was contrary to article 5(1) of directive 76/207. According to that provision, 'application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex '.
- 10 According to the order of the House of Lords, the parties to the main proceedings are agreed that on the basis of the judgment of the Court in case 152/84 Marshall v Southampton and South-West Hampshire area Health Authority [1986] ECR 723 the dismissals were contrary to article 5(1) of directive 76/207. They are also agreed that those dismissals were not unlawful under the British legislation in force at the material time and that according to previous judgments of the house of lords that legislation cannot be interpreted in a manner consistent with directive 76/207. The parties are in dispute over the issue whether article 5(1) of the directive may be relied on against the BGC.
- 11 It was in those circumstances that the House of Lords stayed the proceedings and referred the following question to the Court for a preliminary ruling :  
  
'was the BGC (at the material time) a body of such a type that the appellants are entitled in English courts and tribunals to rely directly upon Council directive 76/207 of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions so as to be entitled to a claim for damages on the ground that the retirement policy of the BGC was contrary to the directive?'
- 12 Reference is made to the report for the hearing for a fuller account of the facts of the case, the relevant Community legislation, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

#### The jurisdiction of the Court

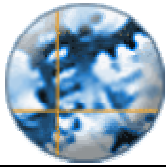
- 13 Before considering the question referred by the House of Lords, it must first be observed as a preliminary point that the United Kingdom has submitted that it is not a matter for the Court of Justice but for the national Courts to determine, in the context of the national legal system, whether the provisions of a directive may be relied upon against a body such as the BGC.
- 14 The question what effects measures adopted by Community institutions have and in particular whether those measures may be relied on against certain categories of persons necessarily involves interpretation of the articles of the Treaty concerning measures adopted by the institutions and the Community measure in issue.
- 15 It follows that the Court of Justice has jurisdiction in proceedings for a preliminary ruling to determine the categories of persons against whom the provisions of a directive may be relied on. It is for the national Courts, on the other hand, to decide whether a party to proceedings before them falls within one of the categories so defined.

#### Reliance on the provisions of the directive against a body such as the BGC

- 16 As the Court has consistently held (see the judgment in case 8/81 *Becker v Hauptzollamt Münster-Innenstadt* [1982] ECR 53, paragraphs 23 to 25), where the Community authorities have, by means of a directive, placed Member States under a duty to adopt a certain course of action, the effectiveness of such a measure would be diminished if persons were prevented from relying upon it in proceedings before a Court and national Courts were prevented from taking it into consideration as an element of Community law. Consequently, a Member State which has not adopted the implementing measures required by the directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligations which the directive entails. Thus, wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the state.
- 17 The Court further held in its judgment in case 152/84 *Marshall*, paragraph 49, that where a person is able to rely on a directive as against the state he may do so regardless of the capacity in which the latter is acting, whether as employer or as public authority. In either case it is necessary to prevent the state from taking advantage of its own failure to comply with Community law.
- 18 On the basis of those considerations, the Court has held in a series of cases that unconditional and sufficiently precise provisions of a directive could be relied on against organizations or bodies which were subject to the authority or control of the state or had special powers beyond those which result from the normal rules applicable to relations between individuals.
- 19 The Court has accordingly held that provisions of a directive could be relied on against tax authorities (the judgments in case 8/81 *Becker*, cited above, and in case C-221/88 *ECSC v Acciaierie e Ferriere Busseni (in liquidation)* [1990] ECR I-495), local or regional authorities (judgment in case 103/88 *Fratelli Costanzo v Comune di Milano* [1989] ECR 1839), constitutionally independent authorities responsible for the maintenance of public order and safety (judgment in case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651), and public authorities providing public health services (judgment in case 152/84 *Marshall*, cited above).
- 20 It follows from the foregoing that a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the state and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon.
- 21 With regard to article 5(1) of directive 76/207 it should be observed that in the judgment in case 152/84 *Marshall*, cited above, paragraph 52, the Court held that that provision was unconditional and sufficiently precise to be relied on by an individual and to be applied by the national Courts.
- 22 The answer to the question referred by the House of Lords must therefore be that article 5(1) of Council directive 76/207 of 9 February 1976 may be relied upon in a claim for damages against a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the state, for providing a public service under the control of the state and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals.

[...]

### 4.3 Case 106/89: Marleasing



#### **NOTE AND QUESTIONS**

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1. In this case the Court developed another strategy to help the individual without subscribing to the doctrine of horizontal effect. One might call it “the indirect effect”. Weaknesses?
2. What does the success of the individual’s suit now depend on?

#### **Marleasing SA v La Comercial Internacional de Alimentation SA**

##### **Case 106/89**

13 November 1990

Court of Justice

[1990] ECR I-4135

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

- 1 By order of 13 March 1989, which was received at the Court on 3 April 1989, the juzgado de primera instancia e instruccion no 1, Oviedo, referred a question to the Court pursuant to article 177 of the EEC Treaty for a preliminary ruling on the interpretation of article 11 of Council directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of Members and others, are required by Member States of companies within the meaning of the second paragraph of article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community.
- 2 Those questions arose in a dispute between Marleasing SA, the plaintiff in the main proceedings, and a number of defendants including la Comercial internacional de alimentacion SA (hereinafter referred to as 'la Comercial '). The latter was established in the form of a public limited company by three persons, including Barviesa SA, which contributed its own assets.
- 3 It is apparent from the grounds set out in the order for reference that Marleasing' s primary claim, based on articles 1261 and 1275 of the Spanish civil code, according to which contracts without cause or whose cause is unlawful have no legal effect, is for a declaration that the founders' contract establishing la Comercial is void on the ground that the establishment of the company lacked cause, was a sham transaction and was carried out in order to defraud the creditors of Barviesa SA, a co-founder of the defendant company. La Comercial contended that the action

should be dismissed in its entirety on the ground, in particular, that article 11 of directive 68/151, which lists exhaustively the cases in which the nullity of a company may be ordered, does not include lack of cause amongst them.

- 4 The national Court observed that in accordance with article 395 of the act concerning the conditions of accession of Spain and the Portuguese republic to the European Communities (official journal 1985 I 302, p. 23) the Kingdom of Spain was under an obligation to bring the directive into effect as from the date of accession, but that that had still not been done at the date of the order for reference. Taking the view, therefore, that the dispute raised a problem concerning the interpretation of Community law, the national Court referred the following question to the Court :

'is article 11 of Council directive 68/151/EEC of 9 March 1968, which has not been implemented in national law, directly applicable so as to preclude a declaration of nullity of a public limited company on a ground other than those set out in the said article?'

- 5 Reference is made to the report for the hearing for a fuller account of the facts of the case, the course of the procedure and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.
- 6 With regard to the question whether an individual may rely on the directive against a national law, it should be observed that, as the Court has consistently held, a directive may not of itself impose obligations on an individual and, consequently, a provision of a directive may not be relied upon as such against such a person (judgment in case 152/84 *Marshall v Southampton and South-West Hampshire area Health Authority* [1986] ECR 723).
- 7 However, it is apparent from the documents before the Court that the national Court seeks in substance to ascertain whether a national Court hearing a case which falls within the scope of directive 68/151 is required to interpret its national law in the light of the wording and the purpose of that directive in order to preclude a declaration of nullity of a public limited company on a ground other than those listed in article 11 of the directive.
- 8 In order to reply to that question, it should be observed that, as the Court pointed out in its judgment in case 14/83 *von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, paragraph 26, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the Courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national Court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of article 189 of the Treaty.
- 9 It follows that the requirement that national law must be interpreted in conformity with article 11 of directive 68/151 precludes the interpretation of provisions of national law relating to public limited companies in such a manner that the nullity of a public limited company may be ordered on grounds other than those exhaustively listed in article 11 of the directive in question.
- 10 With regard to the interpretation to be given to article 11 of the directive, in particular article 11(2)(b), it should be observed that that provision prohibits the laws of the Member States from providing for a judicial declaration of nullity on grounds other than those exhaustively listed in the directive, amongst which is the ground that the objects of the company are unlawful or contrary to public policy.

- 11 According to the Commission, the expression 'objects of the company' must be interpreted as referring exclusively to the objects of the company as described in the instrument of incorporation or the articles of association. It follows, in the Commission's view, that a declaration of nullity of a company cannot be made on the basis of the activity actually pursued by it, for instance defrauding the founders' creditors.
- 12 That argument must be upheld. As is clear from the preamble to directive 68/151, its purpose was to limit the cases in which nullity can arise and the retroactive effect of a declaration of nullity in order to ensure 'certainty in the law as regards relations between the company and third parties, and also between Members' (sixth recital). Furthermore, the protection of third parties 'must be ensured by provisions which restrict to the greatest possible extent the grounds on which obligations entered into in the name of the company are not valid '. It follows, therefore, that each ground of nullity provided for in article 11 of the directive must be interpreted strictly. In those circumstances the words 'objects of the company' must be understood as referring to the objects of the company as described in the instrument of incorporation or the articles of association.
- 13 The answer to the question submitted must therefore be that a national Court hearing a case which falls within the scope of directive 68/151 is required to interpret its national law in the light of the wording and the purpose of that directive in order to preclude a declaration of nullity of a public limited company on a ground other than those listed in article 11 of the directive.

[...]

