

1st JUDGMENT: Reform and Refuse – Greek Waste Infringements and the novelty of Penalty Payment¹

(Case 3 reviewed by Gerda Falkner and Nikolas Rajkovic)

<i>Litigation Basics</i>	
EU Law at Issue	
●	Directives 75/442 and 78/319 re waste disposal, non-application
Transposition Deadlines	
●	Directive 75/442: 25.07.1977
●	Directive 78/319: 31.03.1980
First Proceedings (C-45/91)	
●	Letter of Formal Notice: 26.04.1989
●	Entrance into Registry: 28.01.1991
●	First Judgment: 07.04.1992
Second Proceedings (C-387/97)	
●	Letter of Formal Notice: 21.09.1995
●	Entrance in Court Registry 14.11.1997
●	Second Judgment: 04.07.2000

Case no. 3 again concerns matter of environmental policy. However, the specifics are quite different. This case is considered a milestone in EU law because it was the first where the ECJ provided a ruling pursuant to the penalty procedure. Further, the case did not pertain to correct transposition but rather a failure to apply measures to comply with EU directives. The facts of this case centre on a long-time and illegal dump at the mouth of the Kouroupitos River in Crete. The waste disposal site was started by local inhabitants, but later expanded and received toxic waste from hospitals, industrial plants and a military base. As the site grew, so did its environmental, public health and aesthetic consequences for an ever-widening area affected by the waste. This placed the problem within the jurisdiction of the Commission pursuant to Directives 75/442 and 78/319 dealing with waste disposal and management, and the Commission began its intervention following a complaint in 1987.

¹ Thanks to Zoe Lefkofridi for discussing aspects of the Greek cases with Gerda Falkner.

EU Law and Protection of the Environment

The original EEC Treaty of 1957 made no direct mention of environmental protection, and only contained an indirect reference in Article 30 about “the protection of health and life of humans, animals or plants.” Since then, a sequence of political and judicial moves inscribed environmental protection into the EU’s legal order. These changes coincided with the rise of environmental activism through the 1970s and 1980s and were initiated by the First Community Action Programme on the Environment in 1972.² The Council later enacted its first environmental legislation in 1975, Directive 75/442/EEC, which standardized the concepts of waste and waste disposal to eliminate legal disparities between member states. These measures were complemented in 1978 by Directive 78/319/EEC which dealt with toxic and dangerous waste. The next breakthrough came in 1985 with the ECJ’s judgment in the *ADBHU* case;³ here the Court held that the EC’s fundamental freedoms were to be construed together with ‘objectives of general interest,’ such as environmental protection.⁴ Finally, the invocation of the Single European Act in 1987 inserted a new ‘Environment’ title into the EC Treaty, and subsequent amendments by the Treaties of Maastricht, Amsterdam and Nice have emphasized ‘a high level of protection and improvement of the quality of the environment’ as a further Community principle.⁵

The Maastricht Treaty and Penalty Proceedings

Another pertinent reform, coming with the Maastricht Treaty, was the provision of penalty proceedings. This allowed for penalties to be imposed against member states for not complying with EU law. The notion of a penalty clause for the EC Treaty had first arisen in 1975, when the ECJ, responding to the Paris and Copenhagen Conferences, proposed that member states face sanctions for non-compliance.⁶ This move was endorsed further by a resolution of the European Parliament in 1983 supporting the imposition of penalties.⁷ The Maastricht Treaty enabled the Commission to ask for a lump sum or daily penalty payment in light of non-compliance.

²European Environmental Agency, “1970s”, <<http://www.eea.europa.eu/environmental-time-line/1970s>> (Accessed July 20, 2011); See also Francis Jacobs, “The Role of the European Court of Justice in the Protection of the Environment”, *Journal of Environmental Law* 18, no. 2 (2006), 186.

³Judgment of the Court of 7 February 1985 in European Court of Justice Case C-240/83 *Procureur de la Republique v Association de defense des bruleurs d’huiles usages* (ADBHU) [1985] ECR 531.

⁴ *Ibid*, 187.

⁵ *Ibid*, 186.

⁶ Levente Borzsak, “Punishing Member States or Influencing Their Behaviour or *Index (non) calculate*”, *Journal of Environmental Law* 13, no. 2 (2001), 245.

⁷ *Ibid*.

However, for reasons of certainty and non-retroactivity, the penalty proceedings could only be applied to non-compliance with the ECJ after 1 November 1993.

A River Runs through It: The Case of the Kouroupitos Waste Dump

The problem of Kouroupitos Waste had a modest beginning and perhaps unanticipated consequences. However, it does appear to reflect a widespread problem of uncontrolled waste dumps across Greece (several hundred still in 2007, according to the Greek Ministry of the Environment).⁸ The polluting of the Kouroupitos River originates in the 1960s when local residents began dumping waste at the river's mouth. This misconduct expanded over time and involved more institutional refuse, stemming from industrial plants, hospitals, an American military base and, of greatest concern, chemical and toxic waste.⁹ In September 1987, the European Commission received a complaint that dumping of waste at the Kouroupitos was uncontrolled, encroaching upon the village of Akrotiri and a "majority of communes in the Nomos (district) of Chania in Crete."¹⁰ The consequences included a pollution of the sea at the Gulf of Souda, risks of garbage fires, the proliferation of rodents and insects, offensive smells and a defacement of the picturesque shoreline at Akrotiri.¹¹

In January 1988, the Commission requested comment from the Greek government regarding the waste situation at the Kouroupitos River. The reply came two months later, where Greek authorities advised of proposed disposal sites in the area and the planned cessation of illegal dumping at the Kouroupitos by August 1988. However, these results did not materialize, and the Commission issued a formal letter of notice in April 1989 and then a reasoned opinion in March 1990. The Greek government failed to reply to the reasoned opinion, and this brought the case before in the ECJ in January 1991.

⁸ A. Bosdogianni, "Municipal Solid Waste Management in Greece - Legislation - Implementation Problems", *Eleventh International Waste Management and Landfill Symposium 2007*, S. Margherita di Pula, Cagliari, Italy, CISA Environmental Sanitary Engineering Centre, < <http://www.resol.com.br/textos/062.pdf> >, 3 (accessed November 14, 2013): "In October 2005 (Case C-205/03), the Court of Justice condemned Greece because of the existence of numerous illegal waste dumps. In the course of written procedures, the Greek authorities acknowledged that at least 1125 illegal or uncontrolled waste dumps were still operational. The number of uncontrolled dumps decreased from 3500 to 1450 approximately in the year 2002 and tends to decrease further to 500 in 2007, according to the Ministry of Environment."

⁹ Opinion of Advocate General Jacobs delivered on 26 February 1992 in European Court of Justice Case C-45/91 *Commission v Hellenic Republic* [1992] ECR I-2509, para 16.

¹⁰ Commission of the European Communities, "Report for the Hearing in Case C-45/91", <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61991J0045:EN:PDF>>, 2510.

¹¹ Ibid.

In April of 1992 the Court ruled that Greece had not fulfilled its obligations to ensure waste was disposed of in a secure manner.¹² After receiving no further information regarding steps towards compliance after the first judgment, the Commission sent an informal letter in October 1993 asking for information. The Greek authorities replied that the competent local authority would inform the Commission after completion of a study in late 1994. Having received no such information, the Commission sent a letter of formal notice on 21 September 1995, and, in doing so, initiated penalty proceedings. The case was ultimately registered with the ECJ for a second time on 14 November 1997 and judgment in the second case was delivered on 4 July 2000.¹³

At the hearing, the Greek government argued that local authorities were doing all they could to implement the initial judgment made in 1992. In particular, there were plans for a mechanical recycling and composting plant, bolstered further by a landfill site in an adjacent municipality. However, local measures were frustrated by organized opposition “from the public concerned, in the form of complaints and actions brought before the competent administrative and judicial authorities challenging the administrative decisions...”¹⁴ The ECJ, referring to established case law that internal circumstances were not a defence to non-compliance,¹⁵ found that the Greek government had failed to take “measures necessary to ensure that waste is disposed of in the area of Chania without endangering human health and without harming the environment...”¹⁶ Thus, the Court fined Greece 20 000 Euro for each day of non-compliance with the initial judgement, commencing from the date of delivery of the Article 228 ruling.

The dumping of waste into the Kouroupitos River continued until February 2001, nearly eight months after the penalty payments had been ordered. The reason for the recalcitrance appears rooted in resistance from local officials and continued public discontent.¹⁷ The Greek Environment Minister Costas Laliotis complained that local residents used all means of protest to block construction of an alternative waste storage site: “Every time I move to solve the crisis, they bring out the guns and brandish black flags”.¹⁸ What is more, it is reported that the degree of acrimony over the instatement of a new waste disposal site led to approximately 47 studies on an

¹² Judgment European Court of Justice of 7 April 1992 in case C-45/91, Commission of the European Communities v Hellenic Republic, ECR I-02509 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61991CJ0045:EN:HTML>).

¹³ Judgment of the Court of 4 July 2000 in European Court of Justice Case C-387/97 *Commission v Hellenic Republic* [2000] ECR I-5047.

¹⁴ Judgment of the Court of 4 July 2000 in European Court of Justice Case C-387/97 *Commission v Hellenic Republic* [2000] ECR I-5047, para. 69.

¹⁵ *Ibid.*, para. 70.

¹⁶ *Ibid.*, para. 91-99.

¹⁷ Borzsak, “Punishing Member States”, 261.

¹⁸ Borzsak, “Punishing Member States”, 261.

alternate location.¹⁹ On 7 July 2000, the Mayor of Akrotiri and members of the local council were even arrested following a conflict with the police over the re-opening of Kouroupitos site²⁰

Ultimately, the resolution of the waste dilemma only came following the provision of a temporary disposal site in the locality of Messomouri, along with plans for a permanent site and composting plant in the community of Korakia.²¹ Further, an additional dispute developed when Greece was delayed in paying the imposed penalties, which totalled 4 720 000 Euros.²² This drew the public rebuke of the European Parliament's Committee on the Environment, Public Health and Consumer Affairs²³ (EPC) and warnings from the Commission that aid payments would be stopped.²⁴ The matter was ultimately concluded by March 2001 when the Commission advised the EPC that outstanding fines were in the process of payment.²⁵

Case Notes

- **Problem:** The Greek authorities seem to have a systematic problem with the regulation of waste disposal. In this case, waste began to be dumped randomly into a river mouth beginning in the 1960s, then growing into a large illegal dump with industrial and toxic refuse. The timeline suggests that for a considerable period, administrative and political actors appear to have neglected proper implementation of relevant EU and potentially domestic laws.
- **Causes of Infringement:** It seems initial causes related to economic motives (high costs) and administrative neglect, but later structural blockage occurred. Local officials resisted alternative waste sites proposed by the Environment Minister and local citizen movements attempted to obstruct the creation of an alternative dump.
- **Outcome:** Only after the 2nd judgment and another 7 – 8 months of delay, an alternative, temporary dump went into operation. The entire dispute cost the Greek state a total 5 400 000 Euro in penalty payments. Further infringement proceedings were opened in February 2006 because the Kouroupitos dump had not been cleaned up and the temporary dumps at Messomouri turned into an illegal one (case C-112/06). Considering also the number of impugned dumps, which reportedly remain in Greece, the issue could likely remain on the long term agenda.

¹⁹ *Eleftherotypia*. "Kouroupitos: the Greek Waterloo (translation)." May 13, 2006. Available online at: <http://archive.enet.gr/online/online_obj?pid=97&tp=T&id=32860348> (October 14, 2011).

²⁰ *In GR*. "The waste disposal in Kouroupitos functions again: troubles and arrest of Akrotiri mayor (translation)." 7 July 2000. Available online at <<http://news.in.gr/greece/artide/?aid=278203>> (October 14, 2011).

²¹ Written Question E-4132/08, Answer given by Mr Dimas on behalf of the Commission, <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2008-4132&language=EN>.

²² Written Question E-0491/03, Answer given by Mrs Wallström on behalf of the Commission [2003] OJ C222E/236.

²³ "MEPS maintain pressure on Greek waste dumping", *European Report*, 3 March 2001.

²⁴ "Greece pays up over Kouroupitos fine", *ENDSEurope*, 8 January 2001, <<http://www.endseurope.com/2767>> (May 19, 2011).

²⁵ "Greece breaks rules on waste disposal directive but case soon to be dosed", *European Report*, 24 March 2001.

2nd JUDGMENT: A case of *Force Majeure*? Spanish Bathing Water and the application of EU Environmental Standards

(Case 9 reviewed by Gerda Falkner and Nikolas Rajkovic)

<i>Litigation Basics</i>	
EU Law at Issue	
●	Directive 76/160 (Bathing Water)
Transposition Deadline:	01.01.1986
First Proceedings (C-92/96)	
●	Letter of Formal Notice: 13.10.1989
●	Entrance into Registry: 22.03.1996
●	First Judgment: 12.02.1998
Second Proceedings (C-278/01)	
●	Letter of Formal Notice: 24.01.2000
●	Entrance in Court Registry 13.07.2001
●	Second Judgment: 25.11.2003

Infringements of EU environmental law constitute a significant proportion of the Commission's infringement and enforcement cases.²⁶ The inscription of penalty proceedings into the EC Treaty enabled the Commission to exact more rigorous prosecution of such environmental infringements; and the present case became the second where fines were actually levied.²⁷ This case dealt with the applicable standard that defined non-compliance vis-a-vis bathing water quality. At the time of accession (1986), Spain did not follow Portugal's approach of seeking delays in the implementation of EU environmental standards.²⁸ Spanish authorities were soon confronted with a problem of bathing water compliance under Directive 76/160, and subsequent infringement proceedings from the Commission. Spanish authorities appealed that a severe and multi-annual drought produced sample results which were 20-30 percent below the EU minimum, permitting a defence of *force majeure*. Further, Spanish officials insisted that drought provided a justification for a lowering of the number of acceptable samples required to fulfil compliance.

²⁶ E.g. European Commission, "Statistics on Environmental Infringements", <<http://ec.europa.eu/environment/legal/law/statistics.htm>> (Accessed December 14, 2011).

²⁷ Brian Jack, "Enforcing Member State Compliance with EU Environmental Law: A Critical Evaluation of the Use of Financial Penalties", *Journal of Environmental Law*, Published online before print, <<http://jel.oxfordjournals.org/content/early/2010/11/26/jel.eqq023.abstract>> (Accessed January 14, 2011), 3.

