

Colophon

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1. From the president's desk

The board's biannual gathering in Brussels on 3 November 2003 was combined with a meeting with representatives of the countries with observer status that will become full members of the association from the middle of 2004 and a visit to the European Parliament's LIBE committee. In light of this visit the meeting was held in Brussels, at the offices of the Belgian Council of State. I would like to start by thanking the president of the Belgian Council of State on behalf of the executive for the hospitality shown to us by the Council.

This newsletter includes brief reports of all three meetings, but I would like to briefly mention the most important points that were raised during them.

At the meeting of the board we were delighted to find that good progress has been made in developing the databank and the two communication systems. The databank has been brought up to date and the système d'information rapide and the réseau non public will be technically fully operational this month. With this in mind we have decided to hold another meeting on 15 and 16 December when representatives of the research and documentation departments will be given a demonstration of the systems. This will allow the people whose idea it was to develop the systems to decide for themselves whether the results are in line with what they had in mind last year and give them an opportunity to see whether they can use them. We will also have to see how the quality of the databank can continue to be guaranteed. After all it is not simply a question of ensuring that the right decisions are included in the databank, but checking to see whether certain decisions ought not to be removed in the light of further developments to ensure that the databank is updated and is thus a useful source of information for judges and advisors.

I trust that now the infrastructure is in place, it will also be used effectively.

The main point on the agenda for the meeting with the representatives of the new members of the Association was of course the board's decision to organise a seminar for the new members on the practical aspects of the procedure of Article 234 of the EU Treaty in Trier in March 2004. The seminar will be organised in association with TAIEX and the ERA. TAIEX has already promised to assume a large share of the costs. Heikki KANNINEN of Finland, the general rapporteur of the colloquium in Helsinki and a leading expert on the issues involved,

has already agreed to chair the seminar.

At the meeting with the LIBE committee of the European Parliament on the afternoon of 4 November the board, accompanied by Mr DENOIX de SAINT MARC, gave a presentation about the association's work and the significance of the administrative law judge for the uniform and correct application of European law.

The contributions of the members in this newsletter are a foretaste of the input they will provide for the new information systems. I am pleased to note an upward trend in the number of contributions. Besides the submissions from those members I can almost describe as regular contributors, such as Austria, Greece and the Netherlands, the editors also received judgments from Germany, Ireland and Italy for publication.

In this context, it was interesting to note that the question of whether waste is intended for recovery or for disposal seems to cause similar headaches for administrative courts in Germany (Decision of the Bundesverwaltungsgericht of 13 March 2003 (5d)) and in the Netherlands (Decisions of the Administrative Jurisdiction Division of the Council of State of 2 July 2003 and 6 August 2003 (5b)). This raises the question of whether the same is true in other countries. Could you check in your databanks whether your body has been confronted with similar cases? If you could also send in those judgments, the newsletter as well as the databank could provide a clear and comprehensive overview of national case law on this issue, which is something we could all benefit from. Perhaps these materials could also spur judges to come together to discuss problems relating to the interpretation and application of Regulation 259/93 on the supervision and control of shipments of waste within, into and out of the European Community and Directive 75/442/EEC on waste.

At its meeting in Brussels the board also decided to hold a meeting during 2004 devoted to questions relating to the organisation of the courts of the supreme administrative jurisdictions and acceleration of proceedings, with special attention to the hearing of asylum cases. The newsletter provides an excellent medium for preparing this meeting, in which we can exchange information about solutions that have been found for this issue in the various countries.

This issue of the newsletter includes an article by Pekka HALLBERG about the system of leave to appeal and its effects on the workload of his court, as well as a

contribution from the Netherlands about the asylum procedure before the Administrative Law Division of the Netherlands' Council of State, a procedure that differs in several important respects from the normal procedure and which allows appeal cases to be heard within a period of 46 days. In the previous issue of the newsletter there was an article about the compulsory objections procedure in the Netherlands, which ensures that cases are not submitted to the administrative judge unnecessarily.

I would be delighted to receive your contribution about the measures taken in your country or in your court to manage the case load of the supreme administrative court, to increase the number of cases handled and to accelerate the procedures. This information would allow us to start preparing immediately for next year's meeting.

This issue of the newsletter introduces another new feature, "Meet the new members". I would like to sincerely thank Mr Kobler of the Supreme Court of Slovenia for his column on the Supreme Court of Slovenia and the organisation and procedure of administrative law in his country. We have already received articles from other new members and they will appear in future issues of the newsletter.

This is the last issue of the newsletter to be produced by the Netherlands' Council of State. From 1 January 2004 the editorial offices of the newsletter are moving to the secretariat general in Brussels, which- as you can read in the report of the board meeting- is now fully staffed.

This last issue of the year gives me the opportunity to thank everyone for their input to the activities of the association in the last year, and to offer everyone my best wishes for the coming year.

The association's main event in 2004 will be the colloquium on the quality of European legislation and its interpretation and application in national legal systems. I look forward to meeting you all in The Hague in June.

So until then!

Herman Tjeenk Willink

2. Communications of the Association

• **Brief report of the meeting of the Association's Board, held in Brussels on 3 November 2003**

The Board held a meeting, chaired by the Association's President, Mr Herman TJEENK WILLINK, in Brussels on 3 November 2003. Brussels was chosen because it enabled the Board to combine its meeting with a visit to the European Parliament on 4 November.

This brief report summarises the main points raised during the meeting.

Progress made with the Association's information systems

The Secretary General, Yves KREINS, clarified the status of the Association's information systems.

The databank: Data that the European Court of Justice supplied to the Association has been improved and amplified with recent decisions.

The fast information network: The system's technical requirements have all been met. It will be probably be ready for use on 2 December.

The non-public system: A network that meets all requirements will probably be operational in late November.

We will start with a single network and consider later whether to introduce more, depending on how much it is used.

The systems will be demonstrated at a second meeting of representatives of the research and documentation units, to be held in Trier on 15 and 16 December.

Strengthening the General Secretariat

The Secretary General was able to report the completion of the measures adopted by the General Assembly on 16 June 2003 to strengthen the General Secretariat in Brussels.

Mr Frederik RIEBBELS, of the Belgian Council of State, was appointed to serve as the Secretary General's assistant.

On 1 September 2003, the administrator Philippe VERMEULEN ended his activities at the Belgian Council of State. But fortunately, he has declared himself willing to continue serving the Association in his present capacity at least until 31 December 2003.

Meeting of the Association's member institutions with a consultative function concerning legislation

The six member institutions with a consultative function concerning legislation will meet in The Hague on 16 February 2004. They will consider whether they can use the Association for purposes of cooperation and, if so, in what way. They will also discuss exchanges of infor-

mation between advisory bodies and courts.

A working document for the meeting will soon be sent to the institutions concerned.

A report of the meeting will be sent to the Board.

Publication of a collection of case law produced by national administrative jurisdictions on European environmental legislation (Yearbook)

The director of the British Institute of International and Comparative Law reported that the collection of case law produced by national administrative jurisdictions on European environmental legislation (the Yearbook), publication of which had suffered a long delay, is almost ready. It was agreed that electronic and paper versions would be published.

Much of its material relates to the subject of the 2004 symposium: the quality of European legislation and its transposition and application in the national legal systems of the member states.

Representative of the European Court of Justice on the Board of the Association

The Board has decided to propose to the President of the European Court of Justice that he nominate a member of the Court to become a member of the Board of the Association. Bearing in mind the Court's special role in European judicial legislation and its special contribution, past and present, to the Association's activities, the Board thinks it appropriate to further strengthen the direct ties between the Court and the Association in this way. Having a member of the Court on the Board will ensure that the Court will make a major contribution to the development of Association policy.

Seminars in Trier

The following seminars will be held in Trier before the 2004 General Assembly.

15 and 16 December 2003: meeting of the research and documentation departments to discuss the databank and information systems.

On dates yet to be determined in March 2004: a seminar of European law experts from existing and new member jurisdictions on the procedure under Article 234 of the EC Treaty. The seminar is being organised with TAIEX and the ERA.

Meetings concerning national administrative law

In light of the results of a survey of member jurisdictions, the Board has decided to hold a meeting some time in 2004 to discuss how organisational structures and working methods can speed up proceedings before

supreme administrative jurisdictions.

Also on the agenda will be how various countries are trying to channel appeals to administrative courts to save them from being overloaded with needless and hopeless appeals.

The use of the host country's language alongside French and English at the Association's meetings

The Board has agreed that the language of the host country may be used as well as English and French under certain conditions at Association meetings if to do so would promote active participation and help the meeting go smoothly.

• Brief report of the meeting between the Board and representatives of the jurisdictions admitted to the Association as observers

On 4 November 2003, the Board met representatives of the jurisdictions admitted to the Association as observers by decision of the General Assembly of 16 June 2003. Association members present were Mr Renaud DENOIX de SAINT MARC (Vice President of the French Council of State), Mr Meinrad HANDSTANGER (of the German Federal Administrative Court), and Mr Jan Kees WIEBENGA (of the Dutch Council of State).

Representing the observer jurisdictions were Mr Andrzej KISIELEWICZ (Poland), Mr Gorazd KOBLER (Slovenia), Mr Uno LOHMUS (Estonia), Mr Gábor NAGY (Hungary), and Mr David SCICLUNA (Malta).

The delegates exchanged ideas about the development of Association policy on new members. They agreed to hold a seminar for new members some time in March 2004 to discuss the practicalities for national courts concerning applications to the European Court of Justice for preliminary rulings. The seminar will be chaired by Heikki KANNINEN, who was general rapporteur for the 2004 colloquium. Experts on European law from the member jurisdictions will be invited to take part in the seminar, which will have two objectives: first, to acquaint national administrative courts with the practicalities of the procedure under Article 234; and second, to establish a basis for networks between experts on European law in the present and new member states so that they can consult each other about problems in their specialisms. TAIEX has already promised to pay for most of the seminar. It will pay all the attendance and accommodation expenses of the representatives from the new member states. ERA will also be involved in organising the seminar. During the meeting, the Board also announced that TAIEX had declared itself willing to pay the expenses incurred by observers on working visits to the institutions attached to the Association as long as the working visits

relate to European law and last no longer than a week. In addition, the delegates discussed observers' participation in the Association's regular activities and in the organisation of seminars on organisational and procedural matters in the highest administrative courts.

• Brief report of the meeting between the Association's Board and the LIBE Committee of the European Parliament

On 4 November 2003, the Board visited the European Parliament with the guests from the new member states it had met earlier that day.

At a meeting of the LIBE committee, the President of the Association, Mr Herman TJEENK WILLINK, gave a speech outlining the structure, objectives, and work of the Association, after which Board members explained the Association's various activities such as the colloquiums, the databank, the information systems, and the seminars.

The Association's contribution to the meeting ended with a contribution by Mr Renaud DENOIX de SAINT MARC about the importance of administrative courts to the uniform and effective application of European law in the EU.

