

# Colophon

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- Regarding EC Treaty Articles 73b paragraph 1(a), 1(b) and paragraph 3 (currently EC Treaty Articles 56 paragraph 1, 58 paragraph 1(a) and (b) and paragraph 3).



# 1. From the president's desk

The Association has got off to an excellent start in 2003. On 17 January, the internal databank of national court decisions in the area of Community law (DECNAT) of the European Court of Justice was put onto the Association website in an easily accessible form. Association members and other interested parties can now consult the databank online.

Let me thank the European Court of Justice for giving us the data. Let me also thank Yves Kreins and his colleagues at the Belgian Conseil d'Etat for ensuring that it is easily accessible.

Making the data publicly accessible is an important step forward. The databank can contribute to the quality of our work in both our capacities: as advisers to legislators transposing European legislation into national law and as administrative courts interpreting and applying Community law. It can also play an invaluable part in promoting the development of the law and legal uniformity within the EU. And it can greatly assist courts in the new EU Member States, which will have to start applying Community law next year.

All databanks need updating and maintaining - tasks usually performed by a databank manager. But in this case, we ourselves will have to update and maintain it. After all, it is we who make judicial legislation in this area. If we recognise its significance to the quality of our work, the promotion of legal uniformity, and the development of the law throughout the EU, we must contribute to keeping it up to date.

On 14 and 15 November 2002, the heads of the research and documentation departments of our member organisations met in the hospitable surroundings of the Academy of European Law in Trier. The meeting, presided over by Laurent Olléon of the French Conseil d'Etat, yielded a promising initiative to launch an information network for updating the databank.

The information network will consist of two parts.

The first - publicly accessible - part will contain the full texts of recommendations to governments and judicial decisions in the area of Community law that are deemed relevant to Association members and other interested parties. In each case, the relevant documentation department will email the text (with a short subject heading) to the Association, which will put it into the databank. A few weeks later, the documentation department will send a summary in English or

French, which the Association will also put into the databank and may publish in the Newsletter or Yearbook.

The second part of the network will be accessible only to the research and documentation departments, enabling them to consult each other for information and advice on problems. The second part should thus develop into a high-speed route for exchanging information and views on interpretations of Community law.

On 22 November 2002, at a meeting in The Hague, the Association Board welcomed this initiative enthusiastically and instructed Yves Kreins, the Secretary General, to press for the development of the information network. It also asked him to report on progress made at the Board meeting and the Association's General Assembly to be held in The Hague on 15-16 June 2003. In addition, later in the year, the Board plans to call a meeting of the heads of member research and documentation departments to focus on the development of the information network.

It goes without saying that developing the information network will be technically complicated. But the main ingredient for success will be the effort that we, the Association members, are willing to put into it. The research and documentation departments are enthusiastic about their own role. But they need resources and encouragement - which will require the cooperation and attention of the presidents of each member organisation.

At its meeting of 22 November 2002, the Board also adopted the Association's budget for 2004 and decided on the preparations for the 2004 colloquium. In mid-February, the rapporteurs will receive a discussion document on the many aspects of "the quality of European legislation and its implementation and application in the national legal order". The discussion document will also appear in an extra Newsletter shortly afterwards, enabling others to respond and to pass on their views and relevant experiences to the general rapporteur or their national rapporteur. On 24 and 25 March 2003, the rapporteurs will meet in Trier to prepare for the colloquium. The preparations will thus be as broad as possible and take maximum advantage of the report.

Here too, our strength lies in cooperation.

Herman Tjeenk Willink

## 2. Information from the Association

### 2.a Dates of meeting the General Assembly and the Colloquium 2004

The Board of the Association of Councils of State and Supreme Administrative Jurisdictions of the European Union has set the following dates for the Association's meetings in 2003 and 2004.

- On Monday 16 June 2003, the General Assembly will be held in The Hague. On the afternoon of 15 June 2003 the Board will meet.
- In 2004, the General Assembly and the two-yearly Colloquium will take place on Monday 14 and Tuesday 15 June, respectively.

### 2.b Conclusions of the meeting of the study and documentation services

The study and documentation services of the twelve institutions represented at the Trier symposium<sup>1</sup> of 14 and 15 November 2002 devoted the first part of their exchanges to describing their respective activities. The diversity of these activities arises from the fact that on the one hand, these institutions do not all fulfil the same functions, and on the other hand, the services do not have the same means at their disposal.

#### ***Creation of a database of national court decisions***

A significant lack of information, common to all the services, came to light very early on, as to the decisions taken by the institutions of other member States on subjects of common interest. This is the case, in particular, with the application of Community law: today it is very difficult, not to say impossible, to have access to national cases which interpret Community law without referral to the Court of Justice, or which apply it after the Court has rendered a decision on a preliminary issue. It is also the case with the application by the Councils of State and supreme administrative jurisdictions of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

In opting for a 'step by step' approach, the study and documentation services decided to devote themselves initially to the first of these subjects. The Court of Justice of the European Communities has already developed a database of national case law in which each decision shown is preceded by a short summary giving the principal points decided. The Court has agreed to make the information contained in this database available to the Association of Councils of State and Supreme Administrative Jurisdictions of the European Union so

that a database can be created which is accessible to the public.