²⁸ See Article 395 and Annex XXXVI, Council of the European Communities, "The Act concerning the Conditions of Accession of the Kingdom of Spain and the Portuguese Republic", *Documents Concerning the Accession of the Kingdom of Spain the Portuguese Republic to the European Communities*, <<http://wits.worldbank.org/GPTAD/PDF/archive/EC%2812%29.pdf>> (Accessed January 14, 2011), 138.

Directive 76/160 and Spanish Bathing Water

Directive 76/160, which has now been superseded by Directive 2006/7, regulated the quality of bathing water, excluding water used for therapeutic purposes and swimming pools. The definition of “bathing water” used in the Directive was broadly worded, referring to “all running or still fresh water or parts thereof and sea water in which bathing is expressly authorised by the competent authorities of each Member State or bathing is not prohibited and is traditionally practised by a large number of bathers.”²⁹ The Directive set out criteria for the minimum quality of bathing water, regarding physical, chemical and microbiological limits, as well as rules on sampling frequency and methods of analysis.³⁰ Information obtained from water analysis was to be reported to the Commission at regular intervals.³¹

Water results obtained by the Commission from Spanish authorities became a cause for concern, leading to the delivery of a letter of formal notice in October 1989.³² The reply provided by the Spanish government did not mitigate the dispute, which prompted the Commission to issue a Reasoned Opinion in November 1990.³³ This marked the beginning of a period of correspondence and information exchange between the Commission and Spain. However, by 1996, the Commission remained dissatisfied regarding the quality of Spanish bathing water and brought infringement proceedings respecting inshore bathing water before the ECJ.³⁴

Force Majeure?

At issue in court was the acceptable level of sample conformity for Spanish bathing water. The Commission emphasized how approximately 30 percent of samples taken between 1991 and 1994 failed to conform to the limit values.³⁵ Spanish authorities argued that Spain had undergone

²⁹ Council of the European Communities, *Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water*, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31976L0160:EN:HTML>> (Accessed January 14, 2011).

³⁰ European Commission, *Bathing Water: Summary of Legislation*, <http://europa.eu/legislation_summaries/consumers/consumer_safety/l28007_en.htm> (Accessed January 14, 2011).

³¹ Council of the European Communities, *Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water*, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31976L0160:EN:HTML>> (Accessed January 14, 2011).

³² Judgment of the Court of 12 February 1998 in European Court of Justice Case C-92/96 *Commission v Kingdom of Spain* [1998], para. 14.

³³ *Ibid.*, para. 15-16.

³⁴ *Ibid.*, para. 17-18.

³⁵ Opinion of Advocate General Lenz delivered on 2 October 2003 in European Court of Justice Case C-92/96 *Commission v Kingdom of Spain* [1997], para. 13.

five years of exceptional drought which constituted *force majeure*, and permitted for derogation from the ordinary standard of 95 percent of samples in conformity.³⁶ Further, the government alleged, a number of waters categorized as “bathing areas” were no longer used for that purpose due to changes in social habits.

The Court delivered its judgment in February 1998 and dismissed Spain’s defence claims on the following grounds. First, it held that permitted derogations from the Directive did not include instances of changed social habits.³⁷ Second, and most importantly, the Court criticized the lack of specific evidence provided by the Spanish government to substantiate its connection between the severe drought and poor sample results.³⁸ Further, the Court pointed to observations made by Advocate General Lenz, noting that many impugned bathing areas were actually located in Spain’s north and away from regions known to have been affected by severe drought.³⁹ Thus, the Court ruled that Spain had failed to take necessary measures to ensure inshore bathing waters which conformed to limit values stipulated by the Directive.

Already in March 1998, the Commission requested information from Spain on the measures taken to comply with the Directive and the judgment. Further, the Commission granted Spain a leniency of three bathing seasons by which to achieve compliance.⁴⁰ In reply, Spanish officials delivered information on their plans to restore compliance for inshore bathing waters. Yet, in 2000, samples revealed that 20 percent of bathing areas were still beyond the limit values of the Directive.⁴¹ Thus, the Commission delivered a reasoned opinion in June 2000 and subsequently opened penalty proceedings in July 2001. The Commission sought the imposition of a penalty payment of 45 600 Euro per each day of delay in the adoption of measures.

In court, the Commission pointed to evidence that between 1998 and 2000 the quality of inshore bathing waters was non-compliant with standards of the Directive, and this despite a reduction in the overall number of bathing areas. In its defence, Spain argued that the Commission had not given national authorities reasonable time to remedy a problem involving diffuse sources of pollution and agricultural run-off, which was not easily detected in the short-term. Notably,

³⁶ Ibid., para. 18-19.

³⁷ Judgment of the Court of 12 February 1998 in European Court of Justice Case C-92/96 *Commission v Kingdom of Spain* [1998], para. 28.

³⁸ Ibid., para. 32.

³⁹ Ibid.

⁴⁰ Press Release No. 105/03, “For the Second Time the Court Imposes a Fine on a Member State for Non-Compliance with One of its Judgments”, Press Release and Information Division, <<http://curia.europa.eu/en/actu/communiqués/cp03/aff/cp03105en.htm>> (Accessed January 17, 2011).

⁴¹ Judgment of the Court of 25 November 2003 in European Court of Justice Case C-278/01 *Commission v Kingdom of Spain* [2003], para. 21.

Spain's argument was accepted by Advocate-General Mischio in his Opinion of June 2003.⁴² However, the ECJ took a different view and in its judgment of November 2003 held that three bathing seasons was sufficient time, stressing that compliance must be "commenced immediately" and "accomplished in the shortest time possible."⁴³ Notwithstanding the Court denied the Commission's daily penalty proposal of 45 600 Euro, choosing instead to impose a penalty of 624 150 Euro per annum per percentage of inshore bathing areas that failed to comply with the value limits of the Directive.⁴⁴

Case Notes

- **Problem:** At the time of accession, the Spanish government did not follow the Portuguese example of asking for delay times in the implementation of EU environmental standards.
- **Causes of Infringement:** The challenge of meeting EU water quality standards was a daunting one owing to the complex nature of Spanish bathing water problems. In any case, the Spanish administration did not initiate relevant measures in time, including enquiries as to the key sources of pollution.
- **Outcome:** The Court imposed a penalty of 624 150 Euro per annum per percentage of inshore bathing areas not in compliance. Ultimately, immediate compliance came about following the closure of a number of bathing areas.

⁴² Opinion of Advocate General Mischio delivered on 12 June 2003 in European Court of Justice Case C-278/01 *Commission v Kingdom of Spain* [2003], para 67.

⁴³ Press Release No. 105/03, "For the Second Time the Court Imposes a Fine on a Member State for Non-Compliance with One of its Judgments", Press Release and Information Division, <<http://curia.europa.eu/en/actu/communiqués/cp03/aff/cp03105en.htm>> (Accessed January 17, 2011).

⁴⁴ Judgment of the Court of 25 November 2003 in European Court of Justice Case C-278/01 *Commission v Kingdom of Spain* [2003], para. 2.

3rd JUDGMENT: Enforcement through Penalty Payments...and Lump Sums? The ECJ, French Fisheries Controls and Persistent Non-Compliance

(Case 14 reviewed by Gerda Falkner and Nikolas Rajkovic)

<i>Litigation Basics</i>	
EU Law at Issue	
●	Regulations 2057/82, 2241/87 and 2847/93 (Inspection and technical standards for catching and selling fish).
Transposition Deadline:	01.01.1983
First Proceedings (C-64/88)	
●	Letter of Formal Notice: 21.12.1984
●	Entrance into Registry: 29.02.1988
●	First Judgment: 11.06.1991
Second Proceedings (C-304/02)	
●	Letter of Formal Notice: 11.10.1993
●	Entrance in Court Registry 27.08.2002
●	Second Judgment: 12.07.2005

The Commission's effectiveness in ensuring compliance with EU law is influenced considerably by inspection and enforcement authority which is inconsistent across policy areas. For instance, the Commission possesses enforcement powers in fields of economic policy (i.e. agriculture, fisheries and competition policy) but not over EU environmental law.⁴⁵ The value of this power and capacity became demonstrated in fisheries policy vis-a-vis persistent French non-compliance with Regulations 2057/82 and 2241/87. These regulations set inspection and technical standards for the control of mesh sizes, attachments to nets, by-catches and the minimum size of fish permitted to be sold. Once in court, the case produced a watershed decision that established the ECJ's discretion and authority to impose a lump sum fine on top of a penalty payment, in those cases where non-compliance was persistent and general.

EU Fisheries Regulations and the Problem of French Enforcement

EU fisheries regulation has had the difficult task of balancing often competing policy objectives, such as resource and environmental conservation, food production, income generation and

⁴⁵ Brian Jack, "Enforcing Member State Compliance with EU Environmental Law: A Critical Evaluation of the Use of Financial Penalties", *Journal of Environmental Law* 23, no. 1 (2011), 77.

maintaining viability of fishing communities.⁴⁶ There has also been the concern that fisheries rules and enforcement practices ensure a level playing field for all member states and private actors across the EU. Further, although EU fisheries rules could be produced by qualified majority voting,⁴⁷ the so-called Luxembourg Compromise has de facto meant a unanimity requirement for several decades. In practice, fisheries rules have emerged in a competitive atmosphere between member states with respect to the maintenance of their national fishing industries. This implies that EU states have been keen to protect their authority over national fisheries relative to the Commission; and consequently the Commission has had difficulty in acquiring stronger fishery authority and enforcement powers. In fact, national fisheries have commanded considerable sensitivity in national politics as illustrated by an incident in 1984 where a French Navy gunboat fired upon two Spanish fishing vessels in the protection of French coastal fishing rights.⁴⁸ Further, France has long been unhindered in exercising protectionism in favour of its fisheries as illustrated by how fish protection measures became suspended in Brittany for reasons of socio-economic difficulty and that before 1991, the only case where a sizeable fine was imposed for improper fishing involved a Spanish vessel.⁴⁹

In this present case, the problem revolved around the application of Regulations 2057/82 and 2241/87. The aforesaid Regulations set standards that national authorities were required to implement; specifically with respect to the enforcement of minimum mesh sizes, net attachments, prohibitions on marketing so-called By-Catches, and the minimum size of fish which may be sold. Further, the Regulations placed a positive obligation on national officials to undertake proper inspections, and apply penal or administrative action against skippers and/or fish merchants infringing the technical standards of conservation for fishing resources.⁵⁰

However, between the years 1984 and 1987, Commission inspectors uncovered a series of systematic failures by French fisheries authorities with respect to Regulation 2057/82. In some measure, these shortfalls could be related to the discretion permitted under prior French rules in the application of standards.⁵¹ The extent of the breaches found by Commission inspectors were reaching, involving a number of omissions: low inspection rates; failing to discard prior and less

⁴⁶ Simon Mardle, Sean Pascoe, Jean Boncoeur, Bertrand Le Gallic, Juan J. Garcia-Hoyo, Ines Herrero, Ramon Jimenez-Toribio, Concepcion Cortes, Nuria Padilla, Jesper Raakjaer Nielsen, Christoph Mathiesen, "Objectives of fisheries management: case studies from the UK, France, Spain and Denmark", *Marine Policy* 26, no. 6 (2002), 415.

⁴⁷ EEC Treaty, Article 43.

⁴⁸ Paul Treuthardt, "French Navy Gunboats Fire on Spanish Fisherman, Wounding Nine", *Associated Press*, 8 March 1984.

⁴⁹ Opinion of Advocate General Lenz delivered on 27 February 1991 in European Court of Justice Case C-64/88 *Commission v France* [1991] ECR I-02727, para 14 and 68.

⁵⁰ Judgment of the Court of 11 June 1991 in European Court of Justice Case C-64/88 *Commission v France* [1991] ECR I-02727, para 3.

⁵¹ Opinion of Advocate General Lenz delivered on 27 February 1991 in European Court of Justice Case C-64/88 *Commission v France* [1991] ECR I-02727, para 35.

strict French standards; and a failure of French officials to impose sanctions despite widespread non-compliance.⁵² However, the evidence uncovered also revealed a potential degree of motivated infringement by French authorities in several cases. This involved instances such as: the suspension of enforcement actions in a socio-economically afflicted region;⁵³ the preferential treatment of French fishermen over other member states;⁵⁴ a “silent agreement between industry and authorities to accept landings of hake measuring 24cm instead of the legal size of 27cm;”⁵⁵ and “verbal instructions” permitting the auction of fish below the minimum legal size.⁵⁶

Consequently, the nature and scope of these infringements, which affected the coherence and equality of the EU fisheries policy, drew the concern of the Commission. In December 1984, the Commission issued its letter of formal notice advising French officials of what Commission inspectors had found first-hand. The letter was explicit and exacting in its recount of the systematic nature of infringements; to such an extent that when the case reached adjudication Advocate General Lenz quoted passages from the letter which detailed the very systematic nature of non-compliance and the non-action of French government inspectors in the face of it.⁵⁷

Thus, in June 1991, it was not surprising that the ECJ found France in breach of its obligations under the Regulations and consequently the Treaty. The adverse judgment marked the beginning of a lengthy and protracted dialogue where the Commission attempted to work with France to attain improvements in fishery policy enforcement. The process began with an informal letter from the Commission in November 1991, to which France responded with assurances of doing its “utmost” to comply with Community law.⁵⁸ This was followed by a number of inspections of French ports by Commission officials in ensuing years which noted an improvement, but still

⁵² Opinion of Advocate General Lenz delivered on 27 February 1991 in European Court of Justice Case C-64/88 *Commission v France* [2000] ECR I-02727, para. 20.

⁵³ Opinion of Advocate General Geelhoed delivered on 29 April 2004 in European Court of Justice Case C-304/02 *Commission v France* [2000] ECR I-06263, para. 14.

⁵⁴ Opinion of Advocate General Geelhoed delivered on 29 April 2004 in European Court of Justice Case C-304/02 *Commission v France* [2004] ECR I-06263, para. 68.

⁵⁵ Opinion of Advocate General Geelhoed delivered on 29 April 2004 in European Court of Justice Case C-304/02 *Commission v France* [2000] ECR I-06263, para. 18.