• Report of the meeting of the General Assembly in The Hague on June 16th, 2003

Present:

President: Mr H.D. Tjeenk Willink
(Vice-President of the Council of State of The Netherlands) assisted by Mr A Heijmans

Vice-President: Mr P. Hallberg
(President of the Supreme Administrative Court of Finland)

Vice-President: Mr E. Hien
(President of the Federal Administrative Court of Germany)

Secretary General: Mr Y. Kreins
(Chamber President at the Council of State of Belgium), assisted by Messrs P. Vermeulen and T. De Waele

Treasurer: Mr M. Oosting
(Councillor of State at the Council of State of The Netherlands)

Auditor: Mr F. Azevedo Moreira
(Vice-President of the Supreme Administrative Court of Portugal)

Mr P. Frydman, Secretary General of the IAHAJ and Secretary General of the Council of State of France

Mr C. Jabloner, President of the Administrative Court of Austria

Mr R. Andersen, President of the Council of State of Belgium

Mr T. Melchior, Councillor at the Supreme Court of Denmark

Mr K. Schiemann, Lord Justice at the Royal Courts of Justice of Great Britain

Mr C. Yeraris, President of the Council of State of Greece

Mr J. Murray, Councillor at the Supreme Court of Ireland

Mr A. De Roberto, President of the Council of State of Italy

Mr G. Kill, President of the Administrative Court of Luxembourg

Mr P. Mores, President of the Council of State of Luxembourg

Mr M.F. Santos Serra, President of the Supreme Administrative Court of Portugal

Mr M. Campos Bordona, Councillor at the Administrative Chamber of the Supreme Court of Spain

Mr G. Schäder, Councillor at the Supreme Administrative Court of Sweden

Mr E. Hirsch Ballin, Rapporteur Général of the 2004 Colloquium and Councillor of State at the Council of State of the Netherlands

The meeting was held on Monday 16 June 2003 from 9.30 am to 12.30 pm and from 3.30 to 4.30 pm under the chairmanship of Mr H.D. Tjeenk Willink, President of the Association.

1. Chairman's opening remarks

The President recalled the 4 challenges to be met:

- 1st challenge: expansion of activities (item 3 on the agenda).
- 2nd challenge: establishing contacts with the European authorities: positive contacts had been put in place with the Commission, the Court of Justice and the Parliament (item 9 on the agenda).
- 3rd challenge: the increase of 50% in the number of members, with the courts of a certain number of new States having straight away requested admission with observer status (item 4 on the agenda).
- 4th challenge: the active participation of all the members in the activities of the Association (item 3 on the agenda).

2. Approval of the Minutes of the General Meeting held on 21 May 2002

The Minutes of the General Meeting held on 21 May 2002 were adopted, with the deletion of the last sentence under item 4 (Collection of case-law).

3. Discussion of the note about the Association's objectives

The discussion centred on an assessment of the answers given to the following three questions:

1. Does the policy the Board of Directors proposes to adopt fulfil the needs of your institution?
2. What are your suggestions to improve that policy?
3. What could be the contribution of your institution?

As to the first question, the response was positive.

As to the second question, it was suggested that the Association should not limit itself exclusively to Community law, but take account of administrative law in general. Issues such as these could be made the subject of a seminar at ERA in Trier.

Another subject on which information could usefully be exchanged was the organisation of work. This might include, for example, the speeding up of procedures, the increase in work productivity, working methods, etc. Materials on this topic could be published in the information bulletin. As to the third question, members stated that they were ready to collaborate in the Association's activities within the limits of what was possible for them. This meant that a balance had to be struck between the Association's ambitions and the means at its members' disposal. For this reason, the decision was taken to focus activities on the Association's current priorities, namely the data bank and the information system (the rapid retrieval system for case-law and the non-public network), the biennial Colloquium, the seminars at Trier and the information bulletin.

In the light of these reflections, the role of the contact persons was clearly of prime importance. The Presidents of each member institution were invited to make sure that the contact person nominated by their institution was not only kept properly informed of developments in the case-law of that institution, but was also in a position to pass on the information the Association expected from its members.

4. Observers

4.1 Admission of observers

On the proposal of the Board of Directors, the General Meeting took the following decisions:

1. the Supreme Administrative Courts of Poland and the Czech Republic, and the Supreme Courts of Cyprus, Hungary, Slovenia and Estonia, were admitted as observers;
2. the Board of Directors is authorised to grant any request for admission as observers that might be made by the Supreme Administrative Courts of Latvia, Malta, Lithuania and Slovakia, if it considers that those courts fulfil the requirements imposed by the statutes.

4.2 Development of relations with the observers

The Board of Directors drew up an inventory of the types of contacts which the Association might seek to foster: bilateral or multilateral contacts (for example, during one of the seminars at Trier), sponsorship of twinning initiatives, or research into appropriate European Union programmes.

Initial contact would be made at the meeting to be held on 3 and 4 November 2003 in Brussels with the presidents of those institutions admitted as observers. This would be combined with a meeting of the Board of Directors and a meeting with the Committee on Citizens' Freedom and Rights, Justice and Home Affairs of the European Parliament.

Lord Justice Schiemann made the comment that the most efficient course would be to entrust this type of activities to those colleagues who teach European Law. Presidents Jabloner and Hallberg stated that they were willing to make contact with the courts in Slovakia and the Baltic States, respectively.

5. Strengthening the General Secretariat and the logistics necessary for the information systems

5.1. Proposal for strengthening the General Secretariat

In order to assure the continued existence of the Association, there was clearly an imperative need to strengthen the General Secretariat, which is a permanent structure, by contrast with the Presidency, which changes every two years. After a presentation by the Secretary General, the General Meeting signalled its agreement to the proposal for the strengthening of the General Secretariat as set forth in the note prepared on the subject. That note gave a detailed overview of the number of persons needed (4 persons working between 1/2 and 1 1/2 days per week), the type of contracts, the duties to be carried out and the budgetary implications. The Board of Directors would review the workings of

the General Secretariat on an annual basis.

5.2. Logistical support needed for the internet website, the data bank and the rapid information network

After a presentation by the Secretary General, the General Meeting gave its agreement on the note prepared on the logistical support needed for setting up the internet website, the data bank and the rapid information network. That note gave details of the number of persons needed (3 persons working between 1/2 and 1 day per week), the type of contracts, the duties to be carried out and the budgetary implications. As to the information network, Lord Justice Schiemann mentioned the example of the Venice Commission.

6. Evaluation of the Information Bulletin

The initiative taken by the Presidency to publish an information bulletin was unanimously welcomed. Members were asked to make greater efforts to make information available on events relating to their institution, and on their working methods.

It emerged that there was a discrepancy between the number of copies received by each member.

The General Meeting decided that, in future, 10 copies would be sent to each member institution. Attention was also drawn to the possibility of downloading the information bulletin as it appears on the Association's website and putting it on the internal network within each jurisdiction, as had been done by the Federal Administrative Court of Germany.

A meeting of the contact persons should be organised at ERA in order to clarify the situation.

7. Opinions of the Association to the European Commission

The President raised the question whether it was desirable to enter into discussions with the European Commission to explore to what extent the Association, or more specifically, a group of experts nominated by the Association, might, in the future, give opinions to the European Commission on certain drafts. This was an idea put forward by Mr Marengo, the Deputy Director of Legal Services of the Commission, at one of the Association's seminars at Trier.

Everyone who spoke expressed serious reservations. Mr Melchior said he had his doubts. On the one hand, certain of the member institutions were courts of justice who had no advisory function. On the other hand, it was difficult to decide which were the areas in which such an advisory competence might be exercised. In practice, the "fundamental questions" would often be problems of a political nature on which no opinion could be given. Nor did it seem clear to him if it was the

Association as such which was being called upon to give its opinion, or the members in their individual capacities. In the first case, at least a majority of the members would have to signal their agreement with the opinion. But even in the second case, the party requesting the consultation would be under the impression that it was an opinion of the Association. Finally, before taking a position, all the members would have to carry out the necessary consultations at national level. For all these reasons, he considered that for the present the President's question must be answered in the negative. Mr Campos shared Mr Melchior's reservations. According to him, the system of consultation could only be envisaged in exceptional cases, for example in the case of a draft relating to judicial structures. Mr Yeraris associated himself with these points of view. The Association could only be consulted on questions of judicial architecture, for example the relationship between the Court of Justice and the national courts, the workings of the Court of Justice, etc. If experts were called upon, they would have to express their views on a purely personal basis. Mr Kill was totally opposed to the project in the light of the decision in the Procola case. Mr Andersen pointed out that the proposal was only relevant to those members who exercised an advisory function. Nor was it clear who was requesting the opinion, and who was giving it. In the case of a request for an opinion coming from the Commission, it would need to be determined in what form that request must be made. As to the author of the opinion, the question was whether it was the member institutions as such, or certain of their magistrates who would give an opinion. What would be their relationship to their government and more especially to the organs responsible for the country's foreign policy? All these issues would have to be resolved before the system envisaged was put in place. Mr Frydman thought that, for the moment, the question was premature. He did however think that the Association might be the Commission's interlocutor when it came to texts having a bearing on the organisation of administrative justice. For the moment, the Commission's interlocutor on these issues was the Federation of Administrative Judges, which was a federation of professional associations.

The President drew the following conclusions from the discussion:

1. the decision of the General Meeting was not to give opinions to the Commission for the present;
2. the question of the Commission's interlocutors would be looked into;

3. the findings of the Colloquia should contain as many expressions of view as possible about the European institutions, and attempts must be made to discuss these with the institutions concerned.

8. Finances and budget

The Financial Report for the year was presented by the Treasurer and approved by the General Meeting. All the contributions for the year 2002 had been paid. The subsidy from the European Union had been adequate.

For the year 2003, the Treasurer invited members who had not already done so to pay their contributions.

The amount of the contributions for 2004 was held at the same level.

9. Miscellaneous

9.1 Programme and preparations for the 2004 Colloquium

The Colloquium will be held at the Peace Palace in The Hague on 13, 14 and 15 June 2004. The Rapporteur Général, Mr Hirsch Ballin, presented the subject, the programme and the preparations for the Colloquium. A preparatory meeting of the national rapporteurs and the Representatives of the Court and the Commission had taken place in Trier in March 2003. A questionnaire had been drawn up, which would be sent to all the members in its final form at the end of June 2003. The national rapporteurs were asked to send in their reports by the month of October 2003.

The general report would highlight the deficiencies as well as the " best practices", noted with regard to the transposition of Community law into national law, so that new members could get the maximum benefit from the findings of the Colloquium.

9.2 Yearbook

Given the delays and uncertainties surrounding this project, the Board of Directors had decided to propose to the General Meeting that the project should be dropped.

However, Lord Justice Schiemann passed on a letter from the British Institute of International and Comparative Law of 13 June 2003, which confirmed that they wished to take over the project: decisions on the subject of the environment had been selected and sent to be translated. The latest date for the drafting of commentaries had been set at the end of June. These would then be translated. The manuscript would be sent to the printers at the end of August and the publication would appear in late November or early December 2003. Lord Justice Schiemann explained that the British Institute was conscious of the fact that the financial

assistance from the Association applied only to the year 2003 and would not be renewed in subsequent years. Nonetheless, the British Institute wished to continue with the publication in years to come.

Taking these factors into account, the General Meeting decided to continue with the project, subject to the following conditions being complied with:

1. It was possible for Members who had not had any of their decisions selected to send one or more decisions concerning the environment with a summary in English or French. They would be taken into account if they were of sufficient interest and if they reached Lord Justice Schiemann before 30 June 2003.
2. The British Institute publication must clearly indicate the Association's name, its contact details and its role. The preface would describe the procedure for selecting decisions, and the link with the 2004 Colloquium.
3. Responsibility for the choice of title (Yearbook, Review of Case-Law...) rests with the British Institute.
4. The maximum amount the Association will contribute is 50,000 euros.
5. The work must be completed by 1 December 2003 and in any event the invoices must be in the Association's hands before that date.