The study and documentation services decided to keep this database supplied in the following way. In the days following the handing down of a decision which deals with a novel and interesting issue relating to the application of Community law, they will send to the Association, in the body of an electronic message (HTML), the full text of that decision, in the language of the country, preceded by two or three lines in French and English indicating the provisions of Community law being applied (Treaty articles, Directives, Regulations, etc.) and the sector of activity to which the decision relates. The Association will promptly put this short summary, accompanied by the full text of the decision, on line on its Internet site. In the next phase, the documentation and study services will send the Association a longer summary, still in French and English, which will be used when putting the decision into the database of national decisions. This summary will also be put at the disposal of the editors of the Newsletter and to the European Court of Justice.

In the event that the implementation of this resolution fulfils its objectives, as will be demonstrated by an evaluation which will take place in one year's time, the documentation and study services have in mind to extend its scope to include national decisions concerning the application of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

#### ***Creation of a network of documentation and study services***

Independently of the setting up of the database of national decisions, the documentation and study services decided to establish a network relying essentially on electronic messaging, which would consist of one correspondent for each documentation and study service.

This network could be used, initially, by the services of those institutions which have a consultative function, in

<sup>1</sup> Council of State of Belgium, Council of State of the Netherlands, Council of State of France, Council of State of Greece, Council of State of Luxembourg, Bundesverwaltungsgericht of Germany, Verwaltungsgerichtshof of Austria, Administrative Chamber of Spain, Supreme Administrative Court of Finland, Supremo Tribunal Administrativo of Portugal, Administrative Court of Luxembourg, Court of Justice of the European Communities.

order to make information commonly available, to the extent that each institution's confidentiality obligations allow.

Secondly, the network could be used by the documentation and study services to obtain information, not always easily accessible at present, from their colleagues about comparative law which might be helpful in dealing with certain cases.

Finally, this network could serve as a discussion forum on any subject of common interest to the documentation and study services.

## **2.c Survey of the activities of the Association in 2002**

### ***Development of the Internet site***

The Association's Internet site is currently hosted on the site of the Council of State of Belgium: [www.raadvst-consetat.be](http://www.raadvst-consetat.be).

The Internet site was developed to give access:

- To the data bank of national decisions (see below)
- To all the reports of the 18 colloquia, which have been held in the past, which involves scanning and rereading about 10,000 pages. The scanning and rereading work is nearing its conclusion: the reports of the last 14 colloquia are already on the site and those of the first 4 will be there at the beginning of 2003.
- To the 'Reflets' booklet which is a publication of the Court of Justice of the European Communities designed to provide rapid information in synthetic form about new developments in Community law;
- To the information bulletin (see below);
- To the sites of almost all the member institutions.

### ***Data Bank***

The data bank contains reference to and commentaries on some 17,000 national decisions concerning the application of Community law.

The member institutions of the Association have sent the most interesting decisions and opinions concerning Community law to the Secretary General of the Association. He has passed them on to:

- the research and documentation service of the Court of Justice of the European Communities, which has incorporated them in its DEC-NAT data bank and, to the extent possible, in the 'Reflets' journal;
- the Council of State of The Netherlands, which publishes the 'Newsletter' information bulletin (see below), in which the summaries of national decisions and opinions are also published.

Following an agreement between the Court of Justice of the European Communities and the Association, the data held in the DEC-NAT database are made available to the Association, which has collected them in a data bank. This was put in place in 2002 and will be accessible via the Association's site from the first months of 2003.

### **Publications**

#### ***Publication of a collection of case law***

The Association envisaged the publication of a collection, with commentaries, of the most important decisions of the member jurisdictions. They would be published in English and French. The selection of the decisions and the commentaries would be done under the authority of an editorial board chaired by Lord Schiemann and composed of Professors J. Schwarze (Germany), E. Hirsch Ballin (The Netherlands), J. Massot (France) and G. Paleologo (Italy). The editorial board decided to choose as the theme of the first collection "The protection of the environment".

However, owing to various hitches it has not yet been possible to bring this plan to fruition.

#### ***Newsletter***

This booklet is published in French and in English by the Presidency of the Association, in other words the Council of State of The Netherlands. It is designed to intensify contacts between the member institutions, by keeping them up to date with important events or activities concerning each of them. It also contains a survey of the most recent decisions or opinions likely to be of interest to all members.

The information bulletin was published twice in 2002. It was printed, but was also accessible via the Internet sites of the Association and of the Council of State of the Netherlands.

#### ***Vade-mecum***

This booklet, in English and French, summarises the composition, history and activities of the Association. It also contains the statutes, and the members' exact contact details.

The Vade-mecum was not published in 2002, but preparation has begun for the 2003 Vade-mecum.

#### **Colloquia**

The work of the 18th Colloquium of the Association was opened on 20 May 2002 in Helsinki by the President of the Republic of Finland and continued on 21 May 2002. The theme of the colloquium was

“Referral of preliminary issues to the Court of Justice of the European Communities”. It brought together 70 participants. All the member institutions were represented, as well as the corresponding institutions in Cyprus, Estonia, Hungary, Poland, and Slovenia, who had also been invited.

The national reports and the general report can be consulted on the Association’s Internet site. They have already formed the basis of a conference of administrative judges in Poland.