⁵⁶ "A chaque occasion où des navires ont fait l'objet d'un contrôle en mer en présence d'inspecteurs de la Commission, il a été observé que le maillage des filets ou leurs dispositifs contrevenaient au règlement n° 171/83 du Conseil, titre I; cependant, le service d'inspection de votre gouvernement n'a pris aucune mesure immédiate à cet égard et, en général, aucune mesure pénale ou administrative ultérieure n'a été prise. Les missions des inspecteurs de la Commission dans les ports ont montré qu'il n'y a aucun contrôle des prises accessoires et que, en particulier dans les ports du golfe de Gascogne, il n'y a aucune application des dispositions communautaires relatives aux tailles minimales des poissons prévues dans le règlement n° 171/83 du Conseil, titre III; lorsqu'une réglementation est appliquée, il s'agit des mesures nationales relatives aux tailles des poissons, qui sont moins strictes que la réglementation communautaire, ce qui n'est pas conforme à l'article 1er du règlement n° 2057/82". (Ibid.)

⁵⁷ Ibid.

⁵⁸ Judgment of the Court of 12 July 2005 in European Court of Justice Case C-304/02 *Commission v France* [2005] ECR I-06263, para. 12.

found that controls were inadequate in several areas.⁵⁹ In April 1996, the Commission then issued a reasoned opinion arguing that France had failed to comply in the following three domains: (1) inadequate measuring of minimum mesh sizes; (2) enabling undersized fish to be marketed and sold; and (3) laxness by French authorities in taking action against known infringements.⁶⁰

French officials replied with information on measures taken and ongoing efforts to strengthen controls. French claims were assessed subsequently in a series of port inspections in August 1996, September 1997, October 1997, March/April 1998, March 1999 and July 1999. This led to the issuing of a supplementary reasoned opinion in June 2000 which complained that inadequate controls remained on the sale of undersized fish and the laxness of French authorities in taking action against infringements.⁶¹ The response of French officials in August 2000 asserted that since the last inspections French fisheries control had “undergone significant change.”⁶² This, however, was not confirmed by Commission inspections conducted in 2001 and in 2003. The Commission opened penalty proceedings.

Lump Sums and the ECJ’s Discretion

In its second judgment, the ECJ confirmed the inadequacy of controls and enforcement of fishing activities in France. The proceedings in fact did not even revolve around the issue of whether French fisheries controls remained in non-compliance, but rather the extent of the penalty which the Court could impose. The issue came to the fore with the Advocate General’s opinion that a daily penalty payment alone was insufficient in cases where a member state permitted enduring non-compliance with EU law, necessitating the imposition of a further dissuasive measure.⁶³ The opinion of the Advocate General raised an important legal question because the Commission had only requested the imposition of a daily penalty payment, and not a sum lump. This led to the reopening of the oral procedure where the parties and 16 member states,⁶⁴ as intervenors, gave submissions on whether the ECJ had the discretion to order: (1) the

⁵⁹ Ibid., para 13.

⁶⁰ Ibid., para. 14.

⁶¹ Ibid, para. 17.

⁶² Ibid., para 19.

⁶³ Opinion of Advocate General Geelhoed delivered on 29 April 2004 in European Court of Justice Case C-304/02 *Commission v France* [2000] ECR I-06263.

⁶⁴ Judgment of the Court of 12 July 2005 in European Court of Justice Case C-304/02 *Commission v France* [2005] ECR I-06263, para. 78.

payment of a lump sum where the Commission had only requested a penalty payment; and (2) both a penalty payment and a lump sum, where the Commission had only requested the former.⁶⁵

The ECJ decided that it had full jurisdiction to depart from the Commission's request on penalties. The Court relied upon prior case law involving Greece and Spain⁶⁶ which held the Commission's suggestions to only be a "useful point of reference." Further, in substantive terms, the Court asserted that persistent and serious infringement exposed a member state to both a penalty payment and a lump sum. In this particular case, the Court noted the "structural" inadequacy of control measures. France was thus ordered to pay a penalty of 57 761 250 Euro for each 6-month period of non-compliance and a further lump sum penalty of 20 000 000 Euro. Subsequently, France was found in breach for an initial six month period, and the Commission requested a periodic penalty of 57 761 250 Euro. After the succeeding six month period, the Commission determined that France had finally stopped years of improper and illegal fishing practices and closed the file.⁶⁷ The Commission's quick closure of the fisheries file, however, has not gone without critique, with one commentator openly questioning "whether, after 14 years in breach of the judgment...French fishermen had really changed the habits of a lifetime..."⁶⁸ It should be also noted that France initiated a counter-action⁶⁹ before the Court of First Instance in 2006 (which it lost⁷⁰), questioning whether the Commission possessed the full and proper competence to determine whether or when an infringement had ceased.

⁶⁵ Annette Schrauwen, "Fishery, Waste Management and Persistent and General Failure to Control Obligations: The Role of Lump Sums and Penalty Payments in Enforcement Action under Community law", *Journal of Environmental Law* 18, no. 2 (2006), 296.

⁶⁶ See Case C-387/97 *Commission v. Greece* [2000] ECR I-5047 and Case C-287/01 *Commission v. Spain* [2003] ECR I-14141.

⁶⁷ Ian Kilbey, "The Interpretation of Article 260 TFEU (ex 228 EC)", *European Law Review* 35, no. 3 (2010), 382.

⁶⁸ *Ibid.*, 384.

⁶⁹ *Ibid.*, 382.

⁷⁰ PRESS RELEASE No 113/11, <http://www.eulaws.eu/?p=1021>, accessed 27. 10. 2013.

Case Notes

- **Problem:** Commission officials found that for a prolonged period of time, involving governments that spanned France's political spectrum, French authorities were not properly enforcing EU fisheries Regulations and this despite warnings from Brussels. EU rules were considerably stricter relative to prior French fishing regulations, and French authorities showed reluctance to adapt.
- **Causes of Infringement:** Motivated non-compliance at the application stage showing signs not only of neglect on the part of the French administration but also protectionism favouring French fishermen to the detriment of fish stocks and economic interests of other EU (national) fisheries. The French government had likely failed to appreciate the implications of Regulations 2057/82 and 2241/87 at the time of their enactment, possibly because of the lack of direct powers of the EU Commission to enforce these rules autonomously (beyond only checking on the spot the French authorities' enforcement efforts). In the course of decades of EU constitutional development, however, the means of the Commission to act via ECJ proceedings became more effective – at least in theory.
- **Outcome:** France was ordered to pay a penalty of 57 761 250 Euro for each 6-month period of non-compliance and a further lump sum penalty of 20 000 000 Euro.

4th JUDGMENT: Equality is in the Details – Italy’s non-recognition of acquired rights by Foreign Language Assistants

(Case 17 reviewed by Gerda Falkner and Nikolas Rajkovic)

<i>Litigation Basics</i>	
EU Law at Issue	
●	EC Treaty Article 39(1) (Free Movement of Workers)
First Proceedings (C-212/99)	
●	Letter of Formal Notice: 23.12.1996
●	Entrance into Registry: 04.06.1999
●	First Judgment: 26.06.2001
Second Proceedings (C-119/04)	
●	Letter of Formal Notice: 31.01.2002
●	Entrance in Court Registry: 04.03.2004
●	Second Judgment: 18.07.2006

The principle of equality and non-discrimination is held to be a fundamental norm of EU law.⁷¹ However, what constitutes proper enactment of non-discrimination continues to stoke contention and litigation before the ECJ. Such disputes are often fuelled by parties disagreeing on the specifics of how equality and non-discrimination should be implemented in practice. In this instance, despite litigation before national and EU courts, a number of Italian universities engaged in the employment of foreign language assistants on terms which were argued as discriminatory relative to Italian nationals. Ultimately, the Italian government did take measures to ensure that foreign language assistants were treated more equitably. However, the ECJ did find Italy in breach for lateness in its legal remedies; nonetheless it decided against the imposition of a financial penalty. This made the case the first penalty proceeding where the ECJ abstained from a penalty despite a finding of infringement.

⁷¹ Richard Plender, “Equality and Non-Discrimination in the Law of European Union”, *Pace International Law Review* 7, no. 1 (1995), 57.

The Laboured Road to Equality: Italian Universities and Foreign Language Assistants

The origins of the case at hand arise from earlier suits before Italian courts in the late 1980s.⁷² The aforesaid proceedings involved an Italian decree which enabled national universities to employ foreign language assistants as self-employed contractors, using a method of fixed-term contracts and no social security coverage. The outcome of these earlier cases were rulings by the ECJ which held that Italy was in breach for allowing a system of temporary contracts that discriminated against foreign language assistants.⁷³ In 1995, this led to the passing of a new Italian law which required that relevant fixed-term contracts for foreign language assistants were to become indefinite and such employees were to obtain priority when it came to university hiring.⁷⁴

The new law worked to remedy most such employment relations across Italy. Many universities simply re-hired their foreign language assistants with indefinite contracts, and recognized their prior years of service.⁷⁵ Yet, six Italian universities did not recognize the accrued years of employment and rights of foreign language assistants; choosing to only equalize the current pay of foreign language assistants' relative to Italian nationals.⁷⁶ This prompted the intervention of the Commission, with a letter of formal notice in December 1996, a reasoned opinion in May 1997, and finally the commencement of ECJ proceedings in June 1999.⁷⁷

The Infringement Phase: Equality as the Recognition of Acquired Rights

The ECJ issued its initial judgment in June 2001, and held that Italy had failed in its obligation to ensure that the acquired rights of foreign language assistants were recognized. It made this finding by noting that such recognition was already guaranteed to Italian workers in similar circumstances. The Court came to this conclusion despite a number of arguments made by the Italian authorities. First, the Italian government alleged that the 1995 law, No. 236, did not in fact provide for an automatic conversion from fixed to indefinite term contracts, since some foreign language assistant posts were new and subject to a selection process.⁷⁸ Second, it was argued, the

⁷² Ian Kilbey, "Case Comment: *Commission v Italy*—Case C-119/04", *Liverpool Law Review* 29, no. 3 (2008), 336.

⁷³ *Ibid.*

⁷⁴ Judgment of the Court of 26 June 2001 in European Court of Justice Case C-212/99 *Commission v Italy* [2001] ECR I-04923, para. 4 & 5.

⁷⁵ Judgment of the Court of 26 June 2001 in European Court of Justice Case C-212/99 *Commission v Italy* [2001] ECR I-04923, para. 11.

⁷⁶ Judgment of the Court of 26 June 2001 in European Court of Justice Case C-212/99 *Commission v Italy* [2001] ECR I-04923, para. 12.

⁷⁷ Judgment of the Court of 26 June 2001 in European Court of Justice Case C-212/99 *Commission v Italy* [2001] ECR I-04923, para. 7-9.

⁷⁸ Judgment of the Court of 26 June 2001 in European Court of Justice Case C-212/99 *Commission v Italy* [2001] ECR I-04923, para. 18.

problem of acquired rights recognition involved collective agreements and individual contracts, which were a private and complex labour matter beyond the unilateral intervention of the Italian state.⁷⁹ Nonetheless, the Court denied these claims on the basis that “provisions, practices or situations” in Italy’s internal legal order could not be used to justify the failure to ensure that foreign language assistants were treated in the same manner as similarly situated national assistants.⁸⁰ This required Italian law and universities to account for the experience acquired by former language assistants.

The Penalty Phase: Justified Discrimination and No Penalty

In January 2002, the Commission sought information from the Italian government on its implementation of the Court’s judgment in June 2001. The Italian authorities responded with a series of correspondence between April 2002 and January 2003, which attempted to demonstrate efforts by the government to call upon impugned universities to remedy contractual relations and that the relevant public sector collective agreement (the “National Collective Employment Agreement for University Staff” (CCNL)) would be amended to comply with the Court’s ruling.⁸¹ These measures did not satisfy the Commission, and in April 2003 a reasoned opinion was submitted to the Italian government.⁸² In reply, the Italian government submitted the final revised version of the CCNL and a copy of Decree-Law No. 2/2004 so as to demonstrate compliance. The Decree Law required in particular that the financial treatment of foreign language assistants “shall correspond to that afforded to part-time tenured researchers...from the original date of recruitment.” The Italian government asserted therefore that the Decree-Law fulfilled the requirements of the prior infringement ruling:

“The Italian Government contends that the breach has been remedied. It stresses that decree-law No 2/2004 was adopted specifically in order to resolve the deadlock of the collective negotiations and to oblige the universities to recognise the acquired rights of former foreign-language assistants. The decree-law prescribes that, as a point of reference, the universities must have regard to the financial treatment of part-time-tenured researchers.”⁸³

⁷⁹ Judgment of the Court of 26 June 2001 in European Court of Justice Case C-212/99 *Commission v Italy* [2001] ECR I-04923, para. 19.

⁸⁰ Judgment of the Court of 26 June 2001 in European Court of Justice Case C-212/99 *Commission v Italy* [2001] ECR I-04923, para. 34.

⁸¹ Judgment of the Court of 18 July 2006 in European Court of Justice Case C-119/04 *Commission v Italy* [2006] ECR I-06885, para. 9-12.

⁸² Judgment of the Court of 18 July 2006 in European Court of Justice Case C-119/04 *Commission v Italy* [2006] ECR I-06885, para 13.

⁸³ Opinion of Advocate General Poiares Maduro delivered on 26 January 2006 in European Court of Justice Case C-119/04 *Commission v Italy* [2006] ECR I-06885, para 20.