The Treasurer placed particular emphasis on this last condition. In fact, because the subsidy from the European Union was annual, care must be taken not to lose the 50,000 euros which had been set aside for the Yearbook in the 2003 budget. If the time limits were not adhered to, there would therefore be no participation by the Association in the costs of the Yearbook.

10. Demonstration of the internet website, the data bank and the information network

This demonstration was given by the Secretary General assisted by Mr Stassart, the computer documentation expert at the Council of State of Belgium.

Y. Kreins,
Secretary General.

H.D. Tjeenk Willink,
President.

3. Communications of the members

- **Meeting of the Consiglio di Stato and the Tribunal Supremo in Rome, June 7 until June 10, 2003**

Theme: Expropriation on grounds of public interest.

From 7 to 10 June 2003, the Council of State of Italy received in Rome a delegation from the Supreme Court of Spain, headed by Presidents Francisco José Hernando Santiago and Angel Rodriguez Garcia, and whose members were Councillors Ramon Trillo Torres, Pablo Lucas Murillo de la Cueva and Diego Cordoba Castroverde.

The theme discussed, "Expropriation on grounds of public interest", proved to be one of great interest.

In spite of the differences in doctrine on the subject, it became clear that the fundamental principles of protection of private property are the same in the two countries, and that the new regional organisation has implications for the pre-existing allocation of administrative jurisdiction.

The Italian delegation gave a careful and detailed description of the innovations brought about by the introduction of the new exclusive jurisdiction of administrative judges, not only with respect to disputes concerning administrative decisions, but also claims for compensation.

4. Advisory opinions regarding Community Law

4.a The Netherlands

Advisory opinions of the Raad van State:

• Opinion of 13 October 2003, No. W12.03.0282/IV

*Directive no. 2001/86/EC; Regulation 2157/2001;
Directive 94/45/CE; incomplete implementation*

In its advice the Council remarked on what is, in its opinion, the incomplete adoption of the directive in the bill submitted to the Council due to the directive's - purported - conflict with Regulation 2157/2001. In the proposed Article 1:2, sixth paragraph, the bill does not reproduce the complete definition in Article 2 (c) of Directive 2001/86/EC, which it does do in the implementation of other definitions. The explanatory memorandum states that the implementation of the definition, as set out in Article 2 (c) of Directive 2001/86/EC, is impossible without creating inconsistency with Article 2 of Regulation 2157/2001. According to the explanatory memorandum, Article 3 (6) of Directive 94/45/EC, which is referred to in the said Article 2 (c), fails to take account of the fact that on the grounds of Article 2 of Regulation 2157/2001 only those companies that fall under the legislation of a member state can take part in the formation of a *Societas Europaea*, or SE. The sixth paragraph of Article 1:2 is consequently a simplified version of Article 2 (c) of Directive 2001/86/EC.

The Council is of the opinion that those provisions of Directive 2001/86/EC to be implemented must be fully implemented. The member states must implement directives in time and completely, without deciding themselves whether (a provision of) a directive may possibly be in conflict with other legislation, in this case a regulation. The Court of Justice is the competent authority to decide, if necessary, on the validity of Community legislation and hence on a possible inconsistency between a directive and a regulation.

The Council further adds that it is questionable whether there is in fact any "inconsistency" with Regulation 2157/2001, as is asserted in the explanatory memorandum. The regulation does not prohibit the inclusion in a directive of a provision concerning the choice of the parent company in a case where an enterprise falls under the law of a third country. In that case, the directive is supplementing the regulation.

The Council is therefore of the opinion that the definition in Article 2 (c) of Directive 2001/86/EC must be completely implemented in Article 1:2, sixth paragraph of the bill.

• Opinion of 13 October 2003, No. W03.03.233/I

Regulation (EC) 2157/2001 of the Council of the European Union of 8 October 2001 concerning the Statute for the European Company (SE)

The registration of the European public limited-liability company (*Societas Europaea* or SE) in the trade register pursuant to Article 12 of the Regulation must be publicised pursuant to Article 15 (2) of that Regulation. Moreover, pursuant to Article 14 of the Regulation entries in the trade register, as well as their deletion, must be published for information purposes in the Official Journal of the European Communities. To this end, the relevant particulars must be notified to the Office for Official Publications of the European Communities (hereinafter: the Office) via the trade register within one month of the publication. According to the explanatory memorandum, the Chambers of Commerce have declared their willingness to provide the Office with the necessary information regarding SEs established in the Netherlands. They perform a similar function with respect to the publication of particulars of the existing legal entity, the European Economic Interest Grouping (EEIG). In both cases, it is an obligation imposed on member states by a European regulation.

The Council endorses the choice of the Chambers of Commerce as the most appropriate agencies to carry out the Netherlands' obligation to publish information. However, like the Regulation on the European Economic Interest Grouping (Implementation) Act, the implementing act does not impose a (legal) duty on the Chambers of Commerce to cooperate, but is simply based on the commitment that they are in fact willing to do so. The Council feels it is important that such an obligation is included in the implementing act even if there is no provision to that effect in the similar Regulation on the European Economic Interest Group (Implementation) Act.

After it is formed, the seat of the SE under its articles of association or the domicile of its board of management, or both, can easily be moved to another member state. Given the far-reaching legal and practical consequences of such a move - not only for the shareholders but also for employees and creditors - the Council feels it is desirable that for the implementation of Article 14 (3) of the Regulation there is a legal obligation on the Chambers of Commerce to provide the necessary information to the Office.

4.b Greece

- **Council of State opinion 217/2002, of 30 April 2002**

Council Directive 92/85/EEC, protection of pregnant workers and workers who have recently given birth or are breastfeeding

Under article 2 of Council Directive 92/85/EEC the protection provided to pregnant workers and workers who have recently given birth does not depend on whether they have previously informed their employer of their condition.

Article 10(1) of Directive prohibits the dismissal of pregnant workers during the period from the beginning of their pregnancy to the end of the maternity leave, irrespective of whether the worker has informed her employer of her pregnancy (Judgment of 4-10-2001 of the European Court of Justice, C-109/2000, Tele Danmark Als, I-6993).

The worker is not deprived of this protection, if she failed to inform her employer of her pregnancy, i.e. in case the employer was aware of the pregnancy or the pregnant worker was prevented from disclosing her pregnancy due to personal or social reasons. On the contrary, in view of the fact that the Directive provides minimum requirements for the protection of pregnant workers and workers who have recently given birth or are breastfeeding (who are considered a specific risk group), without prejudice to other more favorable provisions included in the national legislation, article 2 of the said Directive must be interpreted as requiring that the employer should be previously informed only in the cases that this is expressly required by a provision of national legislation and is necessary so that a positive measure, which cannot otherwise be specified, is taken for the protection of a pregnant worker or a worker who has recently given birth.

In the present case, article 2 (2) of Decree 176/1997 states that 'for the purposes of this decree (a) pregnant worker shall mean a pregnant worker, (b) worker who has recently given birth shall mean a worker in confinement (and) for a period up to two months after childbirth...'. The decree under scrutiny attempts to amend the quoted provisions with the addition of the following phrase at the end of each paragraph: 'and has informed her employer of her condition'. In view of the aforementioned, this clause is in conflict with the provisions of the Directive. Therefore, either it should be removed or the following should be added: 'in case this is expressly required by national legislation, so that a positive measure is taken for the protection of the pregnant worker'. Consequently, the definition of the breastfeeding worker, provided in article 2(2c) of Decree 176/1997, must be reconsidered.

5. Jurisprudence regarding Community Law

5.a Austria

Decisions of the Verwaltungsgerichtshof:

- **Decision of 28 February 2002, no. 99/15/0269, and judgements of 31 January 2002, no. 202/15/0003, 0004 and 0005**

Fiscal provisions, harmonisation of legislation, turnover tax, common system of value added tax

By order of 22 September 1999 the Verwaltungsgerichtshof put two preliminary questions pursuant to Article 234 EC, on the interpretation of Article 17, paragraphs 6 and 7, of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of Member States on turnover tax - Common system of value added tax: uniform tax base. These questions were raised in the context of two lawsuits, the first between Metropol Treuhand Wirtschaftsreuehand gmbH and the Finanzlandesdirektion für Steiermark, and the second between M. Stadler and the Finanzlandesdirektion für Vorarlberg, concerning the right to deduction of value added tax (hereafter "VAT") paid upstream for the use, respectively, of a Pontiac TransSport vehicle and a FIAT Ulysse, and the Court gave its answer in its judgement of 8 January 2002, C0409-99. In that case the Verwaltungsgerichtshof held that the deduction of VAT on the claimants' vehicles could not be refused on the sole grounds that under the new definition in the decree of the Federal Finance Minister these vehicles could not be classed as "minibus" vehicles. The Verwaltungsgerichtshof consequently quashed the administrative decision by which the claimants had been refused deduction of VAT.

- **Decision of 28 February 2002, No. 99/17/0008**

Commission Regulation (EEC) No. 2220/85 of 22 July 1985 laying down common detailed rules for the application of the system of securities for agricultural products. Commission Regulation (EEC) No. 3719/88 of 16 November 1988 laying down common detailed rules for the application of the system of import and export licences and advance-fixing certificates for agricultural products. Notion of force majeure

The claimant obtained an import certificate on 28 April 1997 valid until 30 June 1997 for 24,990 kilos of pig meat; Hungary was stated as the country of shipment and of origin.

By administrative decision of 9 July 1998 the claimant's security was declared to have vested for the said certifi-

cate for the sum of ATS 108,350.85 and the claimant was required to pay this amount to the Federal Republic of Austria. In its administrative appeal, the claimant put forward the argument that during the period of validity of the certificate only 5% of the expected products had been imported, because at the time of shipment swine fever had broken out in the Czech Republic. The case was therefore one of force majeure and the security should not have been declared vested. The Minister of Agriculture rejected the claimant's appeal, considering that the conditions for force majeure had not been met in the present case because the country of origin given on the certificate was Hungary, where the epidemic relied upon by the claimant had not spread, and where there were therefore no restrictions on import. The Verwaltungsgerichtshof, which had been seised by the claimant, rejected the appeal because in the instant case the conditions for force majeure derived from the case-law of the Court could not be said to have been fulfilled. The declaration of a country of origin on the certificate was not compulsory and the claimant had been free to import products from other countries. The claimant had not even argued that it was impossible to import pig meat of Hungarian origin. Moreover, while there was no such express provision in Community rules, the terms of Article 22 of Regulation No. 2220/85 (EEC) allowed the conclusion to be drawn that the burden of proof to establish a case of force majeure lay with the businesses.

Nor could the claimant found the appeal on the expiry of the time limit provided for in Article 37 of Regulation No. 3719/88 (EEC). The answer to the question whether or not there had been force majeure was independent of any decision pursuant to Article 37 of the Regulation. Since the point at issue had been resolved by the established case-law of the Court of Justice, there was no need for referral of a preliminary issue.

- **Decision of 28 February 2002, no. 2000/15/0132**

Eighth Council Directive 79/1072/EEC of 6 December 1979 on the harmonisation of the laws of the Member States relating to turnover taxes - Modalities of reimbursement of value added tax to taxable persons not established inside the country

The claimant is an Italian business. It asked its regional tax collecting body to reimburse the value added tax for the months of April, May, August, November and December 1997, and this was refused on the grounds

that the time limit fixed by ministerial decree had expired. The business took its case to the Verwaltungsgerichtshof, arguing, inter alia, that the administrative decision was contrary to the provisions of Article 7 paragraph 4 of Directive 79/1072/EEC because it had been notified of that decision more than six months after the expiry of the time limit laid down in the Directive.