The 19th Colloquium of the Association will be held on 14 and 15 June 2004 in The Hague. It will be devoted to “The legal quality of Community law, its transposition into and application in national law”. In this regard, the Association is planning a collaboration with the Commission, the Parliament and the Council of Ministers of the European Union, as well as with the Intergovernmental Conference (IGC) 2004.

It has also been decided that a scientific collaborator who has already begun work will assist the Rapporteur General, Mr. Hirsch Ballin, Councillor of State of The Netherlands.

#### **Seminars in Trier**

The Association decided to organise meetings bringing together a limited number of participants on more specific topics. These meetings are planned to take place at the Academy of European Law of Trier (ERA). A first meeting was held on 14 and 15 November 2002. It brought together the representatives of most of the documentation and study services of the member

institutions. The first part of the exchanges was devoted to finding out about the respective activities of the different institutions. The object of the second part of the meeting was to look into ways of improving the Association’s data bank (see above). Independently of this aspect, the suggestion was made to put in place a network of study and documentation services. This idea will be studied in depth by the Secretariat General and the board of directors of the Association.

A second meeting is planned for 24 and 25 March 2003. It is intended to prepare for the 2004 Colloquium and will bring together the Rapporteur General and the national rapporteurs.

#### **Meetings of the Board of Directors and the General Assembly**

The Board of Directors met on 19 May 2002 in Helsinki and on 22 November 2002 in The Hague.

The General Assembly was held on 21 May 2002 in Helsinki.

Y. Kreins  
Secretary General

### 3. Information from the members

- Mr Eckart Hien had been appointed president of the Bundesverwaltungsgericht in Leipzig as from 1 October 2002. Mr Hien's successor as vice-president of the Bundesverwaltungsgericht is Ms Marion Eckertz- Höfer.
- The new address of the Council of State of Greece is:

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## 4. Advisory opinions regarding Community Law

### Greece

#### Advisory opinion of the Council of State of Greece no. 194/2000

*Bringing into conformity of Greek legislation with Council Directive No. 89/48/EEC of 21 December 1988 concerning a general system of recognition of higher education diplomas - Organisation of universities in conformity with the Greek Constitution - Interpretation of a Directive in conformity with treaties.*

On the occasion of the preparation of a draft Presidential decree for the adaptation of Greek legislation in order to transpose Council Directive No. 89/48/EEC of 21 December 1988 concerning a general system of recognition of higher education diplomas which approves professional training of a minimum of three years, the Council of State recalled its jurisprudence, according to which the provisions of Article 16 of the Constitution should not be circumvented. According to that Article, higher education (at university level) in Greece can only be carried on by establishments with civil personality under public law, which are fully autonomous and which act under the supervision of the State. Thus, it is forbidden for individuals to set up higher education establishments. According to the jurisprudence on the prohibition on circumventing the constitutional provisions referred to, the competent organism for recognising higher education diplomas of other Member states is not authorised to take into account the length of time a person has spent studying in an establishment or annex of a foreign university functioning in Greece in the form of a private school (*frontisirio*) or of a centre for free studies (*kentro eleftheron spoudon*). This jurisprudence rests on EC Article 126 (subsequently 149) in maintaining that the teaching content and the organisation of the educational system belongs to the competence of Member states, and that, as a result, the interpretation given by the Council of State is not contrary to the treaties in the light of which the provisions of Directive No. 89/48/EEC must be interpreted. In the light of this jurisprudence, the consultative section of the Council of State observed that, when the examination was carried out by the organism competent to determine whether the conditions for recognition of higher education diplomas were fulfilled, that body was bound to act in conformity with the jurisprudence of the Council of State cited above.

#### Advisory opinion of the Council of State of Greece, no. 574/2001

*Free movement of workers - Community Law notion of "Public administration" in EC Article 49 § 4 (subsequently 39 § 4)*

After recalling the jurisprudence of the CJEC concerning the Community notion of "public administration" (EC Art. 39 § 4) according to which the principle of free circulation of persons is not applicable to employment in public administration, the Council of State referred to Article 4§4 of the Constitution, according to which only Greek citizens are eligible for any public office, with the exception of certain cases provided for in special laws. In the light of the aforesaid article, and taking account of the operative part of EC Article 49 § 4 (subsequently 39 § 4), Law No. 2413/1996 was adopted, which provided, as a general rule, that nationals of other Member states of the European Union could have access to employment in a public function (public services, public establishments, public organisms or enterprises), on the same conditions as those laid down for Greek nationals, with the exception of the requirement of Greek nationality, provided that the tasks of the employment did not imply participation, direct or indirect, in the exercise of public power and the exercise of functions the object of which is the safeguard of the general interests of the state or of other public bodies.

In this context, the Council of State in its consultative function considered that the prohibition provided for in Article 1 of the draft decree on appointing nationals of other Member states of the European Union to positions in the Ministry of Public Security, and in particular to the public functions as police, border guards, civilian personnel of the staff of the Chief of Police, fire-fighters or the personnel of the management of the rural police, is in conformity with community law. In fact, these functions involve tasks which imply participation, direct or indirect, in the exercise of public power and are aimed at safeguarding public order, and thus, by their nature, according to the provisions of EC Article 49 § 4 (subsequently 39 § 4) and of Article 1 § 1 of Law No. 2431/1996, justify the prohibition of access to employment in the public administration by the nationals of other Member states of the European Union.