Yet, the Decree-Law in fact provided a new source of contention, with respect to Italy's choice of referential job category (part-time tenured researcher) for foreign language assistants. In March 2004, the Commission filed a penalty proceeding against Italy, and asked for a daily penalty payment of 309 750 Euro. A central controversy in these second proceedings was how the Decree-Law had specified that the prior careers of foreign language assistants were to be assessed "by taking the remuneration of part-time tenured researchers as the standard of reference." The Commission argued that former full-time foreign language assistants should "receive treatment equivalent to that of a full-time tenured researcher." The Italian government replied that the work provided by foreign language assistants was not equivalent to that of full-time tenured researchers, since foreign language assistants did not perform the same tasks:

"[...] the principal task of tenured researchers is to perform scientific research, whilst their teaching duties are merely ancillary. This is reflected in the fact that they must pass entry exams that are specifically devised to assess their research abilities. Entirely equal treatment, in financial terms, of foreign-language assistants and tenured researchers ought therefore to be excluded. In order to avoid relative undervaluation of the work of tenured researchers, the standard of reference should be the financial treatment of part-time researchers, not that of full-time researchers."⁸⁴

The ECJ interpreted these arguments over the appropriate referential category for foreign language assistants in a mixed manner, and showing deference to Italy's choice of remedy. First, the Court re-asserted that the complexities of Italian labour relations could not justify the government's delay to ensure equal treatment under Italian law for foreign language assistants.⁸⁵ However, once Italian authorities had acted with their belated Decree-Law, a breach could not be found vis-à-vis the appropriate reference category for foreign language assistants. This was because, the Court asserted, the earlier judgment did not require "...the Italian Republic...to identify a category of workers comparable to former assistants and to treat the latter in exactly the same way as that category of workers."⁸⁶ Further, a breach could only be established with respect to Italy's choice of part-time referential category, should the Commission supply sufficient evidence and proof that the choice was made on prohibited grounds of discrimination.⁸⁷ Thus, the ECJ held that Italy was only in breach in so far as its adopted Decree-

⁸⁴ Opinion of Advocate General Poiares Maduro delivered on 26 January 2006 in European Court of Justice Case C-119/04 *Commission v Italy* [2006] ECR I-06885, para 23.

⁸⁵ Judgment of the Court of 18 July 2006 in European Court of Justice Case C-119/04 *Commission v Italy* [2006] ECR I-06885, para. 25.

⁸⁶ Judgment of the Court of 18 July 2006 in European Court of Justice Case C-119/04 *Commission v Italy* [2006] ECR I-06885, para 37.

⁸⁷ Judgment of the Court of 18 July 2006 in European Court of Justice Case C-119/04 *Commission v Italy* [2006] ECR I-06885, para. 41.

Law came after the deadline set by the reasoned opinion, and no infringement was evident in the Decree-law itself.⁸⁸

Case Notes

- **Problem:** For a sustained period, foreign language assistants (FLAs) working at Italian universities were employed using a series of fixed-term contracts which provided no social security; and this constituted prohibitive discrimination under EU law relative to Italian nationals. Following a series of court decisions at the Italian and EU levels, relevant changes were made to Italian law. Most universities followed suit, with the exception of six Italian universities which provided indefinite contracts but without recognizing accrued years of service. Ultimately, this was corrected by an Italian Decree Law in 2004 which required the recognition of acquired rights at the level of a part-time tenured researcher. The Commission took issue with this referential job category.
- **Causes of Infringement:** This case centres on a problem of specification vis-a-vis the EU's fundamental norm of non-discrimination. In real terms, this implicated both public and private law in the forms of Italian Decrees and Decree Laws and collective bargaining agreements at Italian universities. This led the Italian government to claim that contractual rights of FLAs could not be properly resolved by state intervention, and requiring instead a resolution by social (corporate) actors at collective bargaining. However, according to EU law, the Italian state remained the guarantor of equal treatment and hence contractual rights possessed by FLAs relative to Italian nationals; and this was emphasized by the Court in its judgments.
- **Outcome:** Despite a finding of late compliance, the ECJ in penalty proceedings did not impose a fine.

⁸⁸ Judgment of the Court of 18 July 2006 in European Court of Justice Case C-119/04 *Commission v Italy* [2006] ECR I-06885, para 48.

5th JUDGMENT:

A “Common” Standard? EU Harmonization meets French Product Liability

(Case 18 reviewed by Gerda Falkner and Nikolas Rajkovic)

<i>Litigation Basics</i>	
EU Law at Issue	
●	Directive 85/374 (Product Liability)
Directive Transposition Deadline:	25.07.1988
First Proceedings (C-52/00)	
●	Letter of Formal Notice: 06.11.1998
●	Entrance into Registry: 17.02.2000
●	First Judgment: 25.04.2002
Second Proceedings (C-177/04)	
●	Letter of Formal Notice: 20.02.2003
●	Entrance into Registry: 14.04.2004
●	Second Judgment: 14.03.2006

This case is notable for the change it imposed upon French legal and judicial practices regarding product liability. French law had been distinguished in Europe for its considerable protection of consumers in the event of harmful defective products. However, the introduction of Directive 85/374/EEC in 1985 was designed to “harmonize to a large extent national law on producer liability,”⁸⁹ so as to avoid competitive distortions and ensure free movement of goods within the common market. This brought more extensive French liability standards into tension with the Commission’s objective for legal harmonization in product liability. What ensued was an 18-year contest between the Commission and France which testified to the difficulty of reaching an effective consensus as between two established legal approaches.

A Matter of Legal Principles: The Directive versus French Product Liability Law

The completion of the internal market required elimination of non-tariffs barriers that could hinder intra-community trade. A key area for concern became different product liability standards between member states, and the need for European regulation to harmonize this area. The

⁸⁹ Commission of the European Communities, *Green Paper: Liability for defective products*, Brussels 28/07/99 <http://europa.eu/documents/comm/green_papers/pdf/com1999-396_en.pdf> (Accessed October 27, 2010), 10.

response was Directive 85/374/ECC which established a common scheme of strict product liability across member states.⁹⁰ The Directive was the result of a long and contested legislative process among Community institutions and member states, which began with a draft Directive in 1974 and the Commission's first official proposal in 1976.⁹¹ In fact, the legislative process began with a sizable dispute between the Commission and the Legal Affairs Committee of the European Parliament over whether the Directive "directly affected" the Common Market and thus could rely properly on Article 100 of the EC Treaty.⁹² Further, most member states at the time of the Directive had no special laws regarding product liability, and dealt with the matter as extensions to existing contract, tort or negligence laws.⁹³ Thus, the formulation of a specific EEC law on product liability became a unique legal opportunity which attracted debate regarding the fair apportionment of risk between producers, suppliers and consumers; with some member states having more established approaches than others, i.e. France and West Germany. The final Directive was for many member states the first specific law on product liability that imposed strict liability upon product producers.⁹⁴

Yet, the corpus and practice of French law was a notable exception in the domain of product liability. First, French civil law had an existing system of strict liability already in place. Second, the reach and intricacy of that liability had considerable pedigree and scope. This was foremost illustrated in how the French courts, in particular the *Cour de Cassation*, through groundbreaking interpretations of the general civil law and *Code Civil*, developed various ways for aggrieved buyers and third-party victims to sue not just the impugned manufacturer but also intermediate suppliers and so-called "guardians" of defective products. Further, French contractual law provided a 30-year period for claims of damages, as well as strict liability that excluded a "developmental risks" defence. In sum, established French product liability had cast a considerably wider net upon the field of product producers and distributors relative to other national laws and relative to what emerged under the 1985 EC Directive. It was this latter aspect that proved problematic regarding the Commission's intent to harmonize product liability rules, since established French law had been more advantageous to injured consumers relative to the Directive. Nonetheless, since passage of the Directive was based on the unanimity requirement of Article 100 EC, it seems that France had generally approved of the Directive.

⁹⁰ Alberto Cavaliere, "Product Liability in the European Union: Compensation and Deterrence Issues", *European Journal of Law and Economics* 18, no. 3 (2004), 299.

⁹¹ Norbert Reich, "Product Safety and Product Liability", *Journal of Consumer Policy* 9, no. 1 (1986), 137.

⁹² Kathleen M. Nilles, "Defining the Limits of Liability: A Legal and Political Analysis of the European Community Products Liability Directive", *Virginia Journal of International Law* 25, no. 3 (1985), 750.

⁹³ Otto Baron van Wassenae van Catwijck, "Products Liability in Europe", *American Journal of Comparative Law* 34, no. 4 (1986), 789.

⁹⁴ *Ibid.*, 791.

A Case of Contested Transposition, *Commission v. France*

The following provisions of the 1985 Directive become pertinent with respect to the French case. First, according to the Directive, a “producer” is deemed the manufacturer of a finished product, the producer of any raw material, the manufacturer of a component part and any entity which puts its name, trademark, or other distinguishing features upon an impugned product.⁹⁵ Second, the Directive defined material “damage” to be inclusive of harm or destruction exceeding 500 Euros. Third, there was a limitation period of three years for the recovery of damages, and an expiry of the right to sue ten years following the date on which the product was put into circulation. Fourth, the Directive provided member states with the option to derogate from only three specific provisions, specifically liability for agricultural products, developmental risks and the financial limit of liability.

The Directive was to be transposed into all national laws by 1988. Although a draft law had been discussed in Parliament⁹⁶, France did not meet the deadline and was condemned in 1993 by the ECJ for non-transposition.⁹⁷ Yet, France was not alone, as only three states had passed requisite laws by the deadline.⁹⁸ Ultimately, the Directive was transposed into French law in 1998, some ten years after the deadline. However, the Commission found this transposition to be not in accordance with the Directive, leading to an exchange between the Commission and the French government concerning correct transposition.⁹⁹ In fact, the exchange began even before French law had taken force, with a letter of formal notice being issued in November 1998.¹⁰⁰ The Commission found the French response inadequate and brought matters to Court; where the ECJ ruled in favour of the Commission in 2002. A year later, in light of continued non-

⁹⁵ Michael G. Faure “Product Liability and Product Safety in Europe: Harmonization or Differentiation?” *Kyklos* 53, no. 4 (2000), 470.

⁹⁶ Agnes Chambraud, Patricia Foucher and Anne Morin, “The Importance of Community Law for French Consumer Protection Legislation”, *Journal of Consumer Policy* 17, no. 1 (1994), 30.

⁹⁷ Judgment of the Court of 13 January 1993 in European Court of Justice Case C-293/91 *Commission v France* [1993] ECR I-00001.

⁹⁸ Sandra N. Hurd and Frances E. Zoller, “European Community: Council Directive on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States concerning liability for Defective Products”, *International Legal Materials* 32, no. 5 (1993): 1347.

⁹⁹ Opinion of Advocate General Geelhoed delivered on 18 September 2001 in European Court of Justice Case C-52/00 *Commission v France* [2002] ECR I-03827, para 8.

¹⁰⁰ Opinion of Advocate General Geelhoed delivered on 18 September 2001 in European Court of Justice Case C-52/00 *Commission v France* [2002] ECR I-03827, para 9.

compliance, the Commission sent a letter of formal notice under the penalty proceedings of the EC Treaty and ultimately referred the matter to the ECJ for a second time.¹⁰¹

An Anatomy of the Pleadings and Rulings

The infringement proceeding began with three specific points of contested transposition. The Commission contested, first, France's inclusion of damages less than 500 Euro as part of product liability under of the *Code Civil*. Second, challenge was directed at France's extension of product liability against suppliers in all cases and on the same basis as producers. Finally, the Commission questioned the revision of the *Code Civil* which held that the producer must demonstrate appropriate steps to rely on the exemption from liability provided for under Article 7(d) and (e) of the Directive.¹⁰²

The main legal question addressed was the extent to which national legislation could enjoy discretion in the implementation of the Directive. The French government brought forward three arguments. First, the Directive had been intended to protect consumers, and thus should national provisions exceed the Directive it would be to the advantage of consumers and hence a permitted derogation from the Directive. Second, France's inclusion of claims below 500 Euro was intended to respect the fundamental right of access to courts under the European Convention on Human Rights and Fundamental Freedoms. Third and finally, France brought forward Article 153 of the EC Treaty which includes the "power of the Member States to adopt or to retain measures which afford consumers greater protection than that afforded under Community legislation."¹⁰³

These arguments were not accepted by the Court and France's qualifications in the transposition of the Directive were held in breach. Foremost, the Court found that the French transposition did not respect how the Directive was intended to harmonize national liability rules, and did not permit national derogations for stricter standards—otherwise referred to as "minimum harmonization." Further, it noted that Article 153 of the EC Treaty came into use following the

¹⁰¹ Judgment of the Court of 14 March 2006 in European Court of Justice Case C-177/04 *Commission v France* [2006] ECR I-02461.

¹⁰² Judgment of the Court of 25 April 2002 in European Court of Justice Case C-52/00 *Commission v France* [2002] ECR I-03827, para 49.

¹⁰³ Opinion of Advocate General Geelhoed delivered on 18 September 2001 in European Court of Justice Case C-52/00 *Commission v France* [2002] ECR I-03827, para 31.

creation of the Directive on product liability, and thus was not effective at the time the latter was agreed.¹⁰⁴

In the ensuing penalty proceedings (Case C-177/04), the Commission, responding to French legislative amendments,¹⁰⁵ withdrew its application regarding the first (damages less than 500 Euro) and the third (exemption of liability) orders of the judgment in Case C-52/00, and only pursued France for its breach of the Directive with regard to the parallel liability of suppliers and producers. Here, the French Republic argued that the applicable provisions of the *Code Civile* were in conformity with the Directive in ultimate effect, as an impugned supplier could avoid liability by merely informing the plaintiff of the identity of the original producer or preceding supplier.¹⁰⁶ The Court rejected this argument on the grounds that prior case law held that “provisions of a directive must be implemented with unquestionable binding force and with requisite specificity, precision and clarity.”¹⁰⁷ Correspondingly, France was ordered to pay 31 650 Euro per day in penalty from the day on which the judgment was delivered until full compliance.¹⁰⁸ As a result of the adverse judgment, three weeks later the French Parliament amended the relevant provision of the *Code Civile*.¹⁰⁹

Case Notes

- **Problem:** The Directive faced resistance vis-a-vis a history of higher standards in French product liability and distinct institutional innovations in French law which empowered consumers relative to producers and suppliers. In a nutshell, the problem involved a contest of legal interpretation along two axes: minimum versus full harmonization; and market-making versus consumer protection. In both categories, France’s interpretation was denied by the ECJ, but it needs mentioning that the Commission continued only one of three impugned aspects in second proceedings.
- **Causes of Infringement:** This was a case of motivated delay caused by a major policy misfit and the intent by France to uphold its higher standards of liability on behalf of consumers.
- **Outcome:** ECJ fined France a daily penalty payment of 31 650 Euro.

¹⁰⁴ Judgment of the Court of 25 April 2002 in European Court of Justice Case C-52/00 *Commission v France* [2002] ECR I-03827, para 15.

¹⁰⁵ Opinion of Advocate General Geelhoed delivered on 24 November 2005 in European Court of Justice Case C-177/04 *Commission v France* [2005], para. 13-14.

¹⁰⁶ Judgment of the Court of 14 March 2006 in European Court of Justice Case C-177/04 *Commission v France* [2006] ECR I-02461, para. 46.