The Verwaltungsgerichtshof rejected the appeal by the business on its merits, considering that it did not follow from the failure to observe the time limit provided for the administrative decision that the request for reimbursement, made out of time, should have been accepted.

• **Decision of 28 February 2002, no. 2001/16/0054**

Council Regulation (EEC) no. 2913/92 of 12 October 1992 establishing the Community customs code and Council Regulation (EEC), no. 2454/93 of 2 July 1993 fixing certain provisions for the application of Council Regulation (EEC) no. 2913/92 establishing the Community Customs and Commission Regulation (EEC) no. 993/2001 of 4 May 2001 amending Regulation (EEC) No. 2913/92 establishing the Community customs code

In this case the Verwaltungsgerichtshof was asked to respond to the question whether the fact that claimant had omitted to include in its stock accounts the title "special warehouse" which had been granted to it by the customs authority, constituted an omission which had real consequences for the proper functioning of the temporary depot or of the customs regime in question. Regulation (EEC) No. 2454/93, and the stock permit obtained by the claimant provided for heavy merchandise to be stored in special warehouses, and made it obligatory to mention the transfer of merchandise from the bonded warehouse to the special warehouse.

The Verwaltungsgerichtshof held that, though Article 859 of Regulation (EEC) No. 2454/93 contained a detailed list of omissions without real consequences, it was legitimate to conclude that omissions less serious than those listed in Article 859 (such as the one with which the claimant was charged) were also without real consequences. For that reason, the Verwaltungsgerichtshof quashed the decision of the administrative authority which had not taken proper account of the legal position.

• **Decision of 23 April 2003, no. 2002/08/0275**

Council Directive 79/7/EEC of 19 December 1978, concerning the progressive implementation of the principle of equal treatment for men and women in matters of social security- Austrian law on unemployment insurance- help given in cases of necessity

According to the consistent case-law of the Verwaltungsgerichtshof, the provisions of paragraph 9, subparagraphs 1 and 2 of the Arbeitslosenversicherungsgesetz (Austrian law on unemployment insurance) are the expression of the objective which is at the basis of the system giving rights to unemployment benefit, which seeks to ensure the reinsertion of the person insured against unemployment who, after his work has come to an end - in spite of his capability and will to work - has not found a post in keeping with social situation that will put him in a position to earn his living without help from public funds. Anyone seeking unemployment benefits must be prepared to accept a job which might be socially necessary, in other words, he must be ready to work in that actual job which might be socially necessary, in other words, he must be ready to work in that actual job. In order to show himself willing to work in a job found by the Arbeitsmarktservice (the administrative authority with competence in the area of unemployment benefits) there must be, in principle, immediate action on the part of the person insured to secure the post, on the one hand, and on the other the person insured must refrain from any conduct which could prevent this new employment contract from taking effect. In weighing up the acceptability of a job at the place of residence of the unemployed person, it is not necessary to take into consideration the risk to his providing for his family, for whose needs he is responsible. When it comes to evaluating the acceptability of employment away from the unemployed person's place of residence, one decisive factor, among others, is that this employment must not jeopardise the unemployed person's ability to provide for his family, for whose needs he is responsible. Thus, providing for the family must not be jeopardised, because the unemployed person cannot return each day to his residence because of the employment, or because, though it is possible to return, the long commuting distance prevents him from being there to feed his family. The Verwaltungsgerichtshof held that this case law did not contravene the prohibition of discrimination as provided in Article 4 paragraph 1 of Council Directive 79/7/EEC of 19 December 1978, on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

• **Decision of 25 July 2003, no. 2000/02/0179**

National legislation regulating the acquisition of real property - the act of adhesion of Austria to the European Union - transitional measures - system of prior authorisation of the acquisition of real property - secondary residences - decision Klaus Konle

By administrative decision, the claimant was found guilty of having intentionally used a house in the Tyrol as a secondary residence during the period from 26 November 1996 to 6 December 1996 contrary to the Tiroler Grundverkehrsgesetz 1996 (the Tyrolean law on acquisition of real property) despite the fact that the administrative authority had given a negative reply to his request for authorisation. The claimant lodged an appeal with the Verwaltungsgerichtshof.

That court decided that it was true that the claimant had not complied with the provisions of paragraph 36 of the Tyrolean law on acquisition of real property, but that the administrative authority had not verified whether that provision should not be applied because there were Community provisions to the contrary.

Even if Article 70 of the Act concerning the conditions of adhesion of Austria to the European Union provided that the restrictions on secondary residences could be maintained up to 1 January 2000, the Court of Justice had held, in its Judgment of 1 June 1999, Klaus Konle v Republic of Austria, case no. C-309/97, that Article 70 of the Act of Adhesion was nonetheless in conflict with a system of acquisition of real property that obliged all acquirers of real property to request a prior administrative authorisation to acquire such property. For that reason, Article 70 of the Act of Adhesion could not validate the provision in Tyrolean law which prohibited the use of the real property at issue in the present case.

In any event, the administrative authority had not considered the problem of applicability of the provisions of Tyrolean law as compared with the provisions of Community law. For that reason, the Verwaltungsgerichtshof quashed the administrative decision.

5.b The Netherlands

Decisions of the Central Appeals Tribunal

• **Central Appeals Tribunal, 6 June 2003 , no. 00/2504 WAO**

Directive 79/7/EEC art. 4, para. 1; equal treatment of men and women; Mary Brown case

The appellant had ceased her full-time employment as

of 12 June 1997 because of a pelvic disorder during pregnancy. Her child was born in September 1997. She was unable to resume work after this as the complaints persisted. She was declared fit to work for a maximum of 20 hours a week as of 11 June 1998. Since, as of 11 June 1998, she had been unfit for work for the statutory qualifying period of 52 weeks, her 100% benefit under the terms of the Sickness Benefits Act ("sick pay") was terminated and she became entitled instead to benefit under the terms of the Invalidity Insurance Act (WAO), calculated on the basis of 65% to 80%.

The appellant contended that the 52 weeks' qualifying period should not have commenced on 11 June 1997, but 12 weeks after her delivery, viz. on 15 December 1997, because in the period surrounding the delivery she had been on maternity leave and was not sick. (Under Dutch law, pregnant women are entitled to at least 16 weeks' pregnancy and maternity leave on full pay in the period before and after childbirth).

The Central Appeals Tribunal began by pointing out that it was disadvantageous for someone on benefit, if his qualifying period for the Invalidity Insurance Act came to an end earlier, for a number of specified reasons.

The Tribunal then noted that sick pay under the terms of the Sickness Benefits Act is awarded in connection with childbirth without there being any need for the person concerned to be unfit for work, but that for the purposes of determining the qualifying period, periods of time in which this form of sick pay is received are considered equivalent to periods of unfitness for work. Since sick pay in connection with childbirth is awarded exclusively to female employees, this means that only women are affected by the adverse effects of this equivalence. The regulations at issue must therefore be deemed directly discriminatory in respect of women. The Tribunal inferred from the case law of the Court of Justice of the European Communities (ECJ) that the Third Directive does not provide for exceptions to the principle of equal treatment protected by Article 4, para. 1 of the Directive, if there is any direct discrimination on ground of sex.

This means that regulations that are directly discriminatory towards women must not be applied. For the calculation of the qualifying period for the Invalidity Insurance Act, it is not therefore permissible to count the period during which the person concerned has been awarded sick pay in connection with childbirth, calculated in accordance with the provisions of Section 29a, subsections 1 and 5 of the Sickness Benefits Act.

Finally, the Tribunal considered that it was not entirely without significance to the above conclusion that even though the Mary Brown judgment could not be transposed wholesale to social insurance law, it followed from that and other related judgments handed down by

the ECJ that not working in consequence of pregnancy or childbirth could not be simply equated with sickness. In the Tribunal's opinion, it was therefore wrong, when applying and interpreting the provisions of Article 4 of the Third Directive, to wholly disregard this ECJ case law. The appellant had already been unfit for work before the period during which she was entitled to sick pay in connection with childbirth, and she had then been entitled in principle to sick pay on that basis. In that sense, the appellant had not been treated any differently or worse than any other person insured under the terms of the Sickness Benefits Act, despite the fact that her unfitness for work was caused by pregnancy. This means that for the purposes of calculating the qualifying period for the Invalidity Insurance Act in the appellant's situation, the period during which she was entitled to sick pay in connection with childbirth, within the meaning of Section 29a, subsections 1 and 5, of the Sickness Benefits Act, may not be counted. The disputed decision was therefore ill-founded.

• **Decision of the Central Appeal Tribunal of 23 January 2003, No. 96/10513 AW**

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, Article 2 (1) and (4) (Official Journal 1, 39, p. 40); ruling of the Court of Justice of the European Communities of 19 March 2002 9 case C - 476/99)

Preferential treatment; reservation of child-care places for female employees, with an exception being made for single fathers, is not in conflict with provisions of national, international or supranational law.

The Ministry of Agriculture has a child-care scheme based on the point of departure that child-care places are in principle provided only to female employees, except in cases of emergency, to be determined by the director. A male employee was refused a place for his child on these grounds.

On 8 December 1999 the Central Appeals Tribunal asked the Court of Justice of the European Communities for a preliminary ruling on the meaning of Directive 76/207/EEC of 9 February 1976. The Court handed down its ruling on 19 March 2002.

The application of the criteria formulated by the Court of Justice of the European Communities leads to the decision that reserving child-care places for female employees, when the scheme makes an exception for single fathers, is in accordance with the provisions of national, international or supranational law, and

specifically with the provisions of Article 2 (1) and (4) of Directive 76/207/EEC 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.

Decisions of the Administrative Jurisdiction division of the Council of State

• **Decision of the Administrative Jurisdiction Division of the Council of State 16 April 2003, no. 200201920/1**

Directive 79/409/EEC on the conservation of wild birds (Birds Directive), Article 4 (4); Wetlands - convention. Only ornithological criteria apply for the designation of an area as a special protection area; agricultural, recreational and economic interests may not lead to a decision that only part of an area that should be designated as a special conservation zone is designated or that the area it is not designated.

On 24 March 2000 the State Secretary for Agriculture, Nature Management and Fisheries designated the IJmeer as a special conservation area in the sense of Article 4 (1) and (2) of Directive 79/409/EEC of the Council of the EC of 2 April 1979 concerning the conservation of wild birds (Official Journal of the European Communities, L 103; Birds Directive).

First, the Division finds that, in light of Article 4 of the Birds Directive, only ornithological criteria may be adopted in the selection of areas that may qualify for designation as special protection areas (SPA) under the Birds Directive. In this context, the Division refers, among others, to the judgements of the Court of Justice of the European Communities in the Lappel Bank case and the Santona case.

In this context, the Division found that the Court of Justice had found in the Lappel Bank case that Article 4 (1) of the Birds Directive imposes on the member states the obligation to classify the most suitable territories in number and size as special protection areas for the conservation of the species listed in annex 1, an obligation they cannot avoid by taking other special protection measures. After all, it follows from this provision that as soon as birds of the specified species appear on the territory of a member state, this state must designate specific special protection areas for them. The economic requirements specified in article 2 of the Birds Directive may not be taken into account in the choice and demarcation of a SPA.