## **4.4 Case C-91/92: Faccini Dori**

### **4.4.1 Judgement of the Court of Justice**

**Paola Faccini Dori v Recreb Srl**

**Case C-91/92**

14 July 1994

Court of Justice

[1994] ECR I-3325

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

- 1 By order of 24 January 1992, received at the Court on 18 March 1992, the Giudice Conciliatore di Firenze (Judge-Conciliator, Florence), Italy, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Council Directive 85/577/EEC, concerning protection of the consumer in respect of contracts negotiated away from business premises (OJ 1985 L 372, p. 31, hereinafter "the directive"), and on the possibility of relying on that directive in proceedings between a trader and a consumer.
- 2 The question was raised in proceedings between Paola Faccini Dori, of Monza, Italy, and Recreb Srl ("Recreb").
- 3 It appears from the order for reference that on 19 January 1989, without having been previously approached by her, Interdiffusion Srl concluded a contract with Miss Faccini Dori at Milan Central Railway Station for an English language correspondence course. Thus the contract was concluded away from Interdiffusion's business premises.
- 4 Some days later, by registered letter of 23 January 1989, Miss Faccini Dori informed that company that she was cancelling her order. The company replied on 3 June 1989 that it had assigned its claim to Recreb. On 24 June 1989, Miss Faccini Dori wrote to Recreb confirming that she had cancelled her subscription to the course, indicating inter alia that she relied on the right of cancellation provided for by the directive.
- 5 As is apparent from its preamble, the directive is intended to improve consumer protection and eliminate discrepancies between national laws providing such protection, which may affect the functioning of the common market. According to the fourth recital in the preamble, where contracts are concluded away from the business premises of the trader, it is as a rule the trader who initiates the negotiations, for which the consumer is wholly unprepared and is therefore often taken by surprise. In most cases, the consumer is not in a position to compare the quality and price of the offer with other offers. According to the same recital, that surprise element generally exists not only in contracts made on the doorstep but also in other forms of contract for which the trader takes the initiative away from his business premises. The purpose of the directive is thus, as indicated by the fifth recital in its preamble, to grant the consumer a right of cancellation for a period of at least seven days in order to enable him to assess the obligations arising under the contract.

- 6 On 30 June 1989, Recreb asked the Giudice Conciliatore di Firenze to order Miss Faccini Dori to pay it the agreed sum with interest and costs.
- 7 By order of 20 November 1989, the judge ordered Miss Faccini Dori to pay the sums in question. She lodged an objection to that order with the same judge. She again stated that she had withdrawn from the contract under the conditions laid down by the directive.
- 8 However, it is common ground that at the material time Italy had not taken any steps to transpose the directive into national law, although the period set for transposition had expired on 23 December 1987. It was not until the adoption of Decreto Legislativo No 50 of 15 January 1992 (GURI, ordinary supplement to No 27 of 3 February 1992, p. 24), which entered into force on 3 March 1992, that Italy transposed the directive.
- 9 The national court was uncertain whether, even though the directive had not been transposed at the material time, it could nevertheless apply its provisions.
- 10 It therefore referred the following question to the Court for a preliminary ruling:

"Is Community Directive 85/577/EEC of 20 December 1985 to be regarded as sufficiently precise and detailed and, if so, was it capable, in the period between the expiry of the 24-month time-limit given to the Member States to comply with the directive and the date on which the Italian State did comply with it, of taking effect as between individuals and the Italian State and as between individuals themselves?"

[...]

- 19 The second issue raised by the national court relates more particularly to the question whether, in the absence of measures transposing the directive within the prescribed time-limit, consumers may derive from the directive itself a right of cancellation against traders with whom they have concluded contracts and enforce that right before a national court.
- 20 As the Court has consistently held since its judgment in Case 152/84 Marshall v Southampton and South-West Hampshire Health Authority [1986] ECR 723, paragraph 48, a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual.
- 21 The national court observes that if the effects of unconditional and sufficiently precise but untransposed directives were to be limited to relations between State entities and individuals, this would mean that a legislative measure would operate as such only as between certain legal subjects, whereas, under Italian law as under the laws of all modern States founded on the rule of law, the State is subject to the law like any other person. If the directive could be relied on only as against the State, that would be tantamount to a penalty for failure to adopt legislative measures of transposition as if the relationship were a purely private one.
- 22 It need merely be noted here that, as is clear from the judgment in Marshall, cited above (paragraphs 48 and 49), the case-law on the possibility of relying on directives against State entities is based on the fact that under Article 189 a directive is binding only in relation to "each Member State to which it is addressed". That case-law seeks to prevent "the State from taking advantage of its own failure to comply with Community law".
- 23 It would be unacceptable if a State, when required by the Community legislature to adopt certain rules intended to govern the State's relations ° or those of State entities ° with individuals and to confer certain rights on individuals, were able to rely on its own failure to discharge its obligations

so as to deprive individuals of the benefits of those rights. Thus the Court has recognized that certain provisions of directives on conclusion of public works contracts and of directives on harmonization of turnover taxes may be relied on against the State (or State entities) (see the judgment in Case 103/88 *Fratelli Costanzo v Comune di Milano* [1989] ECR 1839 and the judgment in Case 8/81 *Becker v Finanzamt Muenster-Innenstadt* [1982] ECR 53).

- 24 The effect of extending that case-law to the sphere of relations between individuals would be to recognize a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations.
- 25 It follows that, in the absence of measures transposing the directive within the prescribed time-limit, consumers cannot derive from the directive itself a right of cancellation as against traders with whom they have concluded a contract or enforce such a right in a national court.
- 26 It must also be borne in mind that, as the Court has consistently held since its judgment in Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, paragraph 26, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, is binding on all the authorities of Member States, including, for matters within their jurisdiction, the courts. The judgments of the Court in Case C-106/89 *Marleasing v La Comercial Internacional de Alimentación* [1990] ECR I-4135, paragraph 8, and Case C-334/92 *Wagner Miret v Fondo de Garantía Salarial* [1993] ECR I-6911, paragraph 20, make it clear that, when applying national law, whether adopted before or after the directive, the national court that has to interpret that law must do so, as far as possible, in the light of the wording and the purpose of the directive so as to achieve the result it has in view and thereby comply with the third paragraph of Article 189 of the Treaty.
- 27 If the result prescribed by the directive cannot be achieved by way of interpretation, it should also be borne in mind that, in terms of the judgment in *Joined Cases C-6/90 and C-9/90 Francovich and Others v Italy* [1991] ECR I-5357, paragraph 39, Community law requires the Member States to make good damage caused to individuals through failure to transpose a directive, provided that three conditions are fulfilled. First, the purpose of the directive must be to grant rights to individuals. Second, it must be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, there must be a causal link between the breach of the State's obligation and the damage suffered.
- 28 The directive on contracts negotiated away from business premises is undeniably intended to confer rights on individuals and it is equally certain that the minimum content of those rights can be identified by reference to the provisions of the directive alone (see paragraph 17 above).
- 29 Where damage has been suffered and that damage is due to a breach by the State of its obligation, it is for the national court to uphold the right of aggrieved consumers to obtain reparation in accordance with national law on liability.
- 30 So, as regards the second issue raised by the national court, the answer must be that in the absence of measures transposing the directive within the prescribed time-limit consumers cannot derive from the directive itself a right of cancellation as against traders with whom they have concluded a contract or enforce such a right in a national court. However, when applying provisions of national law, whether adopted before or after the directive, the national court must interpret them as far as possible in the light of the wording and purpose of the directive.

[...]



#### 4.4.2 Opinion of AG Lenz

(Footnotes omitted)

**Paola Faccini Dori v Recreb Srl**

**Case C-91/92**

9 February 1994

AG Opinion

[1994] ECR I- 3325

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

[...]

##### 2. Horizontal applicability of directives

43. The answer afforded by the Court' s consistent case-law to question as to the effects of an unimplemented directive on legal relations between private persons ° also known as horizontal effect ° is straightforward and clear: a directive may not of itself impose obligations on an individual. (30)
44. The Court' s justification for this is as follows: "... according to Article 189 of the EEC Treaty the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to 'each Member State to which it is addressed' . It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person". (31)
45. Consequently, emphasis is clearly placed on the refusal to impose a burden on a private person. According to the wording of the Treaty, an obligation is imposed only on the Member States to which the directive is addressed.
46. It would be possible to draw the line at this point and argue that the existing case-law should be maintained.
47. However, such an approach appears unsatisfactory to me. Following the judgments in Foster (32) and Marleasing, (33) calls have increasingly been heard in academic circles for directives to be given horizontal effect. Among the members of the Court, to date Advocate General Van Gerven (34) and, recently, Advocate General Jacobs (35) have spoken out in favour of the horizontal applicability of directives ° albeit not in response to questions having a bearing on the determination of the cases then before the Court. (36)
48. Considerations favouring the horizontal effect of directives reflect a drive to do justice by the beneficiary of a provision which the Community legislator intended to be binding and not to abandon his situation for an indefinite period to the whim of a Member State in default of its obligations.