**Luxembourg**  
**Advisory opinion of the Council of State of Luxembourg, of 14 July 2000, Directive no. 96/61/EC**

*Relating to the draft Grand Ducal regulation in application of Council Directive 96/61/EC of 24 September 1996 concerning the integrated prevention and reduction of pollution*

The draft Grand Ducal regulation in application of Council Directive 96/61/EC of 24 September 1996 concerning the integrated prevention and reduction of pollution, as submitted to the Council of State for its opinion, and which was intended to transpose the Directive in question into Luxembourg law, raised certain problems as to the method of transposition of a Community Directive into national law.

The genesis of the draft went back to a position taken by the European Commission, criticising the fact that the said Directive had been incompletely transposed by the Law of 10 June 1999 on classified establishments.

The first finding of the Council of State was that, despite the position taken by the European Commission, the transposition into national law had been complete because the text of the national transposition instrument, in this case the Law of 10 June 1999 on classified establishments, while it did not pick up word for word all the provisions of the Directive, nonetheless respected the spirit and philosophy of the Directive, and therefore achieved the result the Community had in view. On that subject, it recalled that Article 189 of the Treaty of Rome setting up the European Community provides that a Directive binds the Member States as to the result to be achieved. The instrument of transposition must therefore ensure that this "Community result" was fully achieved. Furthermore, it is obligatory to transpose a Directive in its entirety into national law.

While noting that, even if the Community legislator leaves Member State to choose the nature of the legal instrument of transposition, the Council of State however held, in the second place, that the margin of freedom enjoyed by the national authority in choosing the legal means of transposition is in fact very limited, and that because of this it would be desirable, if there was incomplete transposition, for the Luxembourg legislators to put in place one integral transposition of Directive 96/61/EC by adapting the Law of 10 June 1999 concerning classified establishments and not by a multiplicity of different kinds of national instruments of transposition. This procedure would allow the principle

of legal certainty to be guaranteed, and in particular that of the coherence of legal instruments, respecting the hierarchy of norms and the principle of parallelism of forms.

Finally, the Council of State repeated its wish to see the different national laws, which transpose Directives regulating the prevention and reduction of pollution codified in a single text.

**Advisory opinion of the Council of State of Luxembourg, of 12 December 2000, Council regulation (EC) no. 718/1999**

*Relating to the draft law in execution of Council Regulation (EC) No. 718/1999 concerning a policy on the capacity of Community fleets in internal navigation in order to promote transport by navigable waterways. "Self-executing" character of Community Regulations; competence to execute Regulations; measures necessary for the execution of Regulations (penal sanctions).*

The draft law in execution of Council Regulation (EC) No. 718/1999 concerning a policy on the capacity of Community fleets in internal navigation in order to promote transport by navigable waterways, submitted for the opinion of the Council of State, was intended to "put into effect" in Luxembourg law Regulation (EC) No. 718/1999. The reception of this Community Regulation into national law however gave rise to some difficulties with regard to Community law.

In the first place, the Council of State recalled the self-executing character of a Community Regulation which by its nature is directly applicable as to all its elements, and whose provisions thus do not require any transposition into internal law, by contrast with those of a Directive which bind Member states only as to the result to be achieved. As a consequence, the Council of State considered that it was useless to enact, in the instrument of internal "execution", provisions relating to the field of application of the Community Regulation. To proceed in this way amounted in practice to ignoring the self-executing character of a Community Regulation.

In second place, the Council of State was faced with the problem of deciding who was responsible at national level for the execution of the provisions of the Community Regulation in question. In fact, even if the provisions of a Community Regulation are directly applicable in the internal legal order, their practical implementation sometimes calls for national measures of execution. In this case, the intervention of the Luxembourg legislator was required in order to

designate the competent authority for the appropriate execution of the provisions of the Regulation.

The Council of State however opposed the granting of these powers of execution to a State civil servant and not to the Grand Duke who, following the constant jurisprudence of the Luxembourg Constitutional Court, alone is competent for the execution of laws. It started from the general premise that a Community Regulation, as a norm which is general in character, obligatory and impersonal, is equivalent to a law. Community regulation (EC) No. 718/1999, being in essence such a norm, could not therefore be “executed” by anyone other than the Grand Duke.

Finally, the Council of State criticised the point of view of the authors of the draft who considered that the implementation of Community Regulation (EC) No. 718/1999 would not require penal sanctions. In so doing, it based itself on Article 9 of the said Regulation which provides that Member states should decide on the measures necessary for the Regulation’s execution, which measures should include, amongst other things, appropriate sanctions in case of infringement of its provisions. However, the Council of State did not amend the text in question so as to introduce such sanctions, on the grounds that acts which might constitute infringements could be adequately sanctioned by a law in force which dealt with the same subject matter.

## 5. Jurisprudence

### 5.a Denmark

#### **Decision of the Supreme Court of Denmark of 4 May 2001, no. 8/2000**

*Regarding articles 7 and 244 of EC Customs Code*

The regional Danish custom authorities levied execution in the property of a Danish forwarding agency in order to recover agricultural import duties and import duties levied for a number of consignments of butter bound for Italy. The consignments were never presented at the office of destination. The forwarding agency lodged a complaint to the local Bailiff Court, arguing that they could prove that the offences or irregularities were committed in Italy and therefore, in accordance with Article 378 of the Commission Regulation 2454/93, the Danish custom authorities were not competent to pursue the claim.