Furthermore, although the member states possess a certain discretion in the choice and demarcation of a special protection area, particular ornithological criteria specified in the Birds Directive apply for the designation

of those areas. This means that the member states' margin for discretion in the choice of the most suitable areas to be designated as SPAs does not relate to the question of whether it would be convenient to designate the areas that appear the most suitable according to ornithological criteria as SPAs, but solely to the application of these criteria in deciding which areas are most suitable for the conservation of the species listed in annex I of the Birds Directive.

The member states are therefore obliged to designate all areas that, according to ornithological criteria, appear most suitable for the conservation of the species concerned as special protection areas.

Given the above, the Division finds that it was correct that non-ornithological interests were not included in the framework within which the respondent assessed the possible designations SPA. The decision whether an area must be designated as a SPA can only be made on the grounds of ornithological criteria. Neither the agricultural and recreational interests put forward, nor the more general economic interests can, in the opinion of the division, lead to the decision that an area, which ought to be designated as a SPA on the grounds of ornithological criteria, should be only partially designated or not designated at all.

In this context, the Division feels that the position adopted by the state secretary, that it is likely that the normal business activities that already took place in the area concerned before its designation as SPA, can be continued since these activities did not stand in the way of the existence of bird life there, is in principle not unreasonable. Nevertheless, however, expansion or intensification of business activities can only be permitted if doing so will not cause harm to the bird life of the area. However, this point is not being decided.

• **Decision of the Administrative jurisdiction division of the Council of State of 6 August 2003**

No. 2003200528/1 Council Regulation 259/93/EEC (Regulation on the supervision and control of shipments of waste within, into and out of the European Community), Article 2 opening words and under i and k; Directive 75/442/EEC on waste, Article 1 opening words and under e and f.

Use of lightly contaminated substance as filler material in a Belgian loam pit constitutes recovery of waste.

The State Secretary for Housing, Spatial Planning and the Environment objected to the appellant's proposed export 5,600,000 kg of lightly contaminated soil to Belgium.

The appellant classified the method of processing this waste as a recovery operation within the meaning of annex IIB of the Council Directive on waste of 15 July 1975 (75/442/EEC) as amended by Directive 91/156/EEC. The soil is to be used in a recultivation project, where the ground level of a former clay pit will be raised by several metres. After the site has been covered with the original topsoil the location will become part of a city park.

The State Secretary felt that this did not involve an operation as referred to under R13 of the said annex, but involved the deposit on to or into land as referred to under D1 of annex IIA of the directive. In support of this conclusion he argued that although the slightly contaminated material does comply with the requirements imposed by Belgium for soil that is used as filler material for ground, it does not meet the requirements imposed by the Netherlands. The fact that there is a distinct so-called "useful side effect" when a loam pit is filled with this waste cannot transform a disposal operation into a recovery operation. Since there is sufficient capacity in the Netherlands for the final processing of waste for disposal, there are objections to the planned shipment as referred to in Article 4 (3) under b of the Regulation on the supervision and control of shipments of waste within, into and out of the European Community.

The Administrative Jurisdiction Division of the Council of State found as follows.

In its decision of 27 February 2003 in the joined cases C - 307/00 to C - 311/00, the Court of Justice of the European Communities declared in law that it follows from the system put in place by Council Regulation 259/93/EEC on the supervision and control of shipments of waste within, into and out of the European Community that when the competent authority of the member state of dispatch forms the view that the purpose of a shipment has been incorrectly classified as recovery in the notification, that authority must base its objection to that shipment on the ground of that error in classification, without reference to a particular provision of the regulation which, such as Article 4 (3) (b) in particular, describes the objections which member states may make to shipments of waste for disposal.

The Division finds that the appellant had given notification for the shipment of the waste concerned to Belgium for recovery. In light of this finding, the respondent's objection as set out in the disputed decision is in conflict with the system put in place by Council Regulation 259/93/EEC since it is based on Article 4 (3) (b) of that Regulation. The decision must be annulled. On the basis of the documents and the arguments presented during the hearing the Division finds that the slightly polluted soil is intended for use as a layer

of filling material in a loam pit to make the pit suitable for use as a city park. As such the category-1 soil in this case performs a useful function and substitutes for primary raw materials, which would otherwise have to be used as a recultivation layer in the loam pit. In light of the decision of 27 February 2003, in the opinion of the Division the use of the slightly contaminated soil in the loam pit in this case must be regarded as recovery. Given the above, the State Secretary was wrong to adopt the position that this was a shipment of waste for disposal.

• **Decision of the Administrative Jurisdiction Division of the Council of State of 2 July 2003, No. 199901825/2**

Regulation 259/93/EEC (Regulation on the supervision and control of shipments of waste within, into and out of the European Community), Article 2, opening lines and under a, i and k and Article 26 (1) opening lines and under a; Directive 75/442/EEC on waste, Article 1 opening lines and under a, e and f; ruling of the Court of Justice of the European Communities of 27 February 2003 in the joined cases C - 307/00 to C - 311/00 (Oliehandel Koeweit et al.).

Use of fiber glass residues as a filler material in German clay pits is disposal of waste and not recovery of waste.

The Minister of Housing, Spatial Planning and the Environment imposed an order for periodic penalty payments on the appellant, "PPG Industries fiber Glass BV" in Hoogezand.

In a reference on 8 August 2000, no. 199901825/2, the Division asked the Court of Justice of the European Communities for a preliminary ruling. This ruling was handed down on 27 February 2003 in the joined cases C - 307/00 to C - 311/00 (Oliehandel Koeweit et al.).

The Division finds that the appellant concluded a contract with AVG/Nottenkamper OHG (further referred to as: AVG) in Germany for the removal and processing of approximately 9000 tonnes of fiber glass residues each year. These residues are discharged during the production of E-glass fibers by the appellant. It was not shown that there was an intention to produce the fiber glass residues for use as filler material in clay pits. In the opinion of the Division, these facts provide sufficient evidence for the decision that with the shipment of the fiber glass residues to Germany the appellant is disposing of them in the sense of Article 1 (a) of the Framework Directive on Waste. Neither the documents nor the arguments presented during the hearing convinced the Division that the circumstances in the case are such that, despite the above, it should decide that the fiber glass residues should not be regarded as waste.

In light of the ruling of the Court of Justice of the European Communities on 27 February 2003 in the joined cases C-307/00 to C-311/00, it is not impossible that the use of the fiber glass residues concerned to fill in the relevant clay pits in Germany could be regarded as an operation involving recycling of inorganic compounds as referred to under R5 in annex IIB of the framework directive.

The Division further finds that the permit granted by the Landrat Kreis Wezel to AVG to recover clay from clay pits contains an obligation to fill in the excavated clay pits and provides that they must be filled in with substances which are further specified in annex 1 of the permit and which meet the threshold values set out in annex 2 of the permit, including the fiber glass residues.

In light of the documents and the arguments presented during the hearing this case all these substances are waste. It was not shown that there was any replacement of primary raw materials with waste, thereby preserving natural resources. In this context, the Division finds that the appellant has failed to adequately demonstrate its assertion that the fiber glass residues in this case are used directly as a building material because of their suitability for improving the stability of slopes and bodies of sand in the clay pits due to their shearing stress, compaction and sealing properties. In particular, it was not demonstrated that the fiber glass residues are being used specifically as stabilising and sealing materials or that, if the fiber glass residues are not used other materials will be used instead of these fiber glass residues for this specific purpose. Furthermore, according to the documents and the arguments presented at the hearing, the appellant owes AVG a sum for of money every tonne of fiber glass residues it disposes of by consigning it to AVG in this way.

The Division sees sufficient evidence in the above for the decision that in this case the fiber glass residues are not intended for recovery and the main purpose of the shipment is disposal.

5.c Ireland

• **Decision of the Supreme Court of Ireland of July 30 2003**

Europe agreements with Romania and the Czech Republic articles 45, 3 and 4 and article 59, 1; right of establishment as self employed persons; jurisprudence of the European Court of Justice Barkoci, Kondova and Gloszczuk cases

The three appellants in this case had entered the Irish Republic for the purpose of seeking asylum.

Their request being refused and they being required to leave the Republic, they applied for permission to carry on a business as self employed Europe Agreement nationals in Ireland, under article 45 of the Europe agreements with Romania and the Czech Republic. This application was denied by the Irish authorities, who decided that they, in accordance with the administrative arrangements on the establishment of self employed foreigners in force in Ireland, as persons who have no legal entitlement to remain and reside in the State, should (leave Ireland and) make their application from their homeland.

The main question the Supreme Court had to decide was whether in situations as these, it was compatible with the provisions on establishment as set out in the Europe treaties, for Ireland to require that persons who already are in Ireland, should leave Ireland and make their application for permission to carry on a business within Ireland, from their home state.

After an analysis of the decisions of the European Court of Justice in the *Barkoci*, *Kondova* and *Gloszczuk* cases, the Court concluded that “ the case law of the Court of Justice makes it quite clear that the Europe agreements in the terms referred to, do not confer on a non - national the right to enter and stay in a member state for the purpose of making an application for establishment. They confer no autonomous right of residence. The right to enter and stay is ancillary and not absolute. Under a system of prior control, it is only when an applicant has satisfied the substantive requirements concerning the right to establishment, that the member state concerned is obliged to grant leave to enter and stay for that purpose. In principle member states are entitled to require that applications demonstrating that the person concerned fulfils the substantive requirements for establishment be submitted from their home state.”

And further it seemed to the supreme court “ quite clear from the principles stated by the Court of Justice, particularly in the *Barkoci* case, that persons who temporarily have been allowed to enter and/or to remain [in]the State for the purpose of having their applications for asylum examined and whose applications have been refused, derive no right from the Europe Agreements to remain in the State for the purpose of seeking to establish a right of establishment, but on the contrary may have applied to them the general system of prior control which requires that they make their applications for establishment in due and proper form from their home state. The Court [of Justice], like the Advocate General, did not accept that this was unduly restrictive or involved any breach of a principle of proportionality.”

5.d Germany

• Decision of the Bundesverwaltungsgericht of 13 March 2003 no. BVerwGE 7 C 1.02

Concerning regulation (EEC) no. 259/93 of the Council, Article 2 (i) and (k); Article 7 (2) and (4) (a); Article 30 (1), under 1 and Directive 75/422/EEC Article 1 (e) and (f); Article 3 (1) (b).

The competent authority of dispatch¹ (it concerns the shipment of a consignment of waste to Italy for recovery) had objected to the shipment on the grounds of Article 7 (4), fifth indent of Council Regulation (EEC) No 259/93 since in its opinion the ratio of the recoverable and non-recoverable waste, the estimated value of the materials to be finally recovered or the cost of the recovery and the cost of the disposal of the non-recoverable fraction do not justify the recovery under economic and environmental considerations.

In the view of the competent authority this shipment actually involved disposal of waste. In its view, the party concerned had chosen the wrong procedure.

The Verwaltungsgericht had found that the objection was illegitimate. In its judgment the BVerwG said that although Community law did not prevent the competent authority from raising the objection that the wrong procedure was followed (a), it had done so incorrectly in this case (b).