49. At the time of the completion of the internal market ° an area without internal frontiers (37) ° when harmonizing provisions governing legal relations between private individuals are increasingly being adopted, it seems to me to be appropriate to reconsider the effect of directives. In the preamble to Directive 85/577, the Community legislator referred to the need to approximate legislation in completely unambiguous terms:

"Whereas any disparity between such legislation may directly affect the functioning of the common market; whereas it is therefore necessary (38) to approximate laws in this field". (39)

50. Foremost among the arguments in favour of directives' having horizontal effect is that relating to equality of the conditions of competition. Moreover, in the absence of horizontal effect, persons in Member States which comply with Community law are frequently placed at a disadvantage.
51. The principle of the prohibition of discrimination, which ranks as a fundamental right, also militates in favour of directives' being given horizontal effect, from several points of view. First, it is unsatisfactory that individuals should be subject to different rules, depending on whether they have comparable legal relations with a body connected with the State or with a private individual. Secondly, it is contrary to the requirements of an internal market for individuals to be subject to different laws in the various Member States even though harmonizing measures have been adopted by the Community.
52. If those disparities were to be maintained, it would go against the stated aim of the approximation of legislation. That finding cannot be refuted by arguing that it is in the nature of directives that there are bound to be different conditions as between Member States until such time as the directives are transposed into national law. (40) Such inequality should be allowed only during the period prescribed for implementation. It is one of the aims of directives that comparable conditions should prevail after that period has expired.
53. The discrimination argument has gained even more substance since the entry into force of the Maastricht Treaty and of citizenship of the Union, enshrined in the EC Treaty. According to the intention of the Contracting States, (41) the Treaty on European Union marks "a new stage in the process of European integration undertaken with the establishment of the European Communities". Articles 3a and 7a of the EC Treaty stress the importance of the internal market. Articles 2, 3 and 3a of the EC Treaty promote the placing of economic policy more on a common footing. Article 3(s) requires a contribution to be made to the strengthening of consumer protection. More detailed provisions in that regard are set out in Article 129a. The introduction of citizenship of the Union raises the expectation that citizens of the Union will enjoy equality, at least before Community law.
54. In the case of directives whose content is intended to have effects in relations between private persons and which embody provisions designed to protect the weaker party, (42) it is obvious that the failure to transpose a directive deprives it of effet utile. Following the expiry of the period for transposition, the application of protective provisions with precise and unconditional content should be possible. A provision of a directive, which the Community legislator intended to be binding, should be recognized as having substantive effect and the conduct of a Member State contrary to the Treaty should not be able to impede the assertion of legal positions which are in themselves complete.
55. In order to come out in favour of the horizontal direct effect of directives, the starting point should be that the rationale and manner of effect are fundamentally different than in the case of directives having vertical direct effect. Whereas, on the traditional view of the direct applicability of directives, conduct contrary to Community law on the part of the Member State directly determines legal relations between the individual and the State, a third party who is a private person has no influence on the implementation of a directive. (43) The arguments and legal principles (44) put forward in support of the direct applicability of directives vis-à-vis the Member State to the effect

that the Member State is not entitled to profit by its conduct contrary to Community law (45) apply no more in relations between private persons inter se than the reference to the nature of a sanction (46) of direct effect vis-à-vis the State.

56. The direct applicability of directives as between private persons would cease to be in the nature of an objection in the sense that the favourable provision is "relied upon". The directly applicable provision of a directive would in contrast be given effects erga omnes. It would as a result be equated with the directly applicable provisions of the Treaty. (47) The provision of a directive producing horizontal effects would participate in the primacy of Community law, which would be desirable in the interests of the uniform, effective application of Community law.
57. Although horizontal direct effect of directives appears desirable for the reasons given above, substantial arguments exist against such a change in the case-law.
58. Reference is made regularly in those arguments to the wording of Article 189 of the EEC Treaty and to the nature of directives, which are binding only on Member States and then only as to the results to be achieved.
59. In my view, those arguments can be refuted. As regards in the first place the freedom given to the Member States as to the choice of the form and methods for implementing directives, that freedom is completely unaffected until the transitional period expires. Even after that, the Member States retain ° also where individual provisions have direct effect ° leeway wherever that is intended by the directive. Only a fraction of provisions of directives will lend themselves to horizontal applicability. For the rest, the Member States are not entitled to invoke, after the expiry of the period for transposition, freedoms which were conferred on them only for the purposes of the due implementation of the directive within the time-limit laid down.
60. The obligation for the Member State to achieve the results intended by the directive exists immediately that the directive takes effect. As far as the results intended to be achieved by a directive are concerned, the Member States do not normally have any discretion. Such results include, for example, making protective provisions binding by no later than the end of the period for implementation. (48) The binding nature of such rules is ° as I have already observed ° intended by the Community legislator and inherent in the nature of directives. Directives are not measures of lesser quality but are addressed, with a view to their implementation, to the Member States, which are under an obligation under the Treaty to transpose them into national law in full and in good time.
61. In my view, the nature of directives does not preclude their having horizontal effect. Neither would that eliminate the demarcation between regulations and directives, since directives cannot have direct effect until the period for transposition has elapsed and only in the case of clear and unconditional provisions.
62. Another argument put forward against horizontal applicability for directives relates to the burden imposed on third parties on the ground that it is incompatible with the rule of law. That argument cannot in fact be dismissed forthwith. It is questionable whether a private person whose conduct is lawful under the national legal system may have burdens imposed upon him under an unimplemented directive not addressed to him for which, moreover, he will have scarcely any remedy against the Member State in default. (49)
63. On grounds of legal certainty the horizontal effect of directives appears to me to be extremely problematic from the point of view of the third party suffering the burden. The fact that private individuals have had burdens imposed on them indirectly as a result of directly applicable directives ° for example, owing to irregularities committed in a tender calling in question the legal situation of the other tenderers and, possibly, the contractor (50) or owing to the effect of such directives

resulting from their interpretation in conformity with Community law in a dispute between companies subject to private law (51) ° cannot eliminate the reservations evoked by horizontal effect on grounds of the rule of law.

64. The basic condition for a burden imposed on the citizen by legislative measures is their constitutive publication in an official organ. (52) That condition is not fulfilled by directives adopted on the basis of the EEC Treaty. (53) The usage of publishing directives in the Official Journal of the European Communities as measures whose publication is not a condition for their applicability does not remedy that situation. Publication in the Official Journal of the European Communities is purely declaratory and is not a condition for directives to take effect, which is sometimes clarified by a footnote indicating the date on which the directive was notified to the Member States, (54) since directives take effect by notification. (55) The fact that it is possible to take cognizance of a measure does not replace its constitutive publication.
65. In the case of directives adopted and to be adopted following the entry into force of the Maastricht Treaty on 1 November 1993, the situation is fundamentally different. Article 191 of the EC Treaty also requires directives to be published in the Official Journal of the Community. An objection based on absence of publication could therefore no longer be raised against the horizontal effect of such recent directives.
66. For reasons of legal certainty, which is a fundamental right of the citizen on whom a burden is imposed, the public must be prepared as of now for the fact that directives will in future have to be recognized as having horizontal direct effect. For those reasons, too, one must be gratified at the aforementioned stands taken by members of the Court. (56)
67. The principle of legitimate expectations is invoked in favour of private individuals on whom a burden is imposed and against the horizontal effect of directives. Expectations deserving of protection certainly exist, in so far as a private individual does not have to reckon with the imposition of additional burdens provided that he acts lawfully within the context of his national legal system. On the other hand, once a directive has been published and the period for transposition has expired, the burden is foreseeable. I would ask whether the expectation that the national legislature will act contrary to Community law is worthy of protection.
68. An argument based on the democratic principle is put forward against the horizontal effect of directives. According to that argument, the democratic deficit, which is deplored in any event in the context of Community legislation, is increased where national parliaments are by-passed when directives are implemented.
69. As far as the alleged democratic deficit is concerned, I would observe, on the one hand, that the European Parliament's rights to collaborate in drawing up Community legislation have gradually been increased by the Single European Act and the Maastricht Treaty. On the other hand, it cannot be argued, I submit, that the national legislature is by-passed.
70. The national legislature has every freedom during the period for transposition to choose the form and means of transposing the directive into national law. (57) Even after the period for transposition has elapsed, the obligation (58) on the national legislature to transpose the directive continues to exist, as well as leeway to fulfil that obligation in one way or another to the extent permitted by the directive. Only provisions of directives or protective rules which are sufficiently precise to be asserted without being fleshed out in any way and therefore have to be taken over by the national legislature would have legal effects as between the addressees of the legislation in question within the national legal system. To my mind, fears that there will be a hiatus between the legal situation existing during the intermediate period preceding the transposition of the directive into national law and that existing thereafter are groundless, since the provisions suitable for horizontal applicability must also be found in the implementing measure.

71. The objection that recognition of the horizontal direct effect of directives would increase Member State's carelessness in transposing them does not convince me, since the national legislature remains responsible for their implementation in full. Recognition in principle of horizontal effect might possibly encourage Member States to effect transposition within the prescribed period in order to forestall horizontal application by the authorities and courts of the Community and the Member States. In my view, the arguments on the educative effect of horizontal applicability balance themselves out and hence do not tip the balance for or against.
72. Before concluding, I would further observe that, if directives are recognized as having horizontal effect, the necessary consequences should be drawn as regards legal protection. Thus they should be capable of being challenged ° as regulations and decisions are ° under the second paragraph of Article 173. (59)
73. In the final analysis, I consider that for reasons of legal certainty it is not possible to envisage directives having horizontal effect as regards the past. As far as the future is concerned, however, horizontal effect seems to me to be necessary, subject to the limits mentioned, in the interests of the uniform, effective application of Community law. In my view, the resulting burdens on private individuals are reasonable, since they do not exceed the constraints which would have been applied to them if the Member State concerned had acted in conformity with Community law. Lastly, it is the party relying on the unconditional and sufficiently precise provision of a directive who will have to bear the risk of the court proceedings.