¹⁰⁷ *Ibid*, para. 48.

¹⁰⁸ *Ibid*, para. 78.

¹⁰⁹ *Loi n° 2006-406 du 5 avril 2006 relative à la garantie de conformité du bien au contrat due par le vendeur au consommateur et à la responsabilité du fait des produits défectueux* publiée au Journal Officiel du 6 avril 2006, <<http://www.ffsa.fr/ffsa/upload/reprise/docs/application/pdf/2010-02/epi2006abr27.pdf>> (Accessed July 5, 2011).

6th JUDGMENT:

Pacta Sunt Servanda? German procurement contracts in breach of EU law

(Case 19 reviewed by Gerda Falkner and Nikolas Rajkovic)

<i>Litigation Basics</i>	
EU Law at Issue	
●	Directive 92/50 EC (Public Procurement)
Transposition Deadline:	01.12.1991
First Proceedings <i>Braunschweig</i> (C-28/01)	
●	Letter of Formal Notice: 30.04.1999
●	Entrance into Registry: 16.01.2001
●	First Judgment: 10.04.2003
First Proceedings <i>Bockhorn</i> (C-20/01)	
●	Letter of Formal Notice: 20.07.1998
●	Entrance into Registry: 21.01.2001
●	First Judgment: 10.04.2003
Second Proceedings <i>Braunschweig/Bockhorn</i> (C-503/04)	
●	Letter of Formal Notice: 17.03.2003
●	Entrance in Court Registry: 07.12.2004
●	Second Judgment: 18.07.2007

The central controversy of this case relates not to correct transposition but the construal of proper remedy; a contest with such legal significance that during the breadth of proceedings a number of member states sought and obtained intervenor status. Two German localities, Braunschweig and Bockhorn, awarded costly and long-term waste disposal contracts without prior publication of a contract notice, and thus breaching the Public Services Procurement Directive 92/50/EC (Procurement Directive). Municipal counsellors from the Green Party made complaints to the Commission¹¹⁰ which upon investigation led to infringement proceedings against Germany. In response, the German government was quick to acknowledge that a breach had been committed by two localities in the *Land* of Lower Saxony. However, a dispute continued on the question of what the German government had to do to remedy the breach. The Commission and the German government contested whether EU law provided authority to rescind an otherwise lawful contract, or whether damages and measures against future

¹¹⁰ Winfried Didzoleit, "Bruesseler Prinzipien", *Der Spiegel*, 27 November 2000, 124.

infringements would suffice. Ultimately, the case assumed proportions beyond the specific waste contracts in question and the Court had to address the major issue of whether the domestic principle of *pacta sunt servanda*—contracts must be respected—provided immunity from rescission in the event of breach under EU Law. To the revelation of many, the ECJ revised this long-held presumption, holding that contract rescission could in fact be required when an infringement contravenes the freedom to provide services under the Procurement Directive and consequently the EC Treaty.

When Legal Principles compete: What constitutes a breach of EU Procurement law?

The salience of public procurement for European integration was made prominent by the Commission's *White Paper for the Completion of the Single Market* in 1985 (White Paper).¹¹¹ The Paper identified that preferential public purchasing by member states constituted a significant non-tariff barrier that obstructed the functioning of the common market.¹¹² Further, the Commission assessed the value of public procurement at some 15% of the Community's GDP,¹¹³ and noted that preferential procurement imposed excess costs on the public purse.¹¹⁴ Flowing from this were new EU Directives, pursuant to the Single Market agenda,¹¹⁵ which intended to regulate public procurement via the transposition of standards of uniformity, non-discrimination and transparency into domestic laws. This latter criterion, transparency, assumed paramount importance in EU rules on public procurement, requiring public contracts that exceeded defined monetary thresholds to be announced in the Official Journal of the European Communities (Official Journal).¹¹⁶

¹¹¹ Commission of the European Communities, *White Paper for the Completion of the Internal Market*, (COM) 85 310 fin, 1985 <http://www.ena.lu/white_paper_completion_internal_market_14_june_1985-020003520.html> (Accessed November 11, 2010); Christopher Bovis, *EU Public Procurement Law* (Cheltenham: Edward Elgar Publishing Limited, 2007), 2-3.

¹¹² Christopher Bovis, "The Regulation of Public Procurement as a Key Element of European Economic Law", *European Law Journal*, 4, no. 2 (1998), 231.

¹¹³ Commission of the European Communities, "Public Procurement", <http://ec.europa.eu/internal_market/publicprocurement/index_en.htm> (November 12, 2010).

¹¹⁴ See Commission of the European Communities, *The Cost of Non-Europe, Basic Findings Vol 5., Part A: The Cost of Non-Europe in Public Sector Procurement*, Official Publications of the European Communities, Luxembourg, 1988.

¹¹⁵ Martin Lodge, "Isomorphism of National Policies? The 'Europeanisation' of German Competition and Public Procurement Law", *West European Politics*, 23, no. 1 (2000), 98.

¹¹⁶ Public Supplies Contracts, EC Directive 88/295 (OJ 1988, L 127,1), consolidated by Directive 93/36, OJ 1993, L 199; Public Works Contracts, EC Directive 89/440 (OJ 1989 L210,1), consolidated by Directive 93/37, OJ 1993, L 199; Public Services Remedies, EC Directive 89/665, OJ 1989 L 395 and Directive 92/13, OJ 1992 L 76/7; Utilities Sectors, EC Directive 90/531 (OJ 1990, L 297), as amended by Directive 93/98, OJ 1993, L 199; Public Services Contracts, EC Directive 92/50, OJ 1992, L 209. See Christopher Bovis, "The Regulation of Public Procurement", 231.

The localities of Braunschweig and Bockhorn both forewent these EU regulations when they respectively awarded long-term waste disposal contracts without initiating a call for tender in accordance with Procurement Directive 92/50.¹¹⁷ In particular, the city of Braunschweig concluded, in March 1995, a 30-year waste disposal contract for heat treatment at a minimum value of DM 34 000 000 per year.¹¹⁸ While the municipality of Bockhorn, in January 1997, similarly concluded a 30-year agreement with a power distribution company for the removal of wastewater at a value of DM 1 042 000.¹¹⁹ Pursuant to the EC Treaty, the Commission began infringement proceedings by delivering formal letters of notice in July 1998¹²⁰ (Braunschweig) and April 1999¹²¹ (Bockhorn). In replies to both cases, the German government conceded the localities had failed to comply with the tender requirements of the Procurement Directive, and consequently the responsible *Land*, Lower Saxony, would make firm reminders that all public procurement contracts must strictly observe EU law.¹²²

The Commission did not accept the German acknowledgement or proposed remedies as adequate, and issued a reasoned opinion in March of 2000 which insisted Braunschweig and Bockhorn remained in breach by continuing contracts that had infringed EU procurement rules. Further, in January 2001, the Commission initiated court action asserting that Germany had not taken “all necessary steps” to comply with the Procurement Directive.¹²³ In its defence, the German government initiated a two-pronged (domestic versus external) strategy that, first, encouraged a mutual dissolution of the questioned contracts¹²⁴ and amended German law to permit contract rescission.¹²⁵ Second, the government advanced a number of legal arguments to the Commission which denied that the breach remained actionable in law.

¹¹⁷ The failure to advertise tender was not an infringement unique to Braunschweig and Bockhorn. In 2002, it was reported that only 16 percent of total public procurement contracts in the EU were advertised. See Anthony Browne, “Commission is all but impotent to stop abuses”, *The Times (London)*, 15 November 2004, 9.

¹¹⁸ Rhodri Williams, “Remedying a breach of Community Law: the judgment in joined cases C-20/01 and C-28/01, *Commission v. Germany*”, *Public Procurement Law Review* 12, no. 3 (2003), 109.

¹¹⁹ *Ibid.*

¹²⁰ Judgment of the Court of 10 April 2003 in European Court of Justice Joined Cases C-20/01 and C-28/01 *Commission v Germany* [2003] ECR I-03609, para. 14.

¹²¹ Judgment of the Court of 10 April 2003 in European Court of Justice Joined Cases C-20/01 and C-28/01 *Commission v Germany* [2003] ECR I-03609, para. 7.

¹²² Judgment of the Court of 10 April 2003 in European Court of Justice Joined Cases C-20/01 and C-28/01 *Commission v Germany* [2003] ECR I-03609, para 8 and 16.

¹²³ Rhodri Williams, “Remedying a breach of Community Law”, 110.

¹²⁴ Reply of the German government to the Reasoned Opinion (Second Referral) of the European Commission, 1 June 2004, 2.

¹²⁵ *Ibid.*, 2-4. In the German government’s response to the reasoned opinion of the second proceedings, it underlined that a new German law, dated 1 February 2001, provided for rescission of public procurement contracts if those who had tendered unsuccessfully were not informed two weeks prior to the contract being awarded—to allow time to file a challenge. The German government stressed that domestic courts had actually considered rescission of contracts to follow if these provisions were not upheld, and that rescission was all the more appropriate in cases where no call for tender had occurred. Therefore, it needs mentioning that within Germany, a distinct

With respect to this latter strategy, the German government claimed that no persistent infringement was evident because appropriate measures were taken to ensure further public procurement contracts would not breach Community law.¹²⁶ Further, the government argued that there was no legal way to rescind these impugned contracts because applicable German law, at the time of the agreements were made, permitted rescission only in rare cases where there was a severe breach of general legal principles. In particular, German authorities emphasized that Article 2(6) of the Public Services Remedies Directive (89/665) (Remedies Directive) upheld both the principles of legal certainty and legitimate expectations which informed the maxim of *pacta sunt servanda*, requiring only compensation in lieu of breach.¹²⁷ Third and finally, the German government emphasized that termination of the contracts would require a high level of compensation to be paid;¹²⁸ an onerous financial burden which the government argued was disproportionate to the principled aim sought by the Commission.¹²⁹

The prospect that the eventual judgment might set a precedent for the rescission of contracts led the United Kingdom government to obtain intervenor status by order of the Court in May 2001.¹³⁰ It seems the UK entered the case to press the Commission into specifying whether or not it required contract annulment or cancellation in the event of breach.¹³¹ In what later would prove an added controversy in the case, the Commission stated that it did not seek an order for rescission or annulment, rather a declaration from the Court of a failure to tender and publish a notice in the Official Journal.¹³² Flowing from this, on 10 April 2003, the Court held that Germany contravened the Procurement Directive when local authorities granted disposal contracts without following proper tender procedures.

change to the *pacta sunt servanda* principle had already been effectuated, however without retroactive application to the cases at hand.

¹²⁶ Judgment of the Court of 10 April 2003 in European Court of Justice Joined Cases C-20/01 and C-28/01 *Commission v Germany* [2003] ECR I-03609, para. 21.

¹²⁷ Judgment of the Court of 10 April 2003 in European Court of Justice Joined Cases C-20/01 and C-28/01 *Commission v Germany* [2003] ECR I-03609, para. 24 and 25.

¹²⁸ Peter Kalbe, "Public-private partnerships under the constraints of EC procurement rules", *Public Procurement Law Review* 14, no. 6 (2005), 178.

¹²⁹ Judgment of the Court of 10 April 2003 in European Court of Justice Joined Cases C-20/01 and C-28/01 *Commission v Germany* [2003] ECR I-03609, para. 18.

¹³⁰ Judgment of the Court of 10 April 2003 in European Court of Justice Joined Cases C-20/01 and C-28/01 *Commission v Germany* [2003] ECR I-03609, para. 20.

¹³¹ Rhodri Williams, "Remedying a breach of Community Law", 112.

¹³² *Ibid*; Reply of the German government to the Reasoned Opinion (Second Referral) of the European Commission, 1 June 2004, 9.

Contract Law, the ECJ and Europeanization: What consequences for a breach?

Yet, this declaration by the ECJ marked merely the first phase in the dispute between the Commission and Germany over the impugned contracts. With the infringement declaration in hand, the Commission sharpened its demands of Germany and insisted that remedy of the breach required termination of the disputed waste contracts.¹³³ In its reasoned opinion of April 2004, the Commission asserted that future continuation of the impugned contracts would produce infringement “effects” for decades, and this required the German government “to introduce measures to end the Treaty infringement” as required by the initial judgment of 10 April 2003.¹³⁴ In response, the German government reiterated its regret for the breaches, noting measures to prevent re-occurrences of such infringements, but it maintained that the initial judgment by the ECJ did not require specific measures against the Braunschweig and Bockhorn contracts.¹³⁵

The end result was that the Commission, in December of 2004, opened penalty proceedings against Germany, asking that Germany pay 31 680 Euro per day in penalty with respect to the Bockhorn case and 126 720 Euro per day in penalty regarding the Braunschweig case.¹³⁶ Similar to the infringement proceedings, the case drew attention from other member states vis-a-vis the question of whether an established breach would require contractual rescission; and in June of 2005 France, the Netherlands and Finland were added as intervenors in support of Germany.¹³⁷ Yet, in a decisive development in the case, the German government announced in January 2005 (Bockhorn) and July 2005 (Braunschweig) that local authorities had reached agreements with affected contractors to terminate the impugned contracts.¹³⁸ Thus, it seemed the proceedings were moot and had reached a conclusion.

Yet, the Commission did continue its action in part with respect to the Braunschweig case, owing to how contract termination had come after the deadline set by the Commission’s April 2004 reasoned opinion. This set before the Court the task of ruling upon the ultimate question raised by the proceedings: could a breach of EU procurement law override the maxim of *pacta sunt*

¹³³ Marian Niestedt, “Penalties despite Compliance? A note on case C-503/04, Commission v. Germany”, *Public Procurement Law Review* 14, no. 6 (2005), 164-165.

¹³⁴ Opinion of Advocate General Trstenjak delivered on 28 March 2007 in European Court of Justice Case C-503/04 *Commission v Germany* [2007] ECR I-06153, para. 11.

¹³⁵ *Ibid.*, para. 8-10.

¹³⁶ Judgment of the Court of 18 July 2007 in European Court of Justice Case C-503/04 *Commission v Germany* [2007] ECR I-06153, para. 1.

¹³⁷ Judgment of the Court of 18 July 2007 in European Court of Justice Case C-503/04 *Commission v Germany* [2007] ECR I-06153, para. 2.