- a) The opinion of the Verwaltungsgericht ruling out the objection based on the use of the wrong method in the recycling of waste compounds appearing in the Amber List is incompatible with Community law. By virtue of the European Regulation on the supervision and control of shipments of waste within, into and out of the European Community ('the Regulation'), it is the task of the notifier to provide information about the intended purpose of the shipment of waste by specifying the method of disposal or recycling in the consignment note (Article 3 (5), 5th indent; Article 6 (5), 5th indent of the Regulation). As part of the notification procedure the competent authorities must verify whether waste intended to be shipped has been correctly classified in accordance with the Regulation and they must raise objections to the shipment if the classification is incorrect (Court of Justice of the European Communities, case no. C6/00, loc. cit. note 40). Since waste may only be shipped in accordance with the provisions of the Regulation (Article 30 (1) of the Regulation), what is decisive is not the subjective determination of the purpose by the notifier but the question whether the waste is actually intended for the stated purpose according to

the objective criteria set out in the law. Article 7 (2) of the Regulation, on the grounds of which the competent authorities can only raise objections to the shipment of waste for recycling in the limited cases specified in subsection four of this provision, does not therefore prevent the authorities from raising an objection on the grounds that the shipment of waste, which according to the notification is for recycling, is actually waste for disposal (Court of Justice of the European Communities, case no. C228/00, loc. cit. note 35). On the other hand, the objection under environmental considerations (Article 7 (4), under a, 5th indent of the Regulation) only can only be made if at least part of the waste intended for shipment will be recycled. This objection can therefore not replace the objection to a shipment of waste that the authority feels is intended solely for disposal (Court of Justice of the European Communities, case no. C6/00, loc. cit. note 46).

- b) The objection raised by the presidium of the district board on the grounds of the use of the wrong method is however illegitimate since the waste which according to the plaintiff's notification was intended for recycling is objectively determined to be for recycling.

The plaintiff reported the following recycling methods as intended purpose for the fine shredder fraction II: R3 (recycling/reclamation of organic substances which are not used as solvents) for the PUR foam and R4 (recycling/reclamation of metals and metal compounds) for the ferrous and non-ferrous metals. N., a company in Italy, will recover these materials from the fine shredder fraction by means of mechanical separation using sifting and magnetic separators. The methods used are not limited to sorting, in other words collecting materials for subsequent recycling. Rather, the metals extracted from the heterogeneous mixed waste and the PUR foam are previously reclaimed secondary raw materials as referred to in the said recycling methods. Their subsequent use in metal smelters and in the production of insulating plates is a subsequent recycling process.

The fact that the recycling through reclamation of 15% of the raw materials will be followed by the disposal of residual waste amounting to 85% of the original materials does nothing to change the objective classification as waste for recycling. The processing operation in question consists of two independent methods, which, under the Regulation, have to be assessed individually. A characteristic feature of recycling methods is that they produce residual waste, which itself has to be processed either through further recycling or through disposal. If in

such cases the processing measure as a whole was decisive, as a rule a secondary portion of recyclable waste would not qualify for recycling when the residue is disposed of. That would not be compatible with the priority given to recycling (Article 3 (1) under b of the Framework Directive on Waste). Although a condition for a measure for the recycling of waste is always that its principal aim is the use of waste aimed at sparing use of natural resources- either by reclaiming raw materials or by substituting for them in energy production - the point of departure for the principal aim criterion must always be the specific processing method. Where a processing operation consists of a number of actions involving successive methods of processing, only the classification of the first method, to be carried out in another country, is decisive for the classification of the waste as a whole under the Regulation. This is in accordance with the basic idea behind the Framework Directive on Waste and the Regulation.

The objection on environmental grounds is based on the idea that irrespective of the residual waste to be disposed of at a later stage it can be assumed that there is recycling. R11 in Annex II B of the Framework Directive on Waste further regulates a method for the "use of wastes obtained from any of the operations numbered R1 to R10"; R9 or R10 give a similar scenario in relation to R3 (recovery of oil with subsequent refining). A condition for these regulations is that where a processing operation consists of a number of actions these must be assessed separately. The same applies for Article 3 (1) under a, 3rd indent of the Framework Directive on Waste, on the grounds of which the member states shall "(encourage) the development of appropriate techniques for the final disposal of dangerous substances in waste destined for recovery". Finally, the required differentiation of independent operations in the processing of waste is provided for in Article 6 (5), 6th to 8th indents of the Regulation, which require information to be provided about the "planned method(s) of disposal for the residual waste after recycling", about the "amount of the recycled material in relation to the residual waste" and about the "estimated value of the recycled material". This information would not be required if Community law provided that the processing operation as a whole was decisive (see also the conclusion of advocate-general Jacobs in case C116/01 of 14 November 2002, note 56).

The authorities can challenge the shipment of waste for recycling on the grounds, among others, of the environmental considerations.

6. Preliminary referrals

6.a Austria

• Order of 28 February 2002, No. 2000/16/0853

Council Regulation (EEC) No. 2913/92 of 12 October 1992 establishing the Community customs code

The Verwaltungsgerichtshof applied to the Court of Justice to find out if the increase in contributions pursuant to §108 paragraph 1 of the national law implementing the Community customs code (Österreichisches Zollrechts - Durchführungsgesetz), provided for in the case of creation of a customs debt according to Articles 202 to 205 or 210 or 211, or in the case of recovery of contributions according to Article 220 of Regulation No. 2913/92 (EEC), and which correspond to the amount of the delay penalty which resulted for the period between the due date of the customs debt as initially recorded and the recording in the accounts of the customs debt to be collected, was contrary to the Community provisions on customs.

• Order of 23 May 2002, No. 2001/07/0132

Decision of the Commission of 11 June 1992 determining the criteria for approval or recognition of organisations and societies holding or creating genealogical records for registered breeds of horses

The Verwaltungsgerichtshof submitted the following questions to the Court:

- 1.) Does Article 2, paragraph 2 a) of the decision of the Commission of 11 June 1992 determining the criteria for approval or recognition of organisations and societies holding or creating genealogical records for registered breeds of horses confer the right on an organisation or society which has been officially approved or recognised, to require that the approval or recognition of another organisation or society be denied by the State authorities, if the approval or recognition of that new organisation or society jeopardises the preservation of the breed or compromises the workings, or the programme of improvement or selection, of an existing organisation or society?
- 2.) Is Article 2, paragraph 2 a) of the above-cited decision of the Commission in contradiction with a national provision which
 - a) confers on an organisation or society holding or creating genealogical records for registered breeds of horses only the right to be heard before the authority in a procedure for approval or recognition, but not the right to demand that the approval or

recognition of another organisation or society be refused by the State authorities, if the approval or recognition of that new organisation or society jeopardises the preservation of the breed, or compromises the workings, or the programme of improvement or selection, of an existing organisation or society, and,

- b) does not confer on the existing organisation or society the right of recourse to the Verwaltungsgerichtshof, even if the approval or recognition had been announced by the State authorities after they had taken a negative position?

• Order of 4 September 2003, No. 2002/21/0134

Preliminary question on the interpretation of Article 6 paragraph 2 of Decision No. 1/80 of 19 September 1980 of the Council of the Association (Turkey), on the Development of the Association

By Order of 4 September 2003 the Verwaltungsgerichtshof put the following question to the Court, by virtue of Article 234 EC:

Must Article 6 paragraph 2 of the Decision of the Council of the Association - set up by the agreement creating an Association between the European Economic Community and Turkey - of 19 September 1980, No. 1/80, on the development of the Association, be interpreted to mean that a Turkish national loses the rights guaranteed by Article 6 paragraph 2 of Decision No. 1/80 of the Council of the Association on the development of the Association, if he is in prison to serve a three year prison sentence ?

6.b Italy

Order of the Consiglio di Stato of 25 February 2003, No. 1029/2003

Directive 96/92 (liberalisation of electricity)

In the context of proceedings for annulment, on the one hand, of a decree issued by the Minister of Industry, Commerce and Crafts concerning the setting of general charges in the electricity sector, and, on the other hand, of decisions nos. 231 and 232 handed down on 20 December 2000 by the supervisory authority for gas and electricity, concerning the fixing of the amount to be levied to take account of the increase in the price of electricity produced by hydroelectric and geothermal installations, the 6th Section of the Council of State put the following two questions to the Court of

Justice of the European Communities by Order No. 1029 dated 25 February 2003:

1. "If, by virtue of Articles 87 et seq. of the Treaty, it was necessary to classify as State aid an administrative measure which, according to its terms and the objectives listed in the reasoning, required certain undertakings using the electricity distribution network to pay a proportionate price supplement in return for access to and use of that network, in order to finance the general charges in the electricity sector;
2. Whether or not the principles laid down by Directive 96/92 concerning the liberalisation of the internal market in electricity, and in particular the provisions of Articles 7 and 8 concerning the management of the electricity distribution network, must be interpreted to exclude the possibility for a state to take measures to impose, temporarily, on certain undertakings a proportionate price supplement in return for access to and use of the distribution network in order to compensate for the increase in the price of hydro-electric and geothermoelectric power brought about, according to the specific terms of the reasoning, by the modification of the normative framework, which is intended to finance the general charges in the electricity sector".

On these two points, the Council is of the opinion that the measures are compatible with Community law.

As to the first question, the Council of State is inclined to answer in the negative (that the measure would not amount to State aid) because the gain derived from the amount of the proportionate uplift charged in return for the use of the network is not diverted to benefit certain undertakings or categories of undertakings operating in the market, as would be the case with a cross-subsidy, but is meant to be put towards the general charges of the electricity sector for the benefit of customers (who would otherwise have had to bear them). It is also meant to ensure that the larger sums collected under the heading of costs not borne by the production and distribution undertakings do not end up penalising customers in the form of tariffs. It is thus a general measure of economic policy: its objective is not to give an advantage to certain undertakings or certain types of production, but, on the contrary, to further a general interest by ensuring that the production of a guaranteed income does not put consumers at a disadvantage or upset the balance and the functioning of the market.

As to the second question, the Council is inclined to the view that it is compatible with Community law. While admittedly Community law prohibits conduct by the operators which discriminates against users, in the

present case it is important to point out that the measures taken by the Minister and the supervisory authority for the sector, which have no repercussions on the accessibility of the network, set a criterion for the fixing, on a temporary basis, of a proportionate supplement which is not prohibited by Community law and, above all, is not discriminatory, because its aim is to remedy imbalances which favour certain types of user who benefit from income arising solely out of changes to the normative framework.

Finally, it should be pointed out that an application has been drawn up so that the preliminary issues can be decided in accordance with the accelerated procedure provided for in Article 104 bis of the Rules of Procedure of the Court of Justice of 19 June 1991.

This case was considered to be one of exceptional urgency because of the extremely high amounts of the proportional supplements imposed on the applicant company, the considerable length of time during which these measures have been enforced, and the public interest, all of which make it desirable for the rules governing the electricity market to be speedily determined.

6.c Greece

• Order of the Council of State of 23 October 2002, no. 3031/2002

Interpretation of Council Directive 73/239/EEC on the pursuit of the business of direct insurance other than life assurance, and of Council Directive 79/267/EEC, on the pursuit of the business of direct life assurance, as modified

The Council of State decided to defer its decision and to put the following preliminary question to the Court of Justice of the European Communities:

"In the light of the First Council Directive 73/239/EEC on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance (as modified and supplemented by the Second Council Directive 88/357/EEC and the Third Directive 92/49/EEC), and in particular Articles 15 and 16 thereof, and in the light also of of Articles 17 and 18 of the First Council Directive 79/267/EEC on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct life assurance (as modified and supplemented by the Second Council Directive 90/619/EEC and the Third Directive 92/96/EEC), may a national legislator provide that, in the case of an undertaking which is in a state of bankruptcy

or in liquidation or in an equivalent state of insolvency, claims arising out of contracts of employment will be satisfied preferentially out of the assets of the undertaking contained in technical reserves, over the claims of parties having rights under insurance contracts and their specific or residuary successors?"