[...]

## 4.5 Case C-456/98: Centrosteeel

**Centrosteeel Srl v Adipol GmbH**

**Case C-456/98**

13 July 2000

Court of Justice

[2000] ECR I- 6007

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

- 1 By order of 24 November 1998, received at the Court on 15 December 1998, the Pretore di Brescia (Magistrates' Court, Brescia) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) three questions on the interpretation of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (OJ 1986 L 382, p. 17, the Directive) and of the provisions in Chapter 2 and Chapter 3 of Title III of Part Three of the EC Treaty concerning, respectively, freedom of establishment and freedom to provide services.
- 2 Those questions were raised in proceedings between Centrosteeel Srl (Centrosteeel), a company established in Brescia (Italy), and Adipol GmbH (Adipol), a company whose principal place of business is in Vienna (Austria).
- 3 It is apparent from the documents before the national court that, between 1989 and 1991, Centrosteeel acted as commercial agent on behalf of Adipol pursuant to an agency contract entered into between the parties. After the contract had been terminated, Centrosteeel claimed payment of certain sums by way of commission.
- 4 When Adipol refused to pay the sums claimed by Centrosteeel, proceedings were brought at first instance before the Pretore di Brescia. The defendant contended that the agency contract in question was void because Centrosteeel was not entered in the register of commercial agents and representatives, such registration being compulsory under Article 2 of Italian Law No 204 of 3 May 1985 (GURI No 119 of 22 May 1985, p. 3623, Law No 204).
- 5 Article 2 of Law No 204 provides that each Chamber of Commerce is to maintain a register of commercial agents and representatives in which all persons pursuing or intending to pursue the activity of commercial agent or representative are to be registered. Article 9 of Law No 204 prohibits any person who is not so registered from pursuing the activity of commercial agent or representative.
- 6 According to the order for reference, the Italian courts have, in the past, consistently held that an agency contract entered into by a person not entered on the register is void on the ground of infringement of the mandatory rule laid down in Article 9 of Law No 204 and that such a person cannot recover commission and payments in respect of the activities carried out by him.

- 7 When the Court of Justice was asked by the Tribunale (District Court), Bologna, Italy, to give a preliminary ruling on this subject, it held that the Directive precluded a national rule which made the validity of an agency contract conditional upon the commercial agent being entered in the appropriate register (Case C-215/97 *Bellone v Yokohama* [1998] ECR-I 2191).
- 8 In that judgment, the Court held that, as regards the form of an agency contract, Article 13(2) of the Directive mentioned only writing as a requirement for the validity of a contract. Since the Community legislature had dealt exhaustively with the matter, the Member States could not therefore impose any condition other than requiring that a written document be drawn up (*Bellone*, paragraph 14).
- 9 The national court, taking *Bellone* into account, takes the view that, since under the settled case-law of the Court of Justice directives do not have direct effect in relations between individuals, *Bellone* cannot result in Law No 204 being disapplied in the proceedings before it. According to the national court, it may therefore be necessary to refer directly to the provisions of the Treaty, in particular those provisions relating to freedom of establishment and freedom to provide services, which, unlike directives, are directly and immediately applicable in national legal systems. If the relevant Italian legislation were incompatible with those Community principles, that would inevitably mean that it could not be applied.
- 10 In those circumstances the national court decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:
  1. What is the interpretation of Articles 52, 53, 54, 55, 56, 57 and 58 of the EC Treaty; in particular, do Articles 2 and 9 of Italian Law No 204 of 1985, under which entry in a register is compulsory for any person acting as an agent and an agency contract concluded by a person not entered on that register is void, constitute a restriction on the freedom of establishment?
  2. Do the provisions of the Treaty on freedom of establishment contained in Articles 52 to 58 preclude national legislation which makes the validity of an agency contract subject to entry of the commercial agent in an appropriate register?
  3. Do the provisions on freedom to provide services contained in Articles 59 to 66 preclude national legislation which makes the validity of an agency contract subject to the requirement of entry of the commercial agent in an appropriate register?

#### Admissibility

- 11 *Adipol*, the Italian Government and the Commission claim that the reference for a preliminary ruling is inadmissible on the grounds that:
  - it is based on a misunderstanding of the facts since *Centrosteeel* did not act as commercial agent but merely secured certain payments from *Adipol* under arrangements the validity of which is questionable (*Adipol*);
  - the provisions of the Treaty relating to freedom of establishment and freedom to provide services were not raised by the parties in the main proceedings (*Adipol*);
  - the rules of private international law do not confer jurisdiction on the Italian courts to entertain the dispute in the main proceedings since only the Austrian courts were competent in that respect (*Commission*);
  - the questions referred are unnecessary for the resolution of the dispute in the main proceedings (*Adipol*, Italian Government and Commission).
- 12 With the exception of the last argument raised, which is actually related to the substance of the case and will therefore be considered with the substance, the objections to admissibility thus raised cannot be accepted for the reasons set out by the Advocate General in paragraphs 10 to 27 of his Opinion and which the Court adopts.

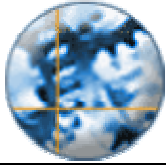
## Substance

- 13 First, it must be noted that the Directive is intended to harmonise the laws of the Member States governing the legal relationship between the parties to a commercial agency contract, irrespective of any cross-border elements. Its scope is therefore broader than the fundamental freedoms laid down by the EC Treaty.
- 14 It should also be noted that in *Bellone* the Court ruled on a situation identical to that which led to the case now pending before the national court, that is to say, the validity of an agency contract, subject to Italian law, where the agent is not entered on the register of commercial agents and representatives. The Court held in that case that the Directive precluded the validity of the agency contract from being conditional on the commercial agent's entry in such a register.
- 15 It is true that, according to settled case-law of the Court, in the absence of proper transposition into national law, a directive cannot of itself impose obligations on individuals (*Case 152/84 Marshall v Southampton and South-West Hampshire Health Authority* [1986] ECR 723, paragraph 48, and *Case C-91/92 Faccini Dori v Recreb* [1994] ECR I-3325, paragraph 20).
- 16 However, it is also apparent from the case-law of the Court (*Case C-106/89 Marleasing v La Comercial Internacional de Alimentación* [1990] ECR I-4135, paragraph 8; *Case C-334/92 Wagner Miret v Fondo de Garantía Salarial* [1993] ECR I-6911, paragraph 20; *Faccini Dori*, paragraph 26; and *Joined Cases C-240/98 to C-244/98 Océano Grupo Editorial v Salvat Editores* [2000] ECR I-4941, paragraph 30) that, when applying national law, whether adopted before or after the directive, the national court that has to interpret that law must do so, as far as possible, in the light of the wording and the purpose of the directive so as to achieve the result it has in view and thereby comply with the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC).
- 17 Where it is seised of a dispute falling within the scope of the Directive and arising from facts postdating the expiry of the period for transposing the Directive, the national court, in applying provisions of domestic law or settled domestic case-law, as seems to be the case in the main proceedings, must therefore interpret that law in such a way that it is applied in conformity with the aims of the Directive. As the Advocate General points out in paragraph 36 of his Opinion, it seems in that regard that the Corte Suprema di Cassazione (Supreme Court of Cassation), following the judgment in *Bellone*, has changed its case-law so that a failure to comply with the obligation prescribed by Law No 204 to be entered in the register of commercial agents and representatives no longer entails the nullity of an agency contract in Italian law.
- 18 In view of the considerations set out above, it is likewise unnecessary, as the Italian Government and the Commission have rightly submitted, to answer the national court's questions concerning the Treaty provisions on freedom of establishment and freedom to provide services, since the case pending before that court may be resolved on the basis of the Directive and the case-law of the Court of Justice on the effects of directives.
- 19 In those circumstances, the answer to be given to the questions referred must be that the Directive precludes national legislation which makes the validity of an agency contract conditional upon the commercial agent being entered in the appropriate register. The national court is bound, when applying provisions of domestic law predating or postdating the said Directive, to interpret those provisions, so far as possible, in the light of the wording and purpose of the Directive, so that those provisions are applied in a manner consistent with the result pursued by the Directive.

[...]



## 4.6 Case C-194/94: CIA Security International



### **NOTE AND QUESTIONS**

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1. Where are the limits of vertical direct effect?
2. Does the Court's ruling differ from the AG's opinion?

#### 4.6.1 Judgement of the Court of Justice

##### **CIA Security International SA v Signalson SA and Another**

**Case C-194/94**

30 April 1996

Court of Justice

[1996] ECR 557

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

- 1 By judgment of 20 June 1994, received at the Court on 4 July 1994, the Tribunal de Commerce (Commercial Court), Liège, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty six questions on the interpretation of Article 30 of that Treaty and of Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1983 L 109, p. 8, hereinafter "Directive 83/189"), as amended by Council Directive 88/182/EEC of 22 March 1988 (OJ 1988 L 81, p. 75).
- 2 Those questions have been raised in two sets of proceedings between (i) CIA Security International SA (hereinafter "CIA Security") and Signalson SA (hereinafter "Signalson") and (ii) CIA Security and Securitel SPRL (hereinafter "Securitel"), those three companies being security firms within the meaning of the Belgian Law of 10 April 1990 on caretaking firms, security firms and internal caretaking services (hereinafter "the 1990 Law").
- 3 Article 1(3) of the 1990 Law provides: "Any legal or natural person pursuing an activity consisting in supplying to third parties, on a permanent or occasional basis, design, installation and maintenance

services for alarm systems and networks shall be considered to be a security firm for the purposes of this Law."