¹³⁸ Opinion of Advocate General Trstenjak delivered on 28 March 2007 in European Court of Justice Case C-503/04 *Commission v Germany* [2007] ECR I-06153, para. 15 and 16.

servanda in national law and invalidate an otherwise lawful contract? The interventions made by Germany, France, the Netherlands and Finland emphasized the most common opinion on EU law prior to the decision: a remedy for breach of the Procurement Directive was governed by Article 2(6) of the Remedies Directive, which accepted national law to preclude contract rescission and allow only an award of damages.¹³⁹ Further, rescission would not be permitted owing to “the principles of legal certainty and the protection of legitimate expectations, the principle of *pacta sunt servanda*, the fundamental right of property, Article 295 EC and the case-law of the Court regarding the limitation of time of the effects of a judgment....”¹⁴⁰

The Court, however, went against these arguments to make a groundbreaking decision which reoriented how the Procurement Directive, the Remedies Directive and national law were to be read together when determining consequences for an infringement. First, with regard to Article 2(6) of the Remedies Directive, the Court held that it could not be applied with the effect of “reducing the scope of [EC Treaty] provisions establishing the internal market.”¹⁴¹ Second, concerning principles which informed and related to *pacta sunt servanda*, the ECJ further asserted that member states could not rely upon such principles to “justify the non-implementation of a judgment establishing a failure to fulfil obligations under Article 226 EC and thereby evade their own liability under Community law.”¹⁴² Finally, regarding the claim under Article 295 EC,¹⁴³ the Court sealed matters further by extending a now familiar rule of EU law into this area of contract law: “...a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order to justify the failure to observe obligations arising under Community law.”¹⁴⁴

Thus, the Court disposed of the case by settling this crucial aspect of the Procurement Directive, putting member states on notice that contracts awarded in breach likely require rescission. This appeared to satisfy the Commission, as the Commission appears to have not insisted on an order from the Court requesting a penalty payment in the Braunschweig case.¹⁴⁵ In a broader perspective, the ruling should also be understood as parcel of the Commission’s larger effort to

¹³⁹ Judgment of the Court of 18 July 2007 in European Court of Justice Case C-503/04 *Commission v Germany* [2007] ECR I-06153, para. 31.

¹⁴⁰ *Ibid.*

¹⁴¹ Judgment of the Court of 18 July 2007 in European Court of Justice Case C-503/04 *Commission v Germany* [2007] ECR I-06153, para. 33.

¹⁴² Judgment of the Court of 18 July 2007 in European Court of Justice Case C-503/04 *Commission v Germany* [2007] ECR I-06153, para. 36.

¹⁴³ “This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.”

¹⁴⁴ Judgment of the Court of 18 July 2007 in European Court of Justice Case C-503/04 *Commission v Germany* [2007] ECR I-06153, para. 38.

¹⁴⁵ Judgment of the Court of 18 July 2007 in European Court of Justice Case C-503/04 *Commission v Germany* [2007] ECR I-06153, para. 40. It should be remembered that the Commission, in its second referral application to the Court, asked for respective daily penalty payments of 31 680 Euro in the *Bockhorn* case and 126 720 Euro in the *Braunschweig* case.

reform the Remedies Directive as demonstrated with amending Directive 2007/66.¹⁴⁶ In particular, Article 2d(s) of the 2007 Directive now requires that “the consequences of a contract being considered ineffective shall be provided for by national law.”¹⁴⁷

Case Notes

- **Problem:** The German localities of Braunschweig and Bockhorn had awarded 30-year contracts worth millions of DM without following EU rules on the advertisement of public procurement tenders. The German government admitted breach but pleaded that governing German law at the time upheld the principle of *pacta sunt servanda* and denied contract rescission as a valid remedy.
- **Causes of Infringement:** This was a case where non-compliance was based on a conflict of domestic versus EU legal principles.
- **Outcome:** In penalty proceedings, the ECJ made the groundbreaking judgment that contract rescission may be an indispensable remedy when EU public procurement rules were disregarded, irrespective of whether the principle of *pacta sunt servanda* was entrenched in a domestic legal system.

¹⁴⁶ Michael-James Clifton, “Ineffectiveness-the new deterrent: will the new Remedies Directive ensure greater compliance with the substantive procurement rules in the classical sectors?”, *Public Procurement Law Review* 2009, no. 4: 165-183.

¹⁴⁷ Directive 2007/66 of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:335:0031:0031:EN:PDF>> (Accessed November 15, 2010).

7th JUDGMENT: Seeds of Discontent – The Commission, France and Social Controversy over Genetic Modification

(Cases 22 & 25 reviewed by Gerda Falkner and Nikolas Rajkovic)

<i>Litigation Basics</i>	
EU Law at Issue	
<ul style="list-style-type: none">• Directives 90/219 and 2001/18 (The contained use of genetically modified micro-organisms and the deliberate release of genetically modified organisms).	
<u>Directive 90/219</u>	
Transposition Deadline:	23.10.1991
First Proceedings (C-429/01)	
<ul style="list-style-type: none">• Letter of Formal Notice:• Entrance into Registry:• First Judgment:	<ul style="list-style-type: none">18.03.199805.11.200127.11.2003
Second Proceedings (C-79/06)	
<ul style="list-style-type: none">• Letter of Formal Notice:• Entrance in Court Registry:• Withdrawal:	<ul style="list-style-type: none">22.12.200410.02.200619.12.2006
<u>Directive 2001/18</u>	
Transposition Deadline:	17.10.2002
First Proceedings (C-419/03)	
<ul style="list-style-type: none">• Letter of Formal Notice:• Entrance into Registry:• First Judgment:	<ul style="list-style-type: none">21.11.200203.10.200315.07.2004
Second Proceedings (C-121/07)	
<ul style="list-style-type: none">• Letter of Formal Notice:• Entrance in Court Registry:• Second Judgment	<ul style="list-style-type: none">13.07.200528.02.200709.12.2008

When disputes arise from an underlying social and political controversy, litigation before the ECJ can sometimes involve more than one law suit. The matter of Genetic Modification (GM) proved such an experience as between the Commission and France on the implementation of EU Directives regulating exposure to GM. The analysis here looks at two cases before the ECJ where the Commission and France were in disagreement over how to implement Directives on GM.

The first case involves Directive 90/219/EC which dealt with standards pertaining to the contained use of Genetically Modified Micro-Organisms (GMM). The second case pertains to Directive 2001/18/EC which regulates the deliberate release of genetically modified organisms (GMO) into the environment. In each instance, the dispute between the Commission and France involved distinct legal and implementation issues, but both cases seemed influenced by steady and growing social opposition toward GM that emerged in France starting in the mid-1990s; prompting protests and civil disobedience which in fact peaked at around the time the Commission pursued second proceedings in both cases (2004-2005).

The EU & GM Regulation: the Single Market versus Anti-GMO Activism in France

Biotechnology has made remarkable advances in the last quarter century, innovations that have prompted debate on their socio-economic, environmental and human effects. Within the EU, these advances have focused attention on uncertainties and consequences of the biotechnological progress.¹⁴⁸ A lightning rod for discussion has been the GM of crops, where public protest and hostility¹⁴⁹ has risen in response to the commercialization of GM crops in the late 1990s¹⁵⁰ and their expanded use in North America.¹⁵¹ Further, a series of agricultural and food crises pertaining to ‘mad cow disease’ and ‘foot and mouth disease’ shook public confidence in the adequacy of regulatory controls over food production.¹⁵²

In the early 1990s, the EU began implementing regulatory controls over the use and gradual development of GM crops. The regulatory goal was to balance sufficient protection for human health and the environment with a single European market in biotechnology.¹⁵³ The first Directive dealt with the contained use of GMMs (90/219 and 90/220) in research, laboratories and industry.¹⁵⁴ The latter Directive (2001/18) was a more advanced regulatory regime dealing

¹⁴⁸ Silvia Francescon, “The New Directive 2001/18/EC on the Deliberate Release of Genetically Modified Organisms into the Environment: Changes and Perspectives”, *Review of European Community and International Environmental Law* 10, no. 3 (2001), 309.

¹⁴⁹ “Food for Thought”, *The Economist*, 19 June 1999; Libby Brooks and Paul Brown, “Felled in the name of natural justice; GM firm condemns destruction of 152 trees”, *The Guardian (London)*, 31 July 1999, 3.

¹⁵⁰ Paula Rey García, “Directive 2001/18/EC on the Deliberate Release into the Environment of GMOs: an Overview and the Main Provisions for Placing on the Market”, *Journal of European Environmental and Planning Law*, 3, no. 1 (2006), 3.

¹⁵¹ Francescon, “The New Directive 2001/18/EC”, 309.

¹⁵² García, “Directive 2001/18/EC on the Deliberate Release”, 4.

¹⁵³ Ruth MacKenzie, “Genetically Modified Organisms: Colloquium Article the Regulations of Genetically Modified Foods in the European Union: An Overview”, *New York University Environmental Law Journal* 8, no. 3 (2000), 532.

¹⁵⁴ Bernd van der Meulen, “Genetically Modified Organisms: Philosophy, Science, and Policy: The EU Regulatory Approach to GM Foods”, *Kansas Journal of Law and Public Policy* 16, no. 3 (2007), 323.

with expanded commercial use and production, prescribing some eighteen authorizations for the release of GMOs in the EU.¹⁵⁵

However, the EU's regulatory approach to GM, as a project conducted within a confined body of EU, industry and scientific experts, ran into difficulty at an early stage of attempted implementation and generated ever growing social intervention intended to frustrate the EU's gradual authorization of GM research and marketing. The institutional peg which enabled greater social influence over EU regulation relates to how the EU's authorization procedure for GM products was multi-level, requiring the concordance of the Commission, the competent member state and, finally, affected member states;¹⁵⁶ with each member state being able to stall EU authorization for a GM product by pointing to "information...that the product...may constitute a risk to human health or the environment."¹⁵⁷ Therefore, as the issue of GM accumulated societal alarm over human safety, the member state level in the authorization procedure became a key site of political and legal struggle.

This dynamic came to the fore with France's tribulations over the attempted easing of regulatory controls on GM maize. At the outset, France appears to have positioned itself as a world leader in agricultural research on GM; housing, in 1998, approximately 1000 or a quarter of the world's testing parcels of GM crops.¹⁵⁸ In 1995, France became the first member state to recommend the importation of GM maize, and even pushed the Commission to re-negotiate GM rules under Directives 90/219 and 90/220.¹⁵⁹ In 1998, the socialist Jospin government further approved the production of two new GM maize varieties, TER25 and MON810.¹⁶⁰

However, the years which followed displayed a role reversal with respect to France's approach to GM, likely affected by determined and increasingly aggressive societal actors in France which sought to halt GM agriculture through legal challenges and popular protest. This process of reversal began in 1996 with the seemingly non-eventful application by biotechnology giant Ciba-Geigy (now Novartis) to French authorities for the marketing authorization of GM maize seed "Bt-176."¹⁶¹ This application was a trigger point that initiated a sequence of escalating mobilizations and interventions by societal activists in ensuing years intent to block GM research

¹⁵⁵ García, "Directive 2001/18/EC on the Deliberate Release", 4.

¹⁵⁶ Tamara K. Hervey, "Regulation of Genetically Modified Products in a Multi-level System of Governance or Citizens", *RECIEL* 10, no. 3 (2001), 321.

¹⁵⁷ *Ibid.*, 325.

¹⁵⁸ Graeme Hayes, "Collection Action and Civil Disobedience: The Anti-GMO Campaign of the *Faucheurs Volontaire*", *French Politics* 5, no. 3 (2007), 295.

¹⁵⁹ Darren McCauley, "Bottom-Up Europeanization Exposed: Social Movement Theory and Non-state Actors in France", *Journal of Common Market Studies* 49, no. 5 (2011), 1026.

¹⁶⁰ *Ibid.*, 1027.

¹⁶¹ Hervey, "Regulation of Genetically Modified Products", 321.

and marketing in France. The force of that social dissonance would deliver sizable legal and political implications for the EU's overall regulation of GM, as notably demonstrated by the 1998 injunction against Bt-176 maize obtained by Greenpeace from France's *Conseil d'Etat*; the congregation of 300 000 activists in 2003 in Larzac, France expressing opposition to the spread of GM crops; the vigilante destruction of approximately 50 per cent of GM maize fields in France between 2004 and 2006; and the 2007 French Presidential candidacy of anti-GMO activist José Bové. The remainder of the analysis will now trace the complex interaction which took place between EU regulation and escalating social opposition to GM, and the French state's navigation in a turbulent legal and political context.

Commission v. France: Directive 90/219

Directive 90/219 set out a regulatory system for research with GMMs which required case-by-case authorization and a “step-by-step process of decreasing containment.”¹⁶² The Directive defined “contained use” as activities involving genetically modified micro-organisms for which “specific containment measures are used to limit their contact with, and to provide a high level of safety for, the general population and environment.” The deadline for transposition into national law was October 1991.

The French government appeared initially to be a supporter of Directive 90/219 by virtue of its leadership in agricultural biotechnology. However, indications began to emerge that increasing public concern about GM promoted, at a minimum, inconsistencies in France's policies on GM and consequently wavering compliance with respect to Directive 90/219.¹⁶³ On the one hand, the years following the Directive's enactment were characterized by little public debate or controversy surrounding the issue of GM in France. In fact, imports of GM crops in 1996 into France from the United States produced scant public attention.¹⁶⁴ On the other hand, a shift in government opinion began to take shape where, for instance, in that same year the Conservative government of Alain Juppe officially adopted the “precautionary principle” with respect to GM crops and also formed the *Comité de la prévention et de la precaution*. In 1997, this was followed by the Juppe government's “last minute” decision to prevent the cultivation of Ciba-Geigy GM maize,

¹⁶² Margaret Rosso Grossman, “Genetically Modified Organisms: Philosophy, Science, and Policy: The Coexistence of GM and other Crops in the European Union”, *Kansas Journal of Law and Public Policy* 16, no. 3 (2007), 333.

¹⁶³ Ingmar von Homeyer, “The Revision of the Directive on the Deliberate Release of Genetically Modified Organisms (GMOs) into the Environment”, *EUROPUB Case Study (WP2) Final Report*, <http://ecologic.eu/download/projekte/1900-1949/1900/1900_drd_case_study.pdf> (July 27, 2011), 198.