The Bailiff's Court's main function is enforcement of judgments, and the rules of procedure of the court envisage summary proceedings. Thus, it may refuse the production of evidence which should be given during ordinary legal proceedings owing to its volume or nature or for other reasons, cf. Section 501 of the Administration of Justice Act (the Act). In the present case the Bailiff's Court reversed the execution order because of the wide range of evidence required for the adjudication of the debtor's objections.

The High Court and the Supreme Court upheld the Bailiff's Court's decision. With regard to the relation between Section 501 of the Act and Articles 7 and 244 of the EC Customs Code, the Supreme Court referred to the established ECJ case law on the relation between Community law and national procedural law. The Court stated that the EC Customs Code, including Articles 7 and 244, is not aiming at regulating the domestic courts' competence or functioning. Furthermore, the Supreme Court found that Section 501 did not render it virtually impossible or excessively difficult to exercise the Community law obligation in question, as the provision, which is applied without discrimination, is justified by, inter alia, the principles of legal certainty and proper conduct of procedure, cf. C-430/93 and C-431/93, van Schijndel and van Veen, ECR I -4705 and C-312/93, Peterbroeck, ECR I-4599

### 5.b Germany

#### **Decisions of the Bundesverwaltungsgericht Decision of the Bundesverwaltungsgericht of 27 January 2000 - BverwG 2.99 (Directive 92/43/EEC)**

*27 January 2000 - BverwG C 2.99: The decision deals with the applicability of the Council Directive 92/43/EEC of May 21, 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora in a case where Germany failed to implement the Directive in due course into national law.*

The Bundesverwaltungsgericht held that in this situation the German Federation and the German Länder are not allowed to make or to realise plans, which were not in line with the Directive. Therefore the construction of a road leading through an area susceptible to be classed according to Art. 34 of the Directive, is only admissible if the exemptions provided for in Art. 6 are fulfilled. The Bundesverwaltungsgericht accepted the reasoning that another alignment did not present a valid alternative, if the costs involved in its realisation are out of proportion to the benefits for the natural environment. It rejected the argument that the construction of the road would reduce the danger of human injuries caused by road accidents. It stated that a mere chance of such a reduction would not be sufficient, and it held, that the effect of protection of human life must be considerable. The Bundesverwaltungsgericht has sent back the case to the lower court to make the appropriate investigations.

#### **Decision of the Bundesverwaltungsgericht of 19 September 2000 - BverwG 1 C 13.00 (art. 6 Decision no. 1/80, Association Council EC -Turkey)**

The plaintiff, a young Turkish National, had been granted a permission to stay in Germany for the same period as his mother, who worked as a teacher in a kindergarten, was granted such permission. After the expiration of his mother's permission his application for renewal of his own permission was refused. The Bundesverwaltungsgericht decided that he was entitled to that permission, because he was a worker (employee) in the sense of Art. 6 of the Decision No 1/80 of the Association Council EC-Turkey, notwithstanding the fact that his job was done in the narrow frame of an apprenticeship. Furthermore, the decision explains that the permission of stay limited in time was sufficient to meet the requirements of the said Association Council Decision.

**Decision of the Bundesverwaltungsgericht of 27 March 2000 - BverwG 7 C 25.98 ( Council Directive 90/313/EEC)**

The plaintiff, who wanted to establish a list of all permissions given by the authorities with regard to the right to discharge waste water into the North Sea and the adjacent rivers, was charged by the competent with fees for information which he asked and received from the competent Board for Nature and Environment.

The plaintiff invoked that the information should be given free of charge.

The Bundesverwaltungsgericht ruled that the national statute empowering the Board to raise the fees was in accordance with the provisions of Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment.

**Decision of the Bundesverwaltungsgericht of 27 October 2000 (Council Directive 85/337/EEC)**

The subject of the decision was the construction of a new highway. The claimant is a farmer who has been compelled to cede a certain amount of land owned or leased by him.

The Bundesverwaltungsgericht held that during the planning the requirements stated in national statutory law and in the Council Directive 85/337/EEC of 27 June 1985 of the assessment of the effects of certain public and private projects to the environment had been met. It explained the meaning of the assessment procedure and set out that an area fulfilling the criteria laid down in annex III to the Directive may be used for circulation purposes, provided an assessment of the impact on the relevant faunal population has been correctly made. The Bundesverwaltungsgericht, however, declared unlawful the authorisation given, due to some procedural defaults in the application of national statutory law.

**Decision of the Bundesverwaltungsgericht of 9 May 2001 - BverwG 3 C 2.01 (Regulation 1999)**

The decision deals with the question whether or not the partial removing of vines and their replacement by fruit-trees does affect the plaintiff's right to use his land in the future for viticulture again.

The Bundesverwaltungsgericht decided that the term "clearing" in the sense of the provisions of Council Regulation (EC) No 1493/1999 of 17 May 1999 on the common organisation of the market in wine implied that all vines are rooted out, so that the term was not applicable in the case of the plaintiff and accordingly did not reduce his right of viticulture.