- 4 Article 1(4) of the 1990 Law provides: "The alarm systems and networks referred to in this article are those intended to prevent or record crimes against persons or property".
- 5 Article 4 of the 1990 Law provides: "Only persons with prior authorization from the Home Affairs Ministry may operate a security firm. Authorization shall be granted only if the firm meets the requirements laid down in this Law and the conditions concerning financial means and technical equipment prescribed by royal decree ...".
- 6 Article 12 of the 1990 Law provides: "The alarm systems and networks referred to in Article 1(4) and their components may be marketed or otherwise made available to users only after prior approval has been granted under a procedure to be laid down by royal decree ...".
- 7 That procedure was laid down by Royal Decree of 14 May 1991 laying down the procedure for approval of the alarm systems and networks referred to in the 1990 Law (hereinafter "the 1991 Decree").
- 8 Article 2(1) of the 1991 Decree provides: "No manufacturer, importer, wholesaler or any other natural or legal person may market new equipment or otherwise make it available to users in Belgium if it has not been previously approved by a committee established for that purpose (the 'equipment committee' )."
- 9 Articles 4 to 7 of the 1991 Decree provide for equipment to be examined and tested before it can be approved.
- 10 According to Article 5, that examination is to consist of identifying the equipment, checking electrical circuits against the documents submitted by the manufacturer and checking the minimum required functions. The tests carried out on the equipment, provided for by Article 6 of the 1991 Decree, concern functional adequacy, mechanical aspects, mechanical and/or electronic reliability, sensitivity to false alarms, and protection against fraud or attempts to neutralize the equipment. For that purpose, equipment is subjected to the tests prescribed in Annexes 3 and 4 to the 1991 Decree.
- 11 Article 8 of the 1991 Decree provides that: "If the applicant establishes by means of the necessary documents that his equipment has already undergone tests which are at least equivalent to those described in Article 7 in an authorized laboratory in another Member State of the EEC according to EEC rules and that it has been approved at most three years before the date of the current application, a body referred to in Article 4(1) shall carry out on the equipment only such tests as have not yet been carried out in the other Member State of the EEC."
- 12 The case-file also shows that the 1991 Decree was not notified to the Commission in accordance with the procedure for the provision of information on technical regulations laid down in Directive 83/189 and that, in February 1993, following delivery of a reasoned opinion by the Commission pursuant to Article 169 of the EEC Treaty, the Belgian Government notified a new draft royal decree laying down the procedure for approval of alarm systems and networks. That draft, adopted on 31 March 1994, is substantially identical to the 1991 Decree which it repealed, Article 8 of the 1991 Decree having, however, been amended in accordance with suggestions made by the Commission.
- 13 The three companies involved in the main proceedings are competitors whose business is, in particular, the manufacture and sale of alarm systems and networks.

- 14 On 21 January 1994 CIA Security applied to the Liège Commercial Court for orders requiring Signalson and Securitel to cease alleged unfair trading practices pursued in January 1994. It based its claims on Articles 93 and 95 of the Belgian Law of 14 July 1991 on Commercial Practices which prohibits unfair trading practices. CIA Security claims that Signalson and Securitel have libelled it by claiming in particular that the Andromède alarm system which it markets did not fulfil the requirements laid down by Belgian legislation on security systems.
- 15 Signalson and Securitel have lodged counterclaims, the main one being for an order restraining CIA Security from continuing to carry on business on the ground that it is not authorized as a security firm and that it is marketing an alarm system which has not been approved.
- 16 In an interim judgment the Liège Commercial Court held that, although the main claims and counterclaims seek orders restraining unfair practices prohibited by the Law on Commercial Practices, those practices must still be assessed by reference to the provisions of the 1990 Law and the 1991 Decree.
- 17 It then found that if CIA Security has infringed the 1990 Law and the 1991 Decree, the actions which it has brought could be declared inadmissible for lack of locus standi or sufficient legal interest in bringing proceedings whilst if the 1990 Law and the 1991 Decree are incompatible with Community law, Signalson and Securitel will not be able to base their counterclaims for restraining orders on breach of those legal provisions.

[...]

The fifth and sixth questions

- 32 By its fifth and sixth questions the national court asks in substance whether the provisions of Directive 83/189, and particularly Articles 8 and 9 thereof, are unconditional and sufficiently precise for individuals to be able to rely on them before a national court which must decline to apply a national technical regulation which has not been notified in accordance with the directive.

- 33 Article 8(1) and (2) of Directive 83/189 provides:

"1. Member States shall immediately communicate to the Commission any draft technical regulation, except where such technical regulation merely transposes the full text of an international or European standard, in which case information regarding the relevant standard shall suffice; they shall also let the Commission have a brief statement of the grounds which make the enactment of such a technical regulation necessary, where these are not already made clear in the draft. Where appropriate, Member States shall simultaneously communicate the text of the basic legislative or regulatory provisions principally and directly concerned, should knowledge of such text be necessary to assess the implications of the draft technical regulation.

The Commission shall immediately notify the other Member States of any draft it has received; it may also refer this draft to the Committee referred to in Article 5 and, if appropriate, to the Committee responsible for the field in question for its opinion.

2. The Commission and the Member States may make comments to the Member State which has forwarded a draft technical regulation; that Member State shall take such comments into account as far as possible in the subsequent preparation of the technical regulation."

- 34 Article 9 of Directive 83/189 provides:

"1. Without prejudice to paragraphs 2 and 2a, Member States shall postpone the adoption of a draft technical regulation for six months from the date of notification referred to in Article 8(1) if the Commission or another Member State delivers a detailed opinion, within three months of that date, to the effect that the measure envisaged must be amended in order to eliminate or reduce any barriers which it might create to the free movement of goods. The Member State concerned shall report to the Commission on the action it proposes to take on such detailed opinions. The Commission shall comment on this reaction.

2. The period in paragraph 1 shall be 12 months if, within three months following the notification referred to in Article 8(1), the Commission gives notice of its intention of proposing or adopting a Directive on the subject.

2a. If the Commission ascertains that a communication pursuant to Article 8(1) relates to a subject covered by a proposal for a directive or regulation submitted to the Council, it shall inform the Member State concerned of this fact within three months of receiving the communication.

Member States shall refrain from adopting technical regulations on a subject covered by a proposal for a directive or regulation submitted by the Commission to the Council before the communication provided for in Article 8(1) for a period of 12 months from the date of its submission.

Recourse to paragraphs 1, 2 and 2a of this Article cannot be accumulative.

3. Paragraphs 1, 2 and 2a shall not apply in those cases where, for urgent reasons relating to the protection of public health or safety, the protection of health and life of animals or plants, a Member State is obliged to prepare technical regulations in a very short space of time in order to enact and introduce them immediately without any consultations being possible. The Member State shall give, in the communication referred to in Article 8, the reasons which warrant the urgency of the measures taken. The Commission shall take appropriate action in cases where improper use is made of this procedure."

- 35 Article 10 of Directive 83/189 provides that: "Articles 8 and 9 shall not apply where the Member States fulfil their obligations as arising out of Community directives and regulations; the same shall apply in the case of obligations arising out of international agreements which result in the adoption of uniform technical specifications in the Community."

[...]

- 40 The first point which must be made is that Directive 83/189 is designed to protect, by means of preventive control, freedom of movement for goods, which is one of the foundations of the Community. This control serves a useful purpose in that technical regulations covered by the directive may constitute obstacles to trade in goods between Member States, such obstacles being permissible only if they are necessary to satisfy compelling public interest requirements. The control is also effective in that all draft technical regulations covered by the directive must be notified and, except in the case of those regulations whose urgency justifies an exception, their adoption or entry into force must be suspended during the periods laid down by Article 9.
- 41 The notification and the period of suspension therefore afford the Commission and the other Member States an opportunity to examine whether the draft regulations in question create obstacles to trade contrary to the EC Treaty or obstacles which are to be avoided through the adoption of common or harmonized measures and also to propose amendments to the national measures envisaged. This procedure also enables the Commission to propose or adopt Community rules regulating the matter dealt with by the envisaged measure.