¹⁶⁴ Daniel Boy and Suzanne de Cheveigné, 'Biotechnology: A Menace to French Food', in George Gaskell and Martin W. Bauer eds., *Biotechnology 1996-2000. The Years of Controversy* (London: Science Museum, 2001), 181-190.

despite the EU's regulatory approval.¹⁶⁵ Nonetheless, coherence appeared lacking in France's policy on GM as months later the new socialist government of Lionel Jospin, flanked by then "Green" Environment Minister Dominique Voynet, permitted the cultivation of the Ciba-Geigy maize while prohibiting the cultivation of other GM crops such as oilseed rape and beet.

This tension within French government policy during the latter 1990s, which tittered between the promotion and restriction of GM crops, seems to have contributed toward the French government's inability to successfully transpose Directive 90/219 to the satisfaction of the Commission.¹⁶⁶ By 2001, this resulted in the Commission declaring its dissatisfaction with France's implementation of the Directive and the filing of infringement proceedings with the Court. The specific items at issue involved largely technical articles on emergency plans and safety notices alleged to have not been properly transposed. The curious feature of the claimed infringement was how it seemed disconnected from the growing tide of concern regarding safety precautions for GM. In particular, the grievance pertained to:

- the failure to adopt an obligation to set up emergency plans in facilities using GMMs;
- the failure to adopt an obligation to inform the public in the aftermath of an emergency;
- the failure to lay down procedures for the consultation of other member states; and
- the failure to include certain military facilities within the scope of the provisions implementing the Directive.

What is more, it seemed that the French government came to question the Commission's interpretation of safety requirements in Directive 90/219, arguing that precautionary measures did not have to be legislated for every category and use of GMMs. The Court, however, sided with the Commission and held that France had failed to provide a full transposition. A recurring theme for the Court in its decision was the following principle:

"It is settled case-law that for the transposition of a directive into the legal order of a Member State it is essential that the national legislation in question effectively ensures that the directive is fully applied, that the legal position under national law is sufficiently precise and clear and that individuals are made fully aware of their rights and obligations...."¹⁶⁷

Yet, soon after the initial judgment, French authorities came to concede that its disagreement regarding the interpretation of Directive 90/219 was subsidiary to the larger policy problem with GM. In response to the Commission's request for particulars on France's implementation of the

¹⁶⁵ Ibid.

¹⁶⁶ For a list see the Reasoned Opinion from 19 May 2005, C (2000) 826 final.

¹⁶⁷ Judgment of the Court of 27 November 2003 in European Court of Justice Case C-429/01 *Commission v France* [2003] ECR I-14355, para. 83.

initial judgment, French authorities explained that the pace of their implementation was slowed by public debate and fierce protest over GM in France:

“En second lieu, les organismes génétiquement modifiés et notamment leur dissémination volontaire dans l'environnement sont devenus, en France, un sujet majeur de débat et de conflits parfois violents comme l'ont illustré de trop nombreuses opérations de destruction de cultures en plein champ notamment en 2003 et en 2004.”¹⁶⁸

This expressed concern by the government was indeed reflective of public concern, as the years 2003 and 2004 were marked by significant degrees of social protest in Europe and even outbreaks of violence in France over GM.¹⁶⁹

Whether, or to what extent, social unrest played a role in delayed compliance with the GMM Directive is difficult to establish. One needs to consider, though, that France delayed any protective measures, which is curious should the French government have become more concerned about GM safety. However, it should be noted that France underwent a significant change in legal opinion regarding its implementation of the infringement judgment between 2004 and 2006. It first presented transposition of the Directive as complex and requiring French laws to be amended:

“Après analyse approfondie, le gouvernement considère qu'il n'est pas possible de transposer par voie réglementaire les dispositions de la directive 90/219/CEE relatives aux utilisations confinées relevant des activités de défense, sans prendre en compte les modifications apportées au texte communautaire par la directive 98/81, lesquelles font actuellement l'objet d'un projet de loi de transposition.”¹⁷⁰

Yet, in the beginning of 2006, and following the Commission's registry of penalty proceedings against France, French authorities showed signs of a shift in approach, forwarding two draft decrees and a draft law on GMMs to the Commission. Arguing initially that the proposed decrees would accomplish many legal revisions necessary but that a more time consuming draft law would still be required for remaining aspects.¹⁷¹ A few months later, the version of the decrees adopted notably included those aspects previously argued as remediable only by law.¹⁷² It turned out that full transposition, in accord with the infringement judgment, could be

¹⁶⁸ Letter from France to the European Commission from 25 February 2005, SG(2005)A/2002.

¹⁶⁹ Lizette Alvarez, “Consumers in Europe Resist Gene-Altered Foods”, *New York Times*, 11 February 2003, 3; Lizette Alvarez, “As for modified foods, European just say ‘no’; ‘It’s not the natural order of things’”, *International Herald Tribune*, 11 February 2003, 1; “Ten-month sentence for destroying GMOs”, *Le Monde*, 24 June 2003, 6; Lara Marlowe, “French gather against WTO”, *Irish Times*, 9 August 2003, pp. 9; John Tagliabue, “Thousands in France rally against global trade”, *New York Times*, 9 August 2003, 3.

¹⁷⁰ Letter from France to the European Commission from 30 September 2004, SG (2004) A/10395.

¹⁷¹ Letter from France to the European Commission from 25 January 2006, Ref Nr 231/LB/ip.

¹⁷² Letter from France to the European Commission from 10 November 2006, Ref Nr 3248/FG/ip.

done by way of decree as opposed to law. Indeed, the Commission withdrew its proceedings against France on 19 December 2006.

Commission v. France, Directive 2001/18

Our comprehension of the Directive 90/219 case, however, becomes fuller when considered alongside France's related dispute regarding Directive 2001/18. Directive 2001/18 pertained to the deliberate release of GMOs into the environment and set standards for marketing GMOs and their experimental release for scientific purposes. The Directive was the product of brewing controversy over GM, amending Directive 90/220, and following a challenging conciliation process where ultimately the French and Italian delegations abstained from the vote rather than block¹⁷³ the Directive formally.¹⁷⁴ In 1999, Austria, Denmark, Greece, France, Italy and Luxembourg¹⁷⁵ prompted the EU to suspend new authorizations for the growing and marketing of GMOs over concerns of inadequate risk assessments, tracing and labelling.¹⁷⁶ This led to the compromise formulated in Directive 2001/18/EC, which amended 90/220, and enhanced environmental risk assessments, risk management, labelling, monitoring and information available to the public.¹⁷⁷ One feature of Directive 2001/18 was its formal incorporation of the "precautionary principle" into EU law, invoking the presumption of added caution and protection:

"...where scientific evidence is insufficient, inconclusive or uncertain and there are indications through preliminary objective scientific evaluation that there are reasonable grounds for concern that the potentially dangerous effects on the environment, human, animal or plant health may be inconsistent with the chosen level of protection."¹⁷⁸

In the years which followed, it appears France along with a number of other member states attempted to continue with an "informal moratorium" on all GMO food products.¹⁷⁹ The Directive was enacted in April 2001 and its deadline for transposition was October 2002. The Commission promptly issued a letter of formal notice in November of 2002, followed by a

¹⁷³ Donald G. McNeil Jr., "Europe Approves Strict Food Rules", *New York Times*, 15 February 2011, A 1.

¹⁷⁴ Council of the European Union, "Deliberate release of genetically modified organisms (GMOs)". PRES/01/50, 15 February 2001, <
<http://europa.eu/rapid/pressReleasesAction.do?reference=PRES/01/50&format=HTML&aged=0&lg=en&guiLanguage=en>> (Accessed June 22, 2011).

¹⁷⁵ Statements made in connection to the adoption of Directive 2001/18 in the Council, 6068/01 ADD 1 REV 2, 3.

¹⁷⁶ Alasdair Murray, "US warns Europe of trade war over GM food", *The Times (London)* 12 August 1999.

¹⁷⁷ Garcia, "Directive 2001/18/EC on the Deliberate Release", 6.

¹⁷⁸ Ibid.

¹⁷⁹ Lizette Alvarez, "Consumers in Europe Resist Gene-Altered Foods", *New York Times*, 11 February 2003, A1; Paul Ames, "After new law, biotech food still faces hurdles in Europe", *Associated Press*, 15 February 2001.

reasoned opinion in April of 2003, and then Court registry of infringement proceedings in October 2003.

In its judgment of July 2004, the ECJ found that France had failed to fulfil its obligation to transpose correctly some of the provisions of Directive 2001/18 into national law.¹⁸⁰ Pursuant to this infringement judgement, but in light of social controversy in France, the government referred the matter to a parliamentary commission scheduled to complete work in April 2005:

“It [France] stated in that letter that, in the light of the fact that GMOs and, in particular, their deliberate release into the environment, had become a major subject of debate in France, giving rise to conflict that was occasionally violent, as demonstrated by the numerous instances of crop destruction in open fields, a parliamentary fact-finding mission on the challenges presented by GMOs trials and use had been set up in October 2004, on the proposal of the President of the Assemblée Nationale (National Assembly).”¹⁸¹

In February 2005, the French government advised the Commission of a decree it had devised to transpose the Directive. However, the Commission was not satisfied with this proposed decree, prompting the start of penalty proceedings against France with a letter of formal notice in July of 2005. In February 2006, the French government advised the Commission of a new draft law it had brought to the French parliament, which intended to fully transpose the Directive but also address social and agricultural concerns over GMOs in France.¹⁸² For instance, the draft law planned to implement a “compensation fund for farmers who had suffered as a result of the adventitious presence of GMOs in their ‘non-GMO based’ produce.”¹⁸³ Yet, despite acceptance by the French Senate in early 2006:

“On 21 February 2007, the French authorities orally notified the Commission staff that, in view of the National Assembly’s busy agenda and the fact that its proceedings would be suspended on 25 February 2007, it appeared that it would no longer be possible for the 2006 draft law to be adopted by the current legislature and, accordingly, it was now envisaged that regulatory provisions designed to ensure the transposition of Directive 2001/18 would be swiftly adopted.”¹⁸⁴

¹⁸⁰ Judgment of the Court of 15 July 2004 in European Court of Justice Case C-419/03 *Commission v France*, <http://curia.europa.eu/juris/liste.jsf?language=de&num=C-419/03> (accessed 21 November 2013).

¹⁸¹ Judgment of the Court of 9 December 2008 in European Court of Justice Case C-121/07 *Commission v France* [2008] ECR I-09159, para 6.

¹⁸² Letter from the French Government to the European Commission from 28 February 2007, SG/CDC/2007/A/1906, 1.

¹⁸³ Judgment of the Court of 9 December 2008 in European Court of Justice Case C-121/07 *Commission v France* [2008] ECR I-09159, para. 10.

¹⁸⁴ Judgment of the Court of 9 December 2008 in European Court of Justice Case C-121/07 *Commission v France* [2008] ECR I-09159, para 12.

Subsequently, France informed the Commission of two draft decrees which it intended to put into force to remedy the situation, but the government advised of this only on the day the Commission brought the case to Court.¹⁸⁵ Notwithstanding, the Commission found that even these decrees, adopted in March of 2007, were insufficient for full compliance with Directive 2001/18. Thus, during the course of proceedings before the Court, another draft law was brought before the French Parliament. However, the ultimate passage of that law was significantly delayed owing to a number of procedural complications, such as a one vote majority rejection of the proposed law during second reading in the National Assembly, 148 proposed amendments,¹⁸⁶ and a further reference to the French constitutional court,¹⁸⁷ events all related to and instigated by social controversy over GM in France. In fact, it was not until oral proceedings before the Court had closed that the promised French law finally entered into force on 25 June 2008, and the Commission acknowledged transposition of the Directive in its entirety.¹⁸⁸ This, however, did not prevent the Court from imposing a lump sum penalty of 10 000 000 Euro against France in order to dissuade from future non-compliance. The French Republic's previous infringement in the same area (related to Directive 90/219, here reviewed case no. 22, above) was considered as an aggravating factor by the ECJ and held to justify the imposition of a high lump sum as "a dissuasive measure"¹⁸⁹. It did not accept the French argument that, until then, the payment of a lump sum had not been imposed if the original judgment had been complied with before the Court proceeding was concluded.¹⁹⁰

Case Notes

- **Problem:** Rising social protest in France and eventual violent demonstrations against the GM of food played a role in slowing French implementation of Directives 90/219 and 2001/18.
- **Causes of Infringement:** Both cases appeared to be instances of motivated non-compliance, however for different reasons. In the case involving Directive 90/219, French policy appeared to reverse or become inconsistent owing to the rise of popular and organized protest against GM in France. However, in the case involving Directive 2001/18, France belonged to a minority of EU states which favoured strict prohibitions on the use of GMOs and seemed to exercise backdoor opposition when the EU did not adopt such GM rules. The French position was further influenced by ever stronger protest by societal groups in France against GM.
- **Outcome:** The ECJ imposed a lump sum fine of 10 000 000 Euro.

¹⁸⁵ Letter of the French Government to the European Commission 28 February 2007, SG/CDC/2007/A/1906, 1.

¹⁸⁶ National Assembly of the Republic of France, *Compte rendu analytique officiel Séance du mardi 20 mai 2008*, <http://www.assemblee-nationale.fr/13/cra/2007-2008/160.asp> (Accessed June 22, 2011).

¹⁸⁷ National Assembly of the Republic of France, *Environnement : Organismes Génétiquement Modifiés (OGM)*, http://www.assemblee-nationale.fr/13/dossiers/organismes_genetiquement_modifies_20_12_2007.asp (Accessed June 22, 2011).

¹⁸⁸ Judgment of the Court of 9 December 2008 in European Court of Justice Case C-121/07 *Commission v France* [2008] ECR I-09159, para 20.

¹⁸⁹ *Ibid.*, para. 69.

¹⁹⁰ *Ibid.*, para. 60.