**Decision of the Bundesverwaltungsgericht of 6 December 2001 - BverwG 3 C 25.01 (Decision no. 3/80 of the EEC-Turkey)**

The plaintiff, a recognized political refugee of Turkish origin, applied for certain social benefits which he was denied on the ground that he was not an employee and that he did not enter Germany for working purposes. The Bundesverwaltungsgericht held that he was nevertheless entitled to the social benefits because the Decision no 3/80 of the EEC-Turkey Association Council on the application of the social security schemes of the member states of the European Communities to Turkish workers and members of their families (Official Journal C 110, 25/04/1983 p. 0001) does not allow any discriminating treatment of the persons protected by the Decision. The decision of the Bundesverwaltungsgericht sets out in detail why the Decision was fully applicable to the plaintiff.

**5.c Spain**

**Decisions of the Tribunal Supremo of Spain:  
Decision of the Tribunal Supremo of 15 December 1997, no. 176/1998**

*Regarding article 22 of EC Directive 97/67 of 15 December 1997 of the European Parliament and Council- separation between the functions of regulation of the postal services and the operation of those services.*

The Tribunal Supremo annulled Article 16.1 of Royal Decree 176/1998 of 16 February 1998, which adopted the Law on the Public Postal Enterprise, because that article infringed the rule of Community law in force on the subject, in providing that the Minister of Public Works should be named as chairman of the said company, and, by delegation, as Secretary General of Communications.

The Secretary General of Communities in Spain has the powers of a national regulatory authority, and the Public Postal Enterprise is the operator with the capacity to provide a universal postal service, which is the exclusive provider of certain services.

Community law - in the opinion of the Tribunal Supremo - requires that the national regulatory authorities for the postal sector designated by Member States should be legally different from the operators for postal services, in order to preserve the independence necessary for the proper functioning of these services, in such a way that there is a genuine separation between the regulatory function on the one hand, and the opera-

tion of postal services on the other. This Community requirement was infringed.

**Decision of the Tribunal Supremo of 9 June 2000, no. 533/1994**

*Regarding appeal 533/1994, EEC Council Regulation 4064/1989- challenge posed by a merger of broadcasting companies to the political pluralism essential for the proper functioning of democratic institutions.*

The Tribunal Supremo annulled the decision of the Council of Ministers dated 20 May 1994 which authorised the merger of two broadcasting companies, a merger which consisted of the two companies surrendering their management to third company.

The said merger infringed Additional Provision No. 6 of the Law on Telecommunications Development and Article 20 of the Spanish Constitution, which Article is relevant even if from the point of view of a stricto sensu definition, none of the legal situations provided for in the above-cited Provision appears exactly to fit the facts, given that the title to the concessions granted for the operation of sound broadcasting services had not been modified, and that no one had become a majority shareholder in more than one concessionaire company.

The elements on which to base a judgement whether there is a merger are: Council Regulation EEC 4064/1989 of 21 December, on the subject of the control of operations in mergers of businesses, and the decisions taken by the Commission.

The Tribunal Supremo considered that, "from the point of view of its essential purpose, its spirit or aim, or if one took account of the state of affairs that the legislator was seeking to avoid" a situation had arisen which was analogous or comparable to the one which the Law prohibited, when that decision had the result that, though a complex network of majority ownership by certain companies of the shares of the concessionaire companies, these latter remained under the complete control of another company which, in its turn, held a majority holding of 80 % of the shares of the concessionaire company.

The Tribunal Supremo concluded that the operations intended by this procedure should not be limited in aim only to persevering the economic order, but must also take account - in conformity with Article 20 of the Spanish Constitution, and as a matter of priority - of the preservation of the political order and the fundamental principles of a democratic society, given that, while in other fields the principles of the economic system do

not necessarily require there to be several operators, because what is illegal is the abuse of the dominant position in a given market, in the sector in question there is a risk that political pluralism will be put at risk by the decrease in the number of operators, thus threatening the very essence of any democratic state. Pluralism is essential to the process of forming public opinion and, as a result, to the proper functioning of democratic institutions.

**Decision of the Tribunal Supremo of 16 July 2001 (appeal no 928/1996)**

*Directives of the Council 90/425/CEE and 92/65/CEE and internal legislation on the prevention of the spread of epidemic animal diseases*

The Tribunal Supremo decided to allow the appeal (casación) brought before it, overrode the contested decision of the Tribunal Superior of Madrid and confirmed the resolutions of the Ministry for Agriculture, Food and Fisheries, resolutions that denied the requested authorisation to import 2000 exotic birds coming from Hong Kong, due to animal health reasons (occurrence of Newcastle disease in Hong Kong).

The Tribunal Supremo did not agree with the substance of the contested decision of the Tribunal Superior, according to which the provisions on health control, contained in the Royal Decree 1316/1992, which transposed the Directives 90/425/EEC and 92/65/EEC in Spanish law, were measures for the control of imported animals in the place of destination, which, as they are applicable to animals coming from third countries, would mean that there is no requirement of authorisation prior to importation, and accordingly that it would not be possible to reject an authorisation requested prior to their importation.

In the opinion of the Tribunal Supremo this interpretation would mean that the prohibition established in accordance with article 94 of the Law on Regulations on Epizootics of 4 February 1995 would not be effective, because this prohibition - meant as a measure against the threat of an epidemic disease - was established as a stricter and more general prevention measure than a check of the animals state of health on the border, which can be insufficient or less efficient in those cases.