- 42 It is settled law that, wherever provisions of a directive appear to be, from the point of view of their content, unconditional and sufficiently precise, they may be relied on against any national provision which is not in accordance with the directive (see the judgment in Case 8/81 Becker [1982] ECR 53 and the judgment in Joined Cases C-6/90 and C-9/90 Francovich and Others [1991] ECR I-5357.
- 43 The United Kingdom considers that the provisions of Directive 83/189 do not satisfy those criteria on the ground, in particular, that the notification procedure contains a number of elements that are imprecise.
- 44 That view cannot be adopted. Articles 8 and 9 of Directive 83/189 lay down a precise obligation on Member States to notify draft technical regulations to the Commission before they are adopted. Being, accordingly, unconditional and sufficiently precise in terms of their content, those articles may be relied on by individuals before national courts.
- 45 It remains to examine the legal consequences to be drawn from a breach by Member States of their obligation to notify and, more precisely, whether Directive 83/189 is to be interpreted as meaning that a breach of the obligation to notify, constituting a procedural defect in the adoption of the technical regulations concerned, renders such technical regulations inapplicable so that they may not be enforced against individuals.
- 46 The German and Netherlands Governments and the United Kingdom consider that Directive 83/189 is solely concerned with relations between the Member States and the Commission, that it merely creates procedural obligations which the Member States must observe when adopting technical regulations, their competence to adopt the regulations in question after expiry of the suspension period being, however, unaffected, and, finally, that it contains no express provision relating to any effects attaching to non-compliance with those procedural obligations.
- 47 The Court observes first of all in this context that none of those factors prevents non-compliance with Directive 83/189 from rendering the technical regulations in question inapplicable.
- 48 For such a consequence to arise from a breach of the obligations laid down by Directive 83/189, an express provision to this effect is not required. As pointed out above, it is undisputed that the aim of the directive is to protect freedom of movement for goods by means of preventive control and that the obligation to notify is essential for achieving such Community control. The effectiveness of Community control will be that much greater if the directive is interpreted as meaning that breach of the obligation to notify constitutes a substantial procedural defect such as to render the technical regulations in question inapplicable to individuals.
- 49 That interpretation of the directive is in accordance with the judgment given in Case 380/87 Enichem Base and Others v Comune di Cinisello Balsamo [1989] ECR 2491, paragraphs 19 to 24. In that judgment, in which the Court ruled on the obligation for Member States to communicate to the Commission national draft rules falling within the scope of an article of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), the Court held that neither the wording nor the purpose of the provision in question provided any support for the view that failure by the Member States to observe their obligation to give notice in itself rendered unlawful the rules thus adopted. In this regard, the Court expressly considered that the provision in question was confined to imposing an obligation to give prior notice which did not make entry into force of the envisaged rules subject to the Commission's agreement or lack of opposition and which did not lay down the procedure for Community control of the drafts in question. The Court therefore concluded that the provision under examination concerned relations between the Member States and the Commission but that it did not afford individuals any right capable of being infringed in the event of breach by a Member State of its obligation to give prior notice of its draft regulations to the Commission.

- 50 In the present case, however, the aim of the directive is not simply to inform the Commission. As already found in paragraph 41 of this judgment, the directive has, precisely, a more general aim of eliminating or restricting obstacles to trade, to inform other States of technical regulations envisaged by a State, to give the Commission and the other Member States time to react and to propose amendments for lessening restrictions to the free movement of goods arising from the envisaged measure and to afford the Commission time to propose a harmonizing directive. Moreover, the wording of Articles 8 and 9 of Directive 83/189 is clear in that those articles provide for a procedure for Community control of draft national regulations and the date of their entry into force is made subject to the Commission's agreement or lack of opposition.
- 51 Finally, it must be examined whether, as the United Kingdom in particular observes, there are reasons specific to Directive 83/189 which preclude it from being interpreted as rendering technical regulations adopted in breach of the directive inapplicable to third parties.
- 52 In this regard, it has already been observed that if such regulations were not enforceable against third parties, this would create a legislative vacuum in the national legal system in question and could therefore entail serious drawbacks, particularly where safety regulations were concerned.
- 53 This argument cannot be accepted. A Member State may use the urgent-case procedure provided for in Article 9(3) of Directive 83/189 where, for reasons defined by that provision, it considers it necessary to prepare technical regulations in a very short space of time which must be enacted and brought into force immediately without any consultations being possible.
- 54 In view of the foregoing considerations, it must be concluded that Directive 83/189 is to be interpreted as meaning that breach of the obligation to notify renders the technical regulations concerned inapplicable, so that they are unenforceable against individuals.
- 55 The answer to the fifth and sixth questions must therefore be that Articles 8 and 9 of Directive 83/189 are to be interpreted as meaning that individuals may rely on them before the national court which must decline to apply a national technical regulation which has not been notified in accordance with the directive.

[...]

#### 4.6.2 Opinion of AG Elmer

##### **CIA Security International SA v Signalson SA and Another**

##### **Case C-194/94**

24 October 1995

AG Opinion

[1995] ECR I- 02201

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

[...]

67. In summary, I consider that the notification rule and suspensory provisions in Articles 8(1) and 9 of the Directive confer rights on individuals and are unconditional and sufficiently precise so that they may be relied upon by an individual before a national court; accordingly technical regulations which have not been notified will not be enforceable in relation to individuals. A non-notified regulation will consequently not furnish a basis for imposing a penalty on a trader or prevent him from marketing a product which does not comply with the regulations.
68. Consideration must, however, be given to the question whether the direct effect of the notification procedure in the Directive can be relied upon in a case such as that in the main proceedings, where the action is between two individuals. Under the Court's case law a directive cannot, as stated, of itself impose obligations on an individual. (See, most recently, the judgment cited above, Case C-91/92, FACCINI DORI, at para [20]). A provision in a directive cannot therefore be relied upon as such against an individual, in the same way as the Community may not issue rules in the form of a directive which impose obligations on an individual. On the other hand, when applying national law, national courts must interpret national legal provisions, as far as possible, in the light of the wording and purpose of the directive so as to achieve the result it has in view. (See, eg, *ibid*, para [26] and Case C-334/92, WAGNER MIRET: [1993] I ECR 6911, [1995] 2 CMLR 49, para [20]). That obligation applies both to provisions in a law which has been specifically introduced in order to implement the directive and to provisions in other legislation, (see Case 80/86, KOLPINGHUIS NIJMEGEN: [1987] ECR 3969, [1989] 2 CMLR 18, para [12]) and it applies regardless whether the legislation preceded the directive or vice versa. (See Case C-91/92, FACCINI DORI, cited above, para [26]).
69. In the main proceedings Signalson and Securitel have claimed that CIA should cease marketing the Andromede system since it has not received type approval under the provisions contained in the Act and 1991 Decree. They have further claimed that CIA should be ordered to pay a periodic penalty payment as a result. Those claims are based on national regulations which have not been notified in accordance with the Directive, namely the Act and the 1991 Decree. On the basis of the Belgian Act on Commercial Practices it is claimed that those regulations should be enforced in relation to a trader by way of an order that he cease marketing and pay a periodic penalty. Such enforcement must, in my view, be contrary to the direct effect of the notification procedure set out in Articles 8(1) and 9 of the Directive. That would, under the Court's case law hitherto, be clear without more if it was the State which, as prosecutor, consumer ombudsman or similar had brought proceedings against CIA. The fact that the question in this case has been raised in the context of a private action, however, in my view can make no difference whatsoever. It is the State which lays down rules on penalties, prohibitions on marketing, etc, and it is the courts which must impose such sanctions regardless of who, under the national rules on procedure, might have brought the case.

70. In the main proceedings CIA claimed that Signalson and Securitel should be fined for having acted in breach of good commercial practice by stating that the Andromede system was not approved in accordance with regulations contained in the Act and the 1991 Decree. That claim is based on the fact that CIA was not obliged to seek type approval since the Belgian regulations had not been notified in accordance with the Directive. The question might be raised whether it can be said that if CIA's claim is upheld that would amount to allowing the Directive to impose obligations on individuals (in this case Signalson and Securitel).
71. The notification procedure in the Directive imposes a number of obligations on the Member States. The Directive does not, however, on its wording, aim to impose duties on individuals and therefore no question arises as to whether the Directive should have direct effect as far as individuals' obligations are concerned. The Directive is thus essentially different from Directive 85/577/EEC which was at issue in Case C-91/92, FACCINI DORI.
72. CIA's claim is itself based on national law. The purpose of the reference to the Court would appear, in the light of CIA's claims, to obtain the necessary basis for the national Court's interpretation of the Belgian Act on Commercial Practices. I would refer to what was stated above concerning the national Court's duty, as far as possible, to interpret national law in the light of Community law. Such interpretation of national law in the light of Community law can naturally indirectly be of significance for the claims relating to Signalson and Securitel, but that is no different from the situation in other cases, whether the Court has indicated the rule of interpretation to be applied (see, eg Case C-106/89, MARLEASING ([1990] I ECR 4135, [1992] 1 CMLR 305)).
73. If it were held that CIA was not able to point to the incompatibility of the Belgian regulations with Community law in its claims against Signalson and Securitel that would, in my view, create an unsatisfactory and incomprehensible situation where Community law would on the one hand be seeking to prevent a Member State from prosecuting an individual who had not complied with a non-notified technical provision, but on the other hand would debar the same individual from relying on the same circumstance in a case against a competitor who had stated that the individual in question had conducted himself unlawfully by not complying with the (unlawful) national regulation.
- It might be useful to illustrate what such a legal situation could entail by means of an example based on the Court's leading case on the direct effect of provisions in a directive, Case 8/81, BECKER. It would mean that Ursula Becker, a self-employed credit negotiator, on the one hand by reference to the direct effect of Article 13 of the Sixth VAT Directive could rely on the State's VAT demand being unlawful, but on the other hand would be debarred from claiming the same right not to pay VAT in an action against a competitor who claimed that she was acting in breach of good commercial practices in not paying the VAT under national law.
74. The question whether, in the context of the national Court's interpretation of national law in the light of Community law, CIA's claims against Signalson and Securitel should be upheld is naturally wholly a question for the national Court. It is, for example, national law which lays down the consequences under criminal law and otherwise of possible mistakes of law concerning the relationship between the national Belgian regulations and the Directive.
75. In summary, I consider that the fifth and sixth questions should be answered to the effect that Articles 8(1) and 9 of the Directive confer rights on individuals and are unconditional and sufficiently precise so that they may be relied on by individuals before a national court which should thus decline to apply a national technical regulation which has not been notified in compliance with the Directive.