• **Order of the Council of State of
30 December 2002, no. 3947/2002**

The command of Greek language and Greek history as a prerequisite for the setting up of coaching establishments and giving private lessons by the nationals of other Member States, according to the E.U. Treaty and the Greek Constitution.

Pursuant to the challenged provisions of Decree 394/1997, it is no longer required that the founder and the director of a coaching (teaching) establishment ('frontistirio') or the private teacher of foreign languages should speak the Greek language. As far as the teachers in the coaching establishments are concerned, it is required that they have a basic, and not thorough, knowledge of the Greek language. Furthermore, the knowledge of Greek history is no longer a prerequisite for the granting of the relevant licences.

The applicants contend that the challenged provisions of the Decree violate Article 16(2) of the Constitution, because they fail to implement the basic purposes of the education (protection of national consciousness and Greek civilization) and they alter the educational activity by abolishing the requirements of a thorough knowledge of Greek language and a basic knowledge of Greek history.

Securing the teaching of foreign languages at coaching establishments ('frontistiria') or privately at home is not considered as a primary objective for the State under Article 16 (2) of the Constitution. Therefore, the learning of foreign languages is not connected with the pursuit of the national educational policy or the development of national consciousness, which constitute the purposes of education according to the Constitution. Consequently, the purpose of coaching (teaching) establishments to promote the national education, according to Articles 20 and 69 of Emergency Law 2545/1940, has no bearing on the matter of the obligatory command of Greek language and history, as a requirement for the setting up of a coaching establishment or for the teaching of foreign languages by the nationals of other Member States. In this light the arguments of the applicants are dismissed.

6.d Germany

• **Order of the Bundesverwaltungsgericht no.
BVerwGE 6 C 6.02 Directive 97/13/EC, Article 11**

The Bundesverwaltungsgericht has submitted the following questions to the Court of Justice of the European Communities:

The proceedings are suspended.

The Court of Justice of the European Communities is asked for a decision on the following questions:

1. Should Directive 97/13/EC of the European Parliament and the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services (Official Journal no. L 117, page 15) be interpreted in such a way that for the allocation of telephone numbers the national regulatory authority may charge a fee commensurate with the economic value of the allocated numbers, although a telecommunications company operating in the same market with a monopolistic market position from its predecessor in law, the former state-owned monopoly, has assumed a very large number of telephone numbers free of charge and national law excludes the possibility of retroactively charging fees for these old numbers?

If the answer to question 1 is affirmative:

2. In such a case may new companies entering the market be charged a one-off fee for the allocation of a telephone number in the amount of a particular percentage (here: 0.1%) of the estimated annual turnover that can be secured when the telephone number is then allocated to the end customer regardless of the size of the other costs of their entry to the market and without an analysis of their competitiveness in relation to the company with a monopolistic market position relative to those costs?

The national regulatory authority for telecommunications (Regulierungsbehörde für Telekommunikation und Post) charged a telecommunications company fees for the allocation of telephone numbers for the local network.

In the proceedings before the Bundesverwaltungsgericht the question arose as to whether the Licensing Directive allowed the national regulatory authority to charge a fee commensurate with the economic value of the allocated numbers, although a telecommunications company operating in the same market with a monopolistic market position from its predecessor in law, the former state-

owned monopoly, has assumed a very large number of telephone numbers free of charge and national law excludes the possibility of retroactively charging fees for these old numbers?

The question raised here relates in particular to the requirements for imposing charges by virtue of Article 11 (2), second sentence of the Licensing Directive. As explained, the Senate feels that telephone numbers of the type in question are scarce resources within the meaning of Article 11 (2), first sentence of the Licensing Directive and therefore in principle a fee commensurate with the economic value of the allocated numbers may be charged in the interests of optimal use of the supply of telephone numbers. The system of fees must comply with the requirements set out in Article 11 (2), second sentence of the Licensing Directive. In this case, it is said that there are special circumstances which, particularly in light of Article 11 (2), second sentence of the Licensing Directive, exclude the possibility of charging a fee commensurate with the economic value of the allocated telephone numbers. A feature of this case is the fact that the telecommunications company with a monopolistic market position acquired around 3.6 million blocks of telephone numbers, each consisting of a thousand numbers, from its predecessor in law, the former state-owned monopoly, for which fees neither had to be paid nor will fees have to be paid retroactively. Although these blocks cannot be used in their entirety because of the short numbers allocated - only seven to nine digits - the company with a monopolistic market position still possesses almost 400 million numbers which it can use free of charge. This could be at odds with the charging of a fee commensurate with the economic value for the allocation of telephone numbers to competitors of the telecommunications company with a monopolistic market position, particularly from the perspective of non-discrimination or in light of the obligation to take account of the need to foster the development of innovative services and competition. A priori, however, there would be no question of a breach of Article 11 (2), second sentence of the Licensing Directive if the decisive factor for compliance with this provision is that on the grounds of current national law a fee commensurate with the economic value of the allocated number is charged to all telecommunications companies whose requests for telephone numbers are allowed. On the other hand, the question is whether Community law should be interpreted in that way. It could be concluded from Community law that in deciding the question of whether the requirements stipulated in the Licensing Directive are complied with account has to be taken of the actual circumstances on the relevant market at the time the fee is charged.

This is supported by the Competition Directive, which is referred to in the third consideration of the Licensing Directive, the purpose of which is to create and guarantee fair competition on the telecommunications market, and the fact that the fifth consideration of the Licensing Directive expressly states that the directive will make a significant contribution to the entry of new operators into the market. If the circumstances on the relevant market are decisive, it is conceivable that there is a conflict with Article 11 (2), second sentence in particular if a fee commensurate with the economic value is charged, although the company with a monopolistic market position did not have to pay a fee for a very large number of telephone numbers. If Community law ought to be interpreted in this way, the regulation for the imposition of the fees in question would not be in accordance with it. The clarity required for the decision in the legal proceedings can only be provided with an answer by the Court of Justice of the European Communities to question 1) in the request for a preliminary ruling.

b) If the above question is answered in the affirmative, in the Senate's opinion it is necessary to answer the question of whether in such a case new companies entering the market may be charged a one-off fee for the allocation of a telephone number in the amount of a particular percentage (here: 0.1%) of the estimated annual turnover that can be secured when the telephone number is then allocated to the end customer regardless of the size of the other costs of their entry to the market and without an analysis of their competitiveness in relation to the company with a monopolistic market position relative to those costs.

This could be in conflict in particular with the requirements stipulated in Article 11 (2), second sentence of the Licensing Directive. A one-off fee of such a size could probably be regarded in and of itself as innocent, but here too the question arises of whether on the grounds of the Licensing Directive the market conditions at the time of the imposition of the fee are decisive. If that is the case here, it could be important that the companies newly entering the market for voice telephony in competition with the company with a monopolistic market position have to make substantial financial investments, especially in the early phase of their activities, on top of which come the fees for the numbers, and that the company with a monopolistic market position did not have to pay a fee for the numbers acquired from its predecessor in law. Against this background, the described exploitation of an economic benefit in connection with the fees for numbers without an analysis of the competitive strength of the new competitors entering the market in relation to the company with a monopo-

listic market position related to the other costs of entry to the market could be in conflict with the Licensing Directive, in particular with Article 11 (2), second sentence of that directive.



7. Subjects of national administrative Law

7.a Finland

• Short description of the system of leave to appeal before the Finnish Supreme Administrative Court

The administrative court system consists of two instances. There are eight Regional Administrative Courts and the Administrative Court of the Province of Åland acting as courts of first instance. Their judgments may be challenged before the Supreme Administrative Court. However, in some cases the Supreme Administrative Court is the first and final instance. This mainly concerns the appeals against the decisions of the Government and the Ministries. There are also some special courts and tribunals.

The main rule is that there are no special restrictions to appeal to the Supreme Administrative Court. The Court examines the cases both in respect of points of law and fact. (It may be observed that there is a considerable difference with the system applicable in general civil and penal courts where all decisions of the courts of appeal are subject to leave to appeal; on the other hand the general court system includes three instances.)

In what cases leave to appeal applies?

However, certain administrative law matters can be appealed to the highest court only when leave to appeal has been granted in advance by the Supreme Administrative Court. This concerns the judgments of the Regional Administrative Courts in tax cases, in some categories of social cases (in particular cases on subsistence allowance) and in most cases concerning aliens (application of the Finnish Aliens Act). In addition to these judgments of the Regional Administrative Courts, appeal against the decisions of the Appeals Board for Rural Industries is subject to leave granted by the Supreme Administrative Court. This Appeals Board is a special judicial body in agricultural matters.

In about one third of all incoming cases to the Supreme Administrative Court a leave to appeal is required.

Development of the system

The scope of the system of leave to appeal has slowly but prudently increased. The main change took place in 1995 when all tax cases came under this system. (The share of the tax cases in the Supreme Administrative Court has been the biggest - earlier more than one third but today no more than one fifth of all cases.) The necessity and possibility to introduce the system of

leave to appeal has always been examined separately in each group of matters. It has been considered that the judicial protection of the individuals requires a careful assessment in each group of matters before the right to appeal can be limited. The nature of the matters, the number of cases and the efficiency of the lower system of judicial protection are, inter alia, important factors in this assessment.

On the other hand, the system of leave to appeal is one notable mechanism to regulate the big number of cases, taking account of the need to improve the possibilities of the Supreme Administrative Court to concentrate its resources more on the important cases.

Grounds for granting leave to appeal

The grounds for granting leave to appeal vary slightly in different matters. This is due to the fact that in each group of matters, where a priori leave to appeal is required, the relevant legislation separately lays down the criteria. However, the tendency seems to be that the following grounds are the most common:

- 1) it is important to bring the matter to the Supreme Administrative Court in order to ensure the consistency of jurisdiction in similar cases (the ground for the precedent),
- 2) there is a manifest error in the decision of the lower court, or
- 3) there is some other weighty reason to examine the case.

A leave to appeal is granted in about 20 % of the cases subject to this restriction.

Although the system of leave to appeal is generally understood as a system where the Supreme Administrative Court examines the case only when there is a need to issue a precedent, it must be emphasised that the prevailing system in the Supreme Administrative Court includes the examination that there is no manifest error in the lower decision. Thus, the merits of all cases are always examined in the light of this requirement.

Savings of work made by the system

The main saving of work is achieved by the fact that, in the phase of the assessment of the need to grant leave to appeal, the file of the case needs not to be studied in respect of all smaller details, that leave to appeal can be refused in a composition of three judges (the normal quorum is five judges) and that the statement of the reasons of a decision to refuse leave to appeal only

explains that there is no ground for granting such a leave; this means that no specific reasons are given. The decision to refuse leave to appeal can be taken also without hearing the other parties.

7.b The Netherlands

• The hearing of aliens cases by the Administrative Jurisdiction Division of the Dutch Council of State

Before the Aliens Act 2000 came into force on 1 April 2001, the administration of justice in aliens cases, including asylum cases, was the responsibility of the aliens division of The Hague District Court, acting as a court of first and last resort. The aliens division was part of the administrative law division of the District Court and sat in various district courts around the country. The Aliens Act 2000 created the possibility of appeal at second - and final - instance to the Administrative Jurisdiction Division of the Council of State.

To channel the flow of cases into the Division and to expedite the disposal of cases within the Division, the Act created a procedure which in several important respects deviates from the customary procedure in administrative cases in the Netherlands.