8th JUDGMENT: In Remedy of the Remedy Procedure – Contradictory Portuguese Law and the Commission’s Procurement Reform

(Case 23 reviewed by Gerda Falkner and Nikolas Rajkovic)

<i>Litigation Basics</i>	
EU Law at Issue	
●	Procurement Remedies Directive 89/665
Transposition Deadline:	01.03.1992
First Proceedings (C-275/03)	
●	Letter of Formal Notice: 08.09.1995
●	Entrance into Registry: 25.06.2003
●	First Judgment: 14.10.2004
Second Proceedings (C-70/06)	
●	Letter of Formal Notice: 21.03.2005
●	Entrance in Court Registry: 07.02.2006
●	Second Judgment: 10.01.2008
Related Case Law	
●	<i>Portuguese Republic v. European Commission</i> , T-33/09 (Application for partial annulment of penalty payment)

The case represents the first in the area of EU public procurement law where a penalty was imposed. The outcome is a curious one because the problem between Portugal and the Commission was relatively straightforward: Portugal had a prior domestic law which undercut the effectiveness of the Procurement Remedies Directive (89/655). Specifically, Portuguese law required aggrieved parties to produce evidence of fault or wilful misconduct in order to claim damages for an alleged violation of EU Procurement Directives. This had the effect of denying claimants the right of redress against impugned authorities, which was contrary to fundamental principles of Community law and could potentially shield clientelism and protectionism. Despite stated efforts to repeal the legislation, Portuguese authorities were considerably delayed in implementing their promise which led to the penalty imposed by the Court.

EU Public Procurement and the Right of Legal Redress

The Commission's 1985 *White Paper for the Completion of the Single Market*¹⁹¹ (White Paper) identified public authorities as significant market players in the consumption of goods and services.¹⁹² Flowing from this, the success of the internal market was closely associated with how well the EU could ensure that national, regional and local procurement practices were truly open to all EU and not merely domestic suppliers.¹⁹³ This concern spurred a number of EU public procurement directives which strengthened internal market rules for the conduct of public procurement.¹⁹⁴ Central to enforcement became the so-called Remedies Directive (89/665¹⁹⁵) which was concerned with enforcing EU procurement rules through the extension of remedies that could be pursued in national courts. The Commission envisioned this self-help notion as the primary way in which procurement rules could be enforced: aggrieved parties would gain the right to legally challenge contracting authorities whenever EU procurement rules were potentially broken.¹⁹⁶ The judicial procedures to be used and remedies sought were still matters determined by national law; however the Directive imposed requirements and limitations which had to be transposed into national law by 1 March 1992.¹⁹⁷

Proper transposition became the issue that brought Portuguese law into conflict with the Remedies Directive and consequently the Commission. The root of the problem was Portuguese Decree Law No. 48051 of 1967 (the Decree Law) which had made the award of damages to persons injured by a breach of public procurement law conditional upon proof of fault or wilful misconduct by an agent (e.g. person or official) acting on behalf of a contracting authority.¹⁹⁸

¹⁹¹ Commission of the European Communities, *White Paper for the Completion of the Internal Market*, (COM) 85 310 fin, 1985 <http://www.enal.lu/white_paper_completion_internal_market_14_june_1985-020003520.html> (Accessed November 11, 2010); Christopher Bovis, *EU Public Procurement Law* (Cheltenham: Edward Elgar Publishing Limited, 2007), 2-3.

¹⁹² Commission of the European Communities, *A report on the functioning of public procurement markets in the EU: benefits from the application of EU directives and challenges for the future*, 3 February 2004 <http://ec.europa.eu/internal_market/publicprocurement/docs/public-proc-market-final-report_en.pdf> (Accessed November 17, 2010).

¹⁹³ Adrian Brown, "Public Procurement in Europe: enforcement and remedies, by Alan Tyrell", *Public Procurement Law Review* 1998, no. 3, 85.

¹⁹⁴ Public Supplies Contracts, EC Directive 88/295 (OJ 1988, L 127,1), consolidated by Directive 93/36, OJ 1993, L 199; Public Works Contracts, EC Directive 89/440 (OJ 1989 L210,1), consolidated by Directive 93/37, OJ 1993, L 199; Public Services Remedies, EC Directive 89/665, OJ 1989 L 395 and Directive 92/13, OJ 1992 L 76/7; Utilities Sectors, EC Directive 90/531 (OJ 1990, L 297), as amended by Directive 93/98, OJ 1993, L 199; Public Services Contracts, EC Directive 92/50, OJ 1992, L 209.

¹⁹⁵ Council Directive of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, 89/665/EEC, O.J. L 395, 30.12.1989, p. 33.

¹⁹⁶ Sue Arrowsmith, "An overview of EC policy on public procurement: current position and future prospects", *Public Procurement Law Review* 1992, no. 1, 32.

¹⁹⁷ *Ibid.*

¹⁹⁸ Opinion of Advocate General Mazák delivered on 9 October 2007 in European Court of Justice Case C-70/06 *Commission v Portugal*[2008], para. 1.

This Decree Law placed a heavy burden on potential claimants because aggrieved tenderers would have great difficulty both in identifying the agent concerned and subsequently demonstrating proof of fault or wilful misconduct.¹⁹⁹ Further, the procedure imposed by the Decree Law ran counter to the presumption the Remedies Directive was more likely to encourage: presumed negligence or misconduct by the contracting authority which would later have to be disproven. Thus, the effect of the Portuguese Decree Law was to undermine the remedies system behind the Procurement Directives because its high onus of proof for aggrieved tenderers prevented “effective and rapid remedies”;²⁰⁰ and, according to the Commission, this constituted an infringement under Article 1 of the Remedies Directive.²⁰¹

Contradictory National Provisions and Non-Application: Portugal’s Defence

The Commission did not immediately pursue an action in this case. Instead, between 1995 and 2003, it engaged in a series of official exchanges with the Portuguese government to induce a proper repeal of the impugned Decree Law.²⁰² However, with the failure of the Portuguese government to ultimately repeal the Decree Law, the Commission filed infringement proceedings on 25 June 2003 asserting that Portugal had failed to “transpose correctly and completely” the Remedies Directive.²⁰³ The defence raised by the Portuguese government alleged that the Commission had wrongly interpreted national law and the actual application of the Decree Law.²⁰⁴ Foremost, the government submitted that the Decree Law was in effect not applied and thus read over by national courts, as its provisions clashed with Article 22 of the Portuguese Constitution.²⁰⁵ Further, the government noted it was drafting a law on extra-contractual liability which would resolve any concern over the Decree Law.²⁰⁶

In its infringement judgment, the Court questioned Portugal’s claim that the Decree Law was a void feature of Portuguese law, and disagreed with the government’s assertion that the

¹⁹⁹ Martin Dischendorfer, “The conditions Member States may impose for the award of damages under the Public Remedies Directive: Case C-275/03 *Commission v. Portugal*”, *Public Procurement Law Review* 14, no. 2 (2005) , 19.

²⁰⁰ Action brought on 25 June 2003 by the Commission of the European Communities against the Portuguese Republic C-275/03 *Commission v. Portugal* [2003] O.J. 1989 L 395.

²⁰¹ *Ibid.*

²⁰² Judgment of the Court of 14 October 2004 in European Court of Justice Case C-275/03 *Commission v Portugal* [2004] unpublished, paras. 13-18.

²⁰³ Action brought on 25 June 2003 by the Commission of the European Communities against the Portuguese Republic C-275/03 *Commission v. Portugal* [2003] O.J. 1989 L 395.

²⁰⁴ Judgment of the Court of 14 October 2004 in European Court of Justice Case C-275/03 *Commission v Portugal* [2004], para. 24.

²⁰⁵ Judgment of the Court of 14 October 2004 in European Court of Justice Case C-275/03 *Commission v Portugal* [2004], para. 25.

²⁰⁶ Judgment of the Court of 14 October 2004 in European Court of Justice Case C-275/03 *Commission v Portugal* [2004] , para. 26. See also Dischendorfer, “The conditions Member States may impose”, 19.

Commission had misinterpreted the Decree Law. In particular, the Court addressed Portugal's claim of "soft" but no less actual transposition of the Remedies Directive. Foremost, it held that because the Decree Law had not been wiped from Portugal's legal books this invited the risk of the Decree Law being used to deny claimants the right to claim damages.²⁰⁷ In addition, the Court held that the failure to repeal the Decree Law contravened the principle of legal certainty where "individuals should have the benefit of a clear and precise legal situation,"²⁰⁸ which thus enables them to exercise their full rights before national courts.²⁰⁹ Finally, concerning the government's notice of tabled draft legislation, the Court referred to settled case law on how the internal circumstances of a member state could not be used to justify non-compliance.²¹⁰

Repeal is not enough? Penalty Proceedings and the question of Full Compliance

Following the initial judgment, Portugal presented the Commission with a draft law intended to repeal the 1967 Decree Law. However, the draft became suspended with the onset of parliamentary elections in Portugal. Subsequently, a new draft was brought into the Portuguese parliament at the end of 2005, but this came after the Commission had already referred the case to the Court for penalization.

The pre-litigation procedure of the penalty proceedings centred on a dispute between Portugal and the Commission whether the draft law fulfilled the requirements of the Directive and the first judgment. There was no dispute that the Decree Law had to be repealed, but a controversy developed between the Commission and Portugal over how the infringement judgment should be interpreted, and whether the Court's order required simple repeal or additional measures to ensure more effective review procedures pursuant to the Remedies Directive.²¹¹ The contest centred on the following passage of Court's initial judgment:

"By failing to repeal ... Decree Law No 48 051 of 21 November 1967...the Portuguese Republic has failed to fulfil its obligations under Article 1(1) and Article 2(1)(c) of ... Directive 89/665 ..."²¹²

²⁰⁷ Judgment of the Court of 14 October 2004 in European Court of Justice Case C-275/03 *Commission v Portugal* [2004], para. 31.

²⁰⁸ Dischendorfer, "The conditions Member States may impose", 20.

²⁰⁹ Judgment of the Court of 14 October 2004 in European Court of Justice Case C-275/03 *Commission v Portugal* [2004], para. 33.

²¹⁰ Judgment of the Court of 14 October 2004 in European Court of Justice Case C-275/03 *Commission v Portugal* [2004], para. 34.

²¹¹ Reasoned Opinion of 13 July 2005, SG-Grefe (2005)D/203393, 4.

²¹² Judgment of the Court of 10 January 2008 in European Court of Justice Case C-70/06 *Commission v Portugal* [2008] ECR I-00001, para 5.

It seems the Court in the penalty proceedings focused on the precise wording in that sentence of the prior judgment, which stressed repeal of the Decree Law;²¹³ notwithstanding that in its infringement ruling the Court had as well referred to obligations embedded in the Directive to provide for effective review procedures.²¹⁴

In conclusion, the Court ordered Portugal to pay 19 392 Euro per day for the time the impugned Decree Law was still in force. Yet, this did not end the dispute between the Commission and Portugal. The Commission later demanded penalty payment for the time which had followed the repeal of the Decree Law, but preceded a new law which was satisfactory to the Commission, because it exceeded the deadline of the reasoned opinion.²¹⁵ The payment dispute centred on a five month period between January to May 2008, worth 2 753 664 Euro in penalties, where the Commission insisted that Portugal had to further improve its amending law (67/2007) in order to reach compliance. The Portuguese government, however, insisted that the second referral order only required calculation of penalties until repeal of the 1967 Decree Law; and this was achieved by 30 January 2008. Following a subsequent action for penalty annulment,²¹⁶ the Portuguese position was vindicated by the General Court which held that the cut-off date for the calculation of penalties was the date on which the 1967 Decree Law was officially repealed.²¹⁷

Case Notes

- **Problem:** Portuguese Decree Law no. 48051 needed to be repealed in order to secure defence rights of aggrieved competitors, in the course of transposition of the Public Procurement Remedies Directive 89/655. The Commission and the Portuguese government were engaged in official exchanges for eight years prior to the commencement of the action.
- **Causes of Infringement:** Non-action in terms of the repeal and replacement of Decree Law no. 48051 seems to have been motivated delay. Maintenance of the law, which required a complainant to prove wilful misconduct, had the effect of shielding public procurement contracts which might have been awarded for reasons of clientelism or protectionism. The Portuguese government's late attempt to pass a draft law in remedy of the dispute was frustrated by the onset of Portuguese elections, while the Commission made a swift move toward penalty proceedings.
- **Outcome:** The ECJ imposed a daily penalty payment of 19 392 Euro applicable for the period between the Commission's reasoned opinion and the repeal of the Portuguese Decree Law.

²¹³ There is no explanation given in the judgment on why the Court had limited itself to repeal only. See Judgment of the Court of 10 January 2008 in European Court of Justice Case C-70/06 *Commission v Portugal* [2008] ECR I-00001, para 17.

²¹⁴ Judgment of the Court of 10 January 2008 in European Court of Justice Case C-70/06 *Commission v Portugal* [2008] ECR I-00001, para 29.

²¹⁵ Judgment of the Court of 29 March 2011 in the General Court (Third Chamber) Case T-33/09 *Portuguese Republic v. Commission* [2011], para. 14.

²¹⁶ Action brought on 26 January 2009 in General Court Case T-33/09 *Portugal v Commission* [2006] OJ C82/30.

²¹⁷ Judgment of the Court of 29 March 2011 in the General Court (Third Chamber) Case T-33/09 *Portuguese Republic v. Commission* [2011], para. 69-81.

9th JUDGMENT: An Olympic Odyssey – The Commission, Greece & the Restructuring of a Flag-Carrier²¹⁸

(Case 26 reviewed by Gerda Falkner and Nikolas Rajkovic)

<i>Litigation Basics</i>	
EU Law at Issue	
●	Article 88(2) EC Treaty (State Aid)
●	Commission Decision 2003/372 (Illegal State Aid)
First Proceedings (C-415/03)	
●	Entrance in Court Registry: 25.09.2003
●	First Judgment: 12.05.2005
Second Proceedings (C-369/07)	
●	Letter of Formal Notice: 18.10.2005
●	Entrance in Court Registry: 03.08.2007
●	Second Judgment: 07.07.2009
Related Proceedings	
●	<i>Olympiaki Aeroporia Ypiresies v. Commission</i> , T-68/03
●	<i>Hellenic Republic v. Commission</i> , T-415/05
●	<i>Olympic Airlines S.A. v. Commission</i> , T-416/05
●	<i>Olympic Airways Services S.A. v. Commission</i> , T-423/05

What makes this compliance case remarkable is that its political twists and turns surpass even what might be anticipated from a member state with a weaker record of compliance with EU law.²¹⁹ The Olympic Airways case is distinct for the degree to which domestic political arrangements and economic interests came to permeate the process of EU airline deregulation, and the extent to which domestic resistance came to be manifest, until quite recently, in evolving political and legal moves which seemed to preserve a web of clientelism and state sponsorship at