[...]



## 4.7 Case C-443/98: Unilever

**Unilever Italia SpA and Central Food SpA**

**Case C-443/98**

26 September 2000

Court of Justice

[2000] ECR I- 7535

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

- 1 By order of 6 November 1998, received at the Court on 7 December 1998, the Pretore di Milano (Magistrate, Milan) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1983 L 109, p. 8), as amended by Directive 94/10/EC of the European Parliament and the Council of 23 March 1994 materially amending for the second time Directive 83/189/EEC (OJ 1994 L 100, p. 30).
- 2 That question was raised in proceedings between Unilever Italia SpA (Unilever) and Central Food SpA (Central Food) concerning payment by Central Food for a consignment of olive oil supplied by Unilever.

Community law

- 3 Article 1(1), (2) and (9) of Directive 83/189 provide:

For the purposes of this directive, the following meanings shall apply :

1. "product", any industrially manufactured product and any agricultural product;
2. "technical specification", a specification contained in a document which lays down the characteristics required of a product such as levels of quality, performance, safety or dimensions, including the requirements applicable to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking or labelling and conformity assessment procedures;

The term "technical specification" also covers production methods and processes used in respect of agricultural products as referred to in Article 38(1) of the Treaty, products intended for human and animal consumption, and medicinal products as defined in Article 1 of Directive 65/65/EEC, as well as production methods and processes relating to other products, where these have an effect on their characteristics.

...

9. "technical regulation", technical specifications and other requirements, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing or use in a Member State or a major part thereof, as well as laws, regulations or administrative provisions of Member States, except those provided for in Article 10, prohibiting the manufacture, importation, marketing or use of a product.

...

4 Article 8(1) to (3) of Directive 83/189 provide:

1. Subject to Article 10, Member States shall immediately communicate to the Commission any draft technical regulation, except where it merely transposes the full text of an international or European standard, in which case information regarding the relevant standard shall suffice; they shall also let the Commission have a statement of the grounds which make the enactment of such a technical regulation necessary, where these have not already been made clear in the draft.

...

The Commission shall immediately notify the other Member States of the draft and all documents which have been forwarded to it; it may also refer this draft, for an opinion, to the Committee referred to in Article 5 and, where appropriate, to the committee responsible for the field in question.

...

2. The Commission and the Member States may make comments to the Member State which has forwarded a draft technical regulation; that Member State shall take such comments into account as far as possible in the subsequent preparation of the technical regulation.

3. Member States shall communicate the definitive text of a technical regulation to the Commission without delay.

5 Article 9 of Directive 83/189 provides:

1. Member States shall postpone the adoption of a draft technical regulation for three months from the date of receipt by the Commission of the communication referred to in Article 8(1).

2. Member States shall postpone:

- for four months the adoption of a draft technical regulation in the form of a voluntary agreement within the meaning of Article 1(9), second indent,
- without prejudice to paragraphs 3, 4 and 5, for six months the adoption of any other draft technical regulation,

from the date of receipt by the Commission of the communication referred to in Article 8(1) if the Commission or another Member State delivers a detailed opinion, within three months of that date, to the effect that the measure envisaged may create obstacles to the free movement of goods within the internal market.

The Member State concerned shall report to the Commission on the action it proposes to take on such detailed opinions. The Commission shall comment on this reaction.

3. Member States shall postpone the adoption of a draft technical regulation for 12 months from the date of receipt by the Commission of the communication referred to in Article 8(1) if, within the three months following that date, the Commission announces its intention to propose or adopt a Directive, Regulation or Decision on the matter in accordance with Article 189 of the Treaty.

4. Member States shall postpone the adoption of a draft technical regulation for 12 months from the date of receipt by the Commission of the communication referred to in Article 8(1) if, within the three months following that date, the Commission announces its finding that the draft technical regulation concerns a matter which is covered by a proposal for a Directive, Regulation or Decision presented to the Council in accordance with Article 189 of the Treaty.

5. If the Council adopts a common position during the standstill period referred to in paragraphs 3 and 4, that period shall, subject to Article 9(6), be extended to 18 months.

6. The obligations referred to in paragraphs 3, 4 and 5 shall lapse:

- when the Commission informs the Member States that it no longer intends to propose or adopt a binding Community act,
- when the Commission informs the Member States of the withdrawal of its draft or proposal,
- when the Commission or the Council has adopted a binding Community act.

7. Paragraphs 1 to 5 shall not apply in those cases where, for urgent reasons, occasioned by serious and unforeseeable circumstances, relating to the protection of public health or safety, the protection of animals or the preservation of plants, a Member State is obliged to prepare technical

regulations in a very short space of time in order to enact and introduce them immediately without any consultations being possible. The Member State shall give, in the communication referred to in Article 8, the reasons which warrant the urgency of the measures taken. The Commission shall give its views on the communication as soon as possible. It shall take appropriate action in cases where improper use is made of this procedure. The European Parliament shall be kept informed by the Commission.

- 6 Pursuant to the first indent of Article 10(1) of Directive 83/189:

Articles 8 and 9 shall not apply to those laws, regulations and administrative provisions of the Member States or voluntary agreements by means of which Member States:

- comply with binding Community acts which result in the adoption of technical specifications.

- 7 In paragraphs 54 and 55 of its judgment in Case C-194/94 *CIA Security v Signalson and Securitel* [1996] ECR I-2201 (hereinafter *CIA Security*) the Court held that Directive 83/189 was to be interpreted as meaning that breach of the obligation to notify rendered the technical regulations concerned inapplicable, so that they were unenforceable against individuals and that individuals might therefore rely on Articles 8 and 9 of Directive 83/189 before the national court, which must decline to apply a national technical regulation which has not been notified in accordance with that directive.
- 8 As the Court made clear in paragraph 35 of its judgment in Case C-226/97 *Lemmens* [1998] ECR I-3711, failure to notify technical regulations, which constitutes a procedural defect in their adoption, renders such regulations inapplicable inasmuch as they hinder the use or marketing of a product which is not in conformity therewith.

#### The Italian legislation and the notification procedure

- 9 According to the documents before the Court, a draft law to govern labelling indicating the geographical origin of the various kinds of olive oil was submitted to the Italian Parliament on 27 January 1998. It was given readings in the Senate in February and March of the same year and in the Chamber of Deputies in April and June.
- 10 In the meantime, having been informed of the existence of the draft, the Commission called on the Italian authorities to notify it in accordance with Article 8(1) of Directive 83/189, and they did so on 4 May 1998. The Commission then brought the draft law to the notice of the Member States and, on 10 June 1998, it published in the Official Journal of the European Communities a notice indicating that the three-month period of suspension provided for in Article 9(1) of Directive 83/189 ran until 5 August 1998. The notice drew attention to the fact that, in accordance with the judgment in *CIA Security*, national courts must decline to apply any national technical regulation which had not been notified in accordance with Directive 83/189, so that the technical regulations concerned can no longer be enforced against individuals (OJ 1998 C 177, p. 2)
- 11 On 23 July 1998, the Commission informed the Italian authorities of its intention to legislate in the field covered by the draft law and called on them to postpone its adoption for a period of 12 months as from the date of the notice, in accordance with the Article 9(3) of Directive 83/189.
- 12 After the definitive approval thereof by both Chambers of the Italian Parliament, Law No 313 on the labelling of origin of extra virgin olive oil, virgin olive oil and olive oil (hereinafter the contested Law) was signed on 3 August 1998 by the President of the Republic, the Prime Minister and the Minister for Agriculture.

- 13 The next day the Commission informed the permanent representative for Italy to the European Union that it would initiate a procedure under Article 169 of the Treaty (now Article 226 EC) if the Law were published in the Gazzetta Ufficiale della Repubblica Italiana and declared that that Law would be unenforceable against individuals if it was published before 4 May 1999.
- 14 On 4 August 1998, the Commission received detailed opinions from the Spanish and Portuguese Governments within the meaning of Article 9(2) of Directive 83/189, to the effect that the draft law should be amended. On 5 August, it received observations from the Netherlands Government under Article 8(2).
- 15 On 29 August 1998, the contested Law was published in Gazzetta Ufficiale della Repubblica Italiana No 201 and it entered into force the following day.
- 16 Article 1 of that the Law provides, in essence, that the oils concerned may not be marketed with a written indication that they have been produced or manufactured in Italy unless the entire cycle of harvesting, production, processing and packaging took place in Italy. Labelling of oils produced in Italy, when derived wholly or in part from oils originating in other countries, must mention that fact, indicating the relevant percentages and the country or countries of provenance; any such oil which does not bear those indications must be disposed of within four months after the entry into force of the Law or, after that date, withdrawn from the market.
- 17 On 22 December 1998, the Commission adopted the legislation which it had announced to the Italian authorities, in the form of Regulation (EC) No 2815/98 concerning marketing standards for olive oil (OJ 1998 L 349, p. 56), which, in particular, lays down rules governing the designation of origin of virgin and extra virgin olive oils on their labels or packaging.