In the case examined, the decision of the Administration denying the request for importation, does not make the importation of animals subject to a prior requirement of authorisation, but makes effective a previous prohibition - of the entry of birds coming from countries effected by

Newcastle disease - adopted as a measure of administrative police aimed at restricting of preventing, prior to importation, the exercise of certain citizens rights.

### **Decision of the Tribunal Supremo of 24 December 2001 (appeal no. 1178/1996)**

*EEC Regulations 3365/1987; force majeure in European and internal law*

The Tribunal Supremo decided to allow the appeal (casación) and override the decisions of the Directorate General for Agricultural Produce and of the Ministry for Agriculture Food and Fisheries rejecting the release of the guarantee advanced for early restitution, as a consequence of the penalty imposed by article 48, paragraph 2(a) of EEC Regulation 3365/1987, because the operator submitted the transportation document after the expiration of the established 12 month period, without mentioning the cause of the delay and had not applied for the extension provided for in the EC regulations.

The Tribunal Supremo was of the opinion that the Tribunal Superior had not given a correct interpretation of the notion of force majeure in the Civil Code, and it declared this notion to be not distinct in substance from the concept applied by the Court of Justice of the European Communities (citing the decisions of that Court of 26 June 1980, 808/79 Fratelli Pardini Spa; 30 January 1974, 158/73 Kampffmeyer/ Einfuhr- and Vorratsstelle für Getreide und Futtermittel).

The notion of force majeure was defined as the abnormal circumstances, not arising from the operator, the consequences of which seem to be unavoidable or can only be avoided by means of excessive sacrifices, though all possible formalities have been conducted, and do not cover the commercial risks usually assumed by operators.

Force majeure - the Tribunal Supremo concludes- may be the destruction, due to unavoidable causes not arising from the operator, of a document that had to be submitted within a certain period of time, provided that this circumstance has been notified and an extension has been applied for, where appropriate.

### **5.d Greece**

#### **Decisions of the Council of State of Greece:**

##### **• Decision of the Council of State no. 1035/2000**

*Regulation - notion - complementary measures - prohibition on introduction at national level of sanctions not provided in the Regulation - Powers automatically*

*scrutinised - Regulation No. 918/183; Council Directive 83/183/EEC*

In this decision, in following the jurisprudence of the CJEC concerning the notion of a Regulation, the Council of State recalled that a Regulation is an instrument which is directly applicable in the internal legal order of Member states, that it prevails over contrary national provisions, such as provisions contained in laws and instruments of administrative regulation, and that it creates rights and obligations for individuals, not only against Member states but against individuals.

The nature of a Regulation does not allow its material provisions to be reproduced in a national legislative or administrative regulatory instrument. Any practice to the contrary would involve depriving the Regulation of its nature as a Community instrument and would run the risk of preventing the implementation of the mechanism for preliminary referral to the Court of questions relating to the validity or interpretation of the Regulation. Nonetheless, the direct applicability of the Regulation does not prevent the adoption of complementary national measures, in cases where the Community provision cannot lead to the modification of the Regulation, or to make its application dependent on supplementary conditions which are contrary to the content of the Regulation.

Consequently, the national provisions which have been put in place, for instance, for the purposes of Council Directive No. 83/183/EEC of 28 March 1983 concerning tax exemptions applicable to the definitive import of the personal belongings of individuals coming from a Member State, and of Council Regulation No. 918/83 of 28 March 1983 concerning the setting up of the Community regime of customs exemptions, cannot be applied, to the extent that they modify the provisions of Article 7 of Regulation No. 918/83 by providing for sanctions other than those provided for in that Article. That being so, the acts of the customs authorities who, by virtue of the aforesaid provisions, impose on the importation of individuals' personal belongings coming from a third country sanctions not provided for in Article 7 of the said Regulation (i.e., a fine in addition to the unpaid customs duties) are illegal and must be annulled. This power is automatically scrutinised because it concerns the validity of the national rule applied, which proved to be contrary to Community law.

• **Decision of the Council of State no. 2227/2000**

*Regarding article 59 of the EC Treaty - Freedom to provide services- Maritime transport - Nonconformity of Greek legislation which set up a discriminatory regime in favour of maritime transports carried on within Greece*

By virtue of the Greek legislation, a tax is levied, for the benefit of the local authorities with port installations, on every vehicle boarding a ship destined for ports in a country other than Greece. When this was appealed on the grounds that it was in excess of powers, with a view to the annulment of a local decree dealing with an increase in this tax, the Council of State ruled that the legislation in question was contrary to Article 59 of the EC Treaty.

In the terms of the decision of the Council of State, which recalled the jurisprudence of the CJEC on the subject, Article 59, in guaranteeing the freedom to provide services, ruled out the application of any national regulation which, without objective justification, impeded the possibility for a provider of services to effectively exercise this freedom; in the perspective of a single market and in order to realise the objectives thereof, the free provision of services likewise ruled out the application of any national regulation the effect of which was to make the provision of services between Member states more difficult than the provision of services which was purely internal to one Member state. The provision of maritime transport services between Member states must not be subject to more rigorous conditions than those which applied to similar services provided at the internal level. In consequence, the tax imposed under the Greek legislation, which put businesses carrying out maritime transport between a Greek port and a port in another Member State in a less favourable position than those businesses carrying on maritime transport between Greek ports, is discriminatory because, in terms of the cost of the services provided, it guarantees an advantage in favour of the internal Greek market and maritime transport taking place within the country. The national regulation is, for that reason, contrary to Article 59 of the EC Treaty by virtue of Article 28 of the Greek constitution, which enshrines the rule of primacy of Community law over national law.

## 6. Preliminary referrals

### 6.a Austria

#### **Order of the Verwaltungsgerichtshof of 25 July 2002, no. 2002/07/0002**

*EEC Council Regulation no. 259/93 of 1 February 1993, concerning the supervision and control of shipments of waste into and out of the European Community*  
*EEC Council Directive 75/442 of 15 July 1975, on waste*

The Verwaltungsgerichtshof submitted the following questions to the Court:

As to the question whether the shipment of waste constitutes an R1 recovery operation under Annex IIB or a D10 disposal operation under Annex IIA of EEC Directive 75/442, are the provisions of EEC Council Regulation no. 259/93 of 1 February 1993 concerning the supervision and control of shipments of waste into and out of the European Community, and of Council Directive 75/442/EEC of 15 July 1975, on waste, sufficiently clear and precise to enable the notifier to understand his rights and obligations without ambiguity, and take measures accordingly, or are the said provisions invalid for lack of certainty and because of the resulting impossibility of execution?

1) As to the characterisation of an operation involving waste as one of R1 recovery (principal utilisation as a combustible or other means of producing energy) under Annex IIB of Directive 75/442/EEC, is the only decisive question whether the waste is used entirely for the production (the utilisation) of energy and if the energy generated is itself in fact utilised?

2) Is the competent administrative authority at the place of destination permitted to base itself on the following criteria in deciding whether a planned operation constitutes a R1 recovery operation or a D10 disposal operation:

- minimalisation of danger
- consideration for primary material resources
- consideration for energy resources
- consideration for the place of discharge
- the ecological suitability of the operation
- the economic suitability of the operation

Is the wording of the sentences that follow precise?

Combustion accompanied by the utilisation of energy is not necessarily a recovery in the sense of an R1 operation. An R1 operation refers not only to the utilisation of the heat generated by combustion, but also requires utilisation as a combustible material. A combustible material is characterised by the fact that it corresponds

to certain criteria as to its calorific value, to the noxious substance content and the speed of deflagration, and by the fact that it presents a sufficient homogeneity in these characteristics to be able to control the combustion process. Waste which does not correspond to these criteria, in other words which does not have a high enough calorific value or whose composition is so variable that there are insufficient possibilities for control (in conventional combustion installations) or which have a content of noxious substances such that their combustion would generate unacceptable emissions, can of necessity not be the subject of a recovery operation in accordance with R1.

#### **Order of the Verwaltungsgerichtshof of 6 November 2002, no. 2001/16/0567, 0568**

*EEC Council Regulation no. 2913/92 of 12 October 1992, establishing the community customs code*

The Verwaltungsgerichtshof submitted the following question to the Court:

Does the expedient of §79 paragraph 2 of the Austrian law on complementary provisions for the execution of EC customs law (which creates a customs liability also on the part of the employer or the principal at the same moment that a customs liability arises for an employee or other agent of a contractor, where the latter, in carrying out the tasks of his employment or his mandate, was found to have acted illegally with regard to the safeguard of customs obligations), amount to an extension of the notion of a debtor which is not allowed in terms of Article 202 paragraph 3 of the Community customs code and is thus contrary to Community law?

#### **Order of the Verwaltungsgerichtshof of 27 August 2002, no. 99/14/0164**

*EC Treaty Articles 73b paragraph 1(a), 1(b) and paragraph 3 (currently EC Treaty Articles 56 paragraph 1, 58 paragraph 1(a) and (b) and paragraph 3)*

The Verwaltungsgerichtshof submitted the following questions to the Court:

1) Are Articles 73b paragraph 1 and 73d paragraph 1(a) and (b) and also paragraph 3, of the EC Treaty (currently Articles 56 paragraph 1, 58 paragraph 1(a) and (b) and paragraph 3 of the EC Treaty) in conflict with a rule such as that contained in §97 paragraphs 1 and 4, as well as in §37 paragraphs 1 and 4 of the Austrian law on income tax (EstG 1988) according to which, in respect of dividends on national shares -

this being a definitive lump-sum tax - the taxpayer can choose whether to subject these dividends to a rate of tax of 25% or whether to have them taxed at a rate which corresponds to half of the average rate applicable to his total income, while for dividends on foreign shares tax must always be paid at the normal rate?

2) Is the amount of tax levied on the revenue of the company of which the taxpayer is a shareholder and whose registered office and place of management are in another Member State or in a third State, relevant in answering the first question?

3) If the answer to the first question is in the affirmative: Can a situation arise which falls within Article 73b paragraph 1 of the EC Treaty (currently Article 56 paragraph 1 of the EC Treaty) by charging, proportionately, taxes on companies paid in their respective State of establishment by limited companies whose registered office and place of management are in another Member State or in a third State, to the Austrian income tax of the taxpayer?