The Government reached further agreements with the Council of State on the number of judges and their support staff, designed to enable the Division to dispose of such cases within the time limits set.

This paper discusses the most important provisions.

Regulating the flow of appeal cases

First, limits have been put on the type of cases in which an appeal may be lodged against a judgment finding against the alien in question handed down by the aliens division of the district court. For example, no appeal may be lodged against a judgment relating to a refusal to grant a visa valid for less than three months. In addition, the deadline for paying court fees has been reduced from the customary 4 weeks to 2.

A major departure from normal administrative law is that one or more grounds of appeal against the district court judgment must be included in the notice of appeal. Each ground must describe that part of the judgment which the appellant is contesting, and the reasons for doing so. If there are no grounds for appeal in the notice of appeal, the appeal will be declared inadmissible without a hearing. Nor does the court have to give the appellant the opportunity - as it does in ordinary appeal proceedings - to rectify the omission. Under this procedure it is therefore no longer possible

to appeal against the judgment of a court of first instance without providing the substantive grounds for that appeal in the notice itself. This omission is common practice in the Netherlands, the appellant merely announcing in the notice of appeal that the grounds will be submitted 'at a later date'.

Another important difference is that the district court's judgment is directly enforceable, and that lodging an appeal does not suspend the execution of that judgment. An alien who receives a judgment at first instance that is not in his favour may be deported, and will have to wait for the outcome of any appeal outside the Netherlands. It is therefore no use for an alien to institute appeal proceedings in an effort to prolong his stay in the Netherlands.

Procedures facilitating the rapid hearing of appeals before the Administrative Jurisdiction Division

Peremptory law states that appeals must always be disposed of using the accelerated procedure laid down in the General Administrative Law Act, the aim of which is to hand down a judgment in the shortest possible time. This procedure allows the court to limit the extent of the preliminary inquiry and reduce the normal procedural time limits.

Cases are normally heard by a single judge. Only complex cases or those where fundamental principles are at issue are referred to a panel of three judges.

Another important provision supplements the one referred to above allowing the court to dispose of an appeal without a hearing if the notice of appeal contains no specific grounds. In other areas of law, such a judgment may be contested by filing an action to set aside a default judgment, but in aliens law, this option is excluded.

Furthermore, judgments may be brief. The Act says that the Administrative Jurisdiction Division may confine itself in the judgment to an assessment of the grounds for appeal, and, if the Division concludes that a particular ground cannot lead to the reversal of the contested judgment, it may simply state this conclusion.

Maximum time limit

The Act also - unusually - sets a maximum time limit of 23 weeks for the disposal of such appeals by the Division.

Practice within the Administrative Jurisdiction

Division

In practice, the Division has remained well within the time limits set by the Act. At the end of 2002, the average time taken was 33 days. This was partly due to the fact that the influx of cases remained well below the expectations on which the staffing of the relevant Chamber of the Division was based (1,885 cases instead of the expected 6,775). To a certain extent, this can be explained by the fact that the district courts still have a backlog of cases to work through dating from before the new Act, when no appeal was possible.

This year the flow of cases has substantially increased, and the current average disposal time is 46 days. Despite this increase, however, the disposal time is still well below the maximum set by the Act.

At present, 22% of cases heard by the district courts go to appeal. This is considerably lower than the figure of 30% in ordinary cases. It may thus be concluded that the measures provided for by the Act to limit the number of appeals have had a definite impact.

8. Meet the new members

Short presentation of the Supreme Court of the Republic of Slovenia

The Supreme Court is the highest appellate court in Slovenia. It functions primarily as a court of cassation. It is a court of appellate jurisdiction in criminal and civil cases, in commercial lawsuits and in labour and social security disputes. It is the court of the third instance in almost all these cases within its jurisdiction.

The Supreme Court of the Republic of Slovenia is competent for:

1. trial or determination in first instance of administrative and accounting administrative lawsuits, except for matters which under law fall within the jurisdiction of another court of first instance
2. trial in second instance of appeals against decisions of the courts of first instance in matters cited in the preceding clause and of appeals against decisions of courts of first instance where provided by law
3. trial in third instance of regular means of redress against decisions of courts of second instance
4. trial of extraordinary appeals against judicial decisions, except where the law provides that the determination of an extraordinary means of redress falls within the jurisdiction of another court
5. determination of disputes over jurisdiction between lower courts, except where the law provides that the determination of such disputes falls within the jurisdiction of another court
6. determination of the transfer of jurisdiction in cases provided by law
7. handling of other cases provided by law

The Supreme Court of the Republic of Slovenia keeps records of the judicial practice of courts in the Republic of Slovenia and keeps abreast of the judicial practice of intergovernmental courts.

The general assembly of the Supreme Court:

1. passes legal opinions in principle which are important for the uniform application of laws
2. passes legal opinions on questions of judicial practice
3. decides on initiatives for the enactment or amendment of laws
4. adopt the annual rota of judges
5. determines the method of adopting judicial practice in courts
6. performs other tasks within the jurisdiction of the Supreme Court if so provided by law

The Supreme Court has five divisions (chambers):

- the Criminal Division,
- the Civil Division,
- the Commercial Lawsuits Division,
- the Labour and Social Security Disputes Division,
- the Administrative Review Division.

The Registry is the sixth division of the Supreme Court.

Administrative judicial system in the Republic of Slovenia

Pursuant to Article 157 of the Slovenian Constitution and the new Administrative Dispute Act (ADA) in force since 2 September 1997, the administrative judicial system in Slovenia has been organised in a different manner since 1 January 1998, and different rules of procedure apply.

The scope of administrative disputes has been broadened in the new law (Articles 1, 2 and 3 of the ADA). Normally, it is an individual administrative act issued by a state body, local community body or a holder of public authorisation, while it is sometimes also an individual action of the part of any of the above. Most often it is an administrative act, i.e. an individual final act, through which any of the subjects listed above has decided on the rights, obligations or legal benefits of an individual, a legal entity or another person who might be a party in an administrative procedure. An administrative dispute may also include non-administrative, i.e. other individual acts, for instance issued in electoral procedures, in procedures of appointments to or dismissals from an office, individual acts issued in the form of a regulation, regulating individual legal relations by state bodies or holders of public authorisation. If no other form of legal protection is provided, then any other individual act affecting the constitutional rights of an individual may also become the subject of a dispute. If so determined by law, disputes between the state and municipalities, or between the above-cited bodies and holders of public authorisations may also become the subject of an administrative dispute. This can be an individual action affecting constitutional rights, but only on condition that no other form of judicial protection is provided for. It can also be a claim for the return of items seized pursuant to the contested act, or for reimbursement for the damages caused by the contested act.

The circle of parties to administrative disputes has been expanded under the new law (Articles 17 to 20 of the

ADA). Parties in an administrative dispute can be any of the following: the plaintiff, the defendant, a representative of the public interest and the injured party. The plaintiff can be any individual, legal entity, a settlement etc., i.e. any person or body claiming that a violation of any of his or her rights or legal benefits has been committed through the contested act. The attorney general may assume the role of the plaintiff. Defendants can be a state body, local community body or the holder of public authorisation that issued the contested act at the second instance or, in a single-instance procedure, the body which issued the contested act. Following the amendments to the law, a representative of the public interest can also be a party in the procedure. As a rule, this role is assumed by the attorney general. The injured party is the individual or legal entity who would suffer direct damage as a consequence of the removal of the contested administrative act.

Under the new ADA, the administrative judicial system is organised on two levels (Articles 9 to 12 of the ADA). First-instance decisions in administrative disputes as a rule come under the jurisdiction of the Administrative Court of the Republic of Slovenia as a specialised court. The Supreme Court adjudicates as its main seat or at separate departments. The Supreme Court may rule on administrative disputes of first instance only in the cases, which are specified in Article 10 of the ADA. These include cases concerning the legality of acts issued by electoral bodies, and cases concerning elections to the National Assembly, National Council and elections for the Presidency of the Republic; and also disputes concerning elections, appointments to, or dismissals from office of persons elected, appointed or dismissed by the President of the Republic, the National Assembly, the National Council or the Government. The Supreme Court is also competent with regard to decisions issued in the form of a regulation and regulating individual relations, if issued by state bodies or holders of public authorisations at the national level.

In the second instance, decisions in administrative disputes are always made by the Supreme Court of the Republic of Slovenia.

It also rules on disputes over jurisdiction (Article 13 of the ADA).

In administrative disputes, more emphasis is given of the principle of adversarial nature of the procedure in all of its stages. An administrative procedure consists of the first instance, appellate instance and extraordinary legal remedies.

The procedure in first-instance (Articles 24 to 68 of the ADA) begins with the filing of the action, which must happen within 30 days of the recipient being served with the contested act. One important new element is that the plaintiff may now propose a temporary decree postponing execution of the administrative act or temporary regulation of the situation to be issued (Article 69 of the ADA).

This is followed by formal and material testing of the action in order to determine whether it was done in accordance with the requirements set by law, and to test whether all procedural requirements have been met. The next stage consists of the action being submitted to the defendant, representative of the public interest or injured party, where such a party exists, to submit their reply, a reply for the appeal and for submission of the files.

As the next possible stage, the preparatory procedure envisages several procedural operations to be conducted by the court.

The court adjudicates (adopts a decision) after the main hearing or a panel session. The court usually decides on a dispute through a ruling or, in the cases of procedural issues, through a decision. As a rule, the court issues a ruling removing the contested acts which were found not to be in compliance with the law. Only when the conditions set by law have been met, may the court itself decide on the subject, i.e. to rule itself on the right, obligation or legal benefit of the plaintiff. If the Court establishes that the procedure of issuing the contested decree was correct and the decision was correct and based in law, the Court shall reject the suit as unjustified.

Under the new arrangements, an appeal may be filed against the first-instance ruling as well as against a decision, which precludes the continuation of the procedure (Articles 70 and 79 of the ADA). An appeal has the effect of suspending the execution. An appeal can be filed by any party in the first-instance procedure. Following the submission of files and preliminary testing of the appeal, the appellate court may adopt any of the following decisions (Articles 73 to 77):

- through a decision annul the first-instance court ruling and return the case to the first-instance court for a new hearing of the case;
- through a decision annul the first-instance court ruling and return the case to the first-instance court for a new hearing of the case;
- through a decision annul the first-instance court ruling and reject the action;
- through a ruling annul the first-instance court ruling and remove the administrative act.

If the appellate court conducts the main hearing itself or, in specific and exceptional circumstances without a main hearing, it may alter the first-instance court ruling through a ruling.

For appeals, the principle of the prohibition of the introduction of new facts during the appellate stage and of the prohibition on reformatio in peius (paragraph 1 of Article 71 and Article 78 of the ADA) apply.

The ADA also regulates two extraordinary legal remedies: retrial and request for the protection of legality (Articles 80 and 84 and 85 to 99 of the ADA).

While retrial is intended to correct the actual situation and may be applied in both the first as well as the second instance, and may be proposed by the parties. The request to protect the legality may only be filed by the Public Prosecutor of the Republic of Slovenia and may only be requested in cases where fundamental violations of the provisions on administrative dispute procedure have been committed or in the event of incorrect application of substantive law, and not also for the actual state of affairs. The decision on the request is made by the Supreme Court of the Republic of Slovenia.

With regard to the execution of judgements, Article 91 of the ADA stipulates that under the provisions of the General Administrative Procedure Act only that ruling is to be implemented with which the court replaced the administrative act.

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