The main proceedings and the question referred to the Court

- 18 On 29 September 1998, in response to an order from Central Food, Unilever supplied it with 648 litres of extra virgin olive oil for the price of ITL 5 330 708.
- 19 By letter of 30 September 1998, Central Food informed Unilever that the olive oil supplied to it was not labelled in accordance with the contested Law. Consequently, it refused to pay the amount due and called on Unilever to remove the goods from its warehouse.
- 20 On 2 October 1998, Unilever contested Central Food's position. On the ground that, under the procedure for notification and examination of draft technical regulations established by Directive 83/189, the Commission had called on the Italian Republic not to legislate in relation to the labelling of oil until 5 May 1999 and referring to the CIA Security judgment, Unilever contended that the contested Law should not be applied. Asserting that the olive oil supplied was therefore wholly in conformity with the Italian legislation in force, it called on Central Food to accept the consignment and to pay for it.
- 21 Central Food refused to do so and on 21 October 1998 Unilever commenced proceedings before the Pretore di Milano for an order requiring Central Food to pay a sum corresponding to the price of the consignment.
- 22 In those circumstances, the Pretore di Milano decided to stay proceedings pending a preliminary ruling from the Court of justice on the following question:

May a national provision which has been promulgated and entered into force in the Member State (Law No 313 of 3 August 1998) be disapplied by a national court called upon to issue an order for payment in relation to the supply of extra virgin olive oil labelled in a manner not in accordance with

the provisions of the aforementioned national provision, in circumstances where, following the notification and the subsequent examination of a draft national Law concerning the labelling of extra virgin olive oil, virgin olive oil and olive oil, the European Commission, on the basis of Article 9(3) of Council Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations, formally requested the notifying State not to legislate during a prescribed period (until [5 May] 1999) in relation to the marketing rules for olive oil, pending adoption of a Community regulation on the matter at issue?

The effects of failure to comply with Article 9 of Directive 83/189

- 31 The question from the national court seeks, in essence, to ascertain whether a national court is required, in civil proceedings between individuals concerning contractual rights and obligations, to refuse to apply a national technical regulation which was adopted during a period of postponement of adoption prescribed by Article 9 of Directive 83/189.
- 32 Unilever contends that the Court has confirmed, in its judgment in *CIA Security*, that a national technical regulation adopted in breach of the obligations imposed by Articles 8 and 9 of Directive 83/189 cannot in any circumstances be relied on against individuals.
- 33 The Commission submits, first, that in *CIA Security*, which concerned a dispute between individuals, the Court held that technical regulations adopted in breach of Directive 83/189 were inapplicable and that it follows from that judgment that such inapplicability may be invoked in a dispute between individuals. It adds that there is no reason why that consequence of non-compliance with Directive 83/189 should not also apply in proceedings for summary judgment such as the main proceedings in this case.
- 34 Second, the Commission contends, such inapplicability is mandatory both in the case of breach of the obligation of notification laid down in Article 8 of Directive 83/189 and in that of failure to observe the postponement periods prescribed in Article 9 of that directive. The adoption of a national technical regulation after notification of the draft but during the standstill period, without taking account of the observations or other reactions of the Commission and the other Member States, entails the risk of creating new hindrances to intra-Community trade wholly identical to that resulting from the adoption of a technical regulation in breach of the obligation of notification.
- 35 The Italian Government, supported by the Danish Government, observes that, whilst the Court has indeed attributed direct effect to certain provisions of directives in that individuals, in the absence of proper transposition, may rely on such provisions as against the defaulting Member State, it has also held that to extend such a precedent to relationships between individuals would be tantamount to granting the Community power to impose, with immediate effect, obligations on individuals, even though it has no such competence except where it is empowered to adopt regulations. Thus, it is clear from settled case-law of the Court that a directive cannot of itself impose obligations on individuals and cannot therefore be relied on as such against them. No derogation from that principle can be based on the judgment in *CIA Security*. The operative part of that judgment discloses no intention to reverse the principle according to which a directive cannot have direct effect in horizontal relations between individuals.
- 36 The Italian, Danish and Netherlands Governments also submit, in particular, that in *CIA Security* the Court merely held that failure to observe the obligation of notification laid down in Article 8 of Directive 83/189 gives rise to the inapplicability of the technical regulation concerned. Article 9 of Directive 83/189 differs substantially from Article 8. It is the effectiveness of the preventive control provided for in Article 8 of Directive 83/189 which gave rise to that interpretation. By contrast, inapplicability in the event of breach of the obligation to postpone adoption pursuant to Article 9 would not contribute to the effectiveness of control by the Commission. In such circumstances, the fact that a Member State has not observed a procedural rule such as that laid down in Article 9

cannot have any effect other than that of allowing the Commission to bring infringement proceedings against the defaulting State.

- 37 In view of those submissions, it is appropriate, first, to consider whether the legal consequence of failure to fulfil the obligations imposed by Directive 83/189 is the same in relation both to the obligation to observe periods of postponement under Article 9 of Directive 83/189 and to the obligation of notification under Article 8 of Directive 83/189.
- 38 CIA Security related to a technical regulation which had not been notified in accordance with Article 8 of Directive 83/189. This explains why the operative part of that judgment confines itself to finding that technical regulations which have not been notified in accordance with that article are inapplicable.
- 39 However, in the statement of the grounds on which that finding was based, the Court also examined the obligations deriving from Article 9 of Directive 83/189. The Court's reasoning shows that, having regard to the objective of Directive 83/189 and to the wording of Article 9 thereof, those obligations must be treated in the same way as those deriving from Article 8 of the same directive.
- 40 Thus, in paragraph 40 of CIA Security, it was emphasised that Directive 83/189 is designed, by means of preventive control, to protect freedom of movement for goods, which is one of the foundations of the Community, and that, in order for such control to be effective, all draft technical regulations covered by the directive must be notified and, except in the case of those regulations whose urgency justifies an exception, their adoption or entry into force must be suspended during the periods laid down in Article 9.
- 41 Next, in paragraph 41 of that judgment, the Court held that notification and the period of postponement afford the Commission and the other Member States an opportunity to examine whether the draft regulations in question create obstacles to trade contrary to the EC Treaty or obstacles which were to be avoided through the adoption of common or harmonised measures and also to propose amendments to the national measures envisaged. That procedure also enables the Commission to propose or adopt Community rules regulating the matter dealt with by the envisaged measure.
- 42 In paragraph 50 of CIA Security the Court indicated that the aim of the directive was not simply to inform the Commission but is also, more generally, to eliminate or restrict obstacles to trade, to inform other States of technical regulations envisaged by a State, to give the Commission and the other Member States time to react and to propose amendments for lessening restrictions to the free movement of goods arising from the envisaged measure and to afford the Commission time to propose a harmonising directive.
- 43 The Court went on to hold that the wording of Articles 8 and 9 of Directive 83/189 was clear in that they provide a procedure for Community control of draft national regulations, the date of their entry into force being subject to the Commission's agreement or lack of opposition.
- 44 Although, in paragraph 48 of CIA Security, after reiterating that the aim of Directive 83/189 was to protect freedom of movement for goods by means of preventive control and that the obligation to notify was essential for achieving such Community control, the Court found that the effectiveness of such control would be that much greater if the directive were interpreted as meaning that breach of the obligation to notify constituted a substantial procedural defect such as to render the technical regulations in question inapplicable to individuals, it follows from the considerations set out in paragraphs 40 to 43 of this judgment that breach of the obligations of postponement of adoption set out in Article 9 of Directive 83/189 also constitutes a substantial procedural defect such as to render technical regulations inapplicable.

- 45 It is therefore necessary to consider, secondly, whether the inapplicability of technical regulations adopted in breach of Article 9 of Directive 83/189 can be invoked in civil proceedings between private individuals concerning contractual rights and obligations.
- 46 First, in civil proceedings of that nature, application of technical regulations adopted in breach of Article 9 of Directive 83/189 may have the effect of hindering the use or marketing of a product which does not conform to those regulations.
- 47 That is the case in the main proceedings, since application of the Italian rules is liable to hinder Unilever in marketing the extra virgin olive oil which it offers for sale.
- 48 Next, it must be borne in mind that, in *CIA Security*, the finding of inapplicability as a legal consequence of breach of the obligation of notification was made in response to a request for a preliminary ruling arising from proceedings between competing undertakings based on national provisions prohibiting unfair trading.
- 49 Thus, it follows from the case-law of the Court that the inapplicability of a technical regulation which has not been notified in accordance with Article 8 of Directive 83/189 can be invoked in proceedings between individuals for the reasons set out in paragraphs 40 to 43 of this judgment. The same applies to non-compliance with the obligations laid down by Article 9 of the same directive, and there is no reason, in that connection, to treat disputes between individuals relating to unfair competition, as in the *CIA Security* case, differently from disputes between individuals concerning contractual rights and obligations, as in the main proceedings.
- 50 Whilst it is true, as observed by the Italian and Danish Governments, that a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual (see *Case C-91/92 Faccini Dori* [1994] ECR I-3325, paragraph 20), that case-law does not apply where non-compliance with Article 8 or Article 9 of Directive 83/189, which constitutes a substantial procedural defect, renders a technical regulation adopted in breach of either of those articles inapplicable.
- 51 In such circumstances, and unlike the case of non-transposition of directives with which the case-law cited by those two Governments is concerned, Directive 83/189 does not in any way define the substantive scope of the legal rule on the basis of which the national court must decide the case before it. It creates neither rights nor obligations for individuals.
- 52 In view of all the foregoing considerations, the answer to the question submitted must be that a national court is required, in civil proceedings between individuals concerning contractual rights and obligations, to refuse to apply a national technical regulation which was adopted during a period of postponement of adoption prescribed in Article 9 of Directive 83/189.

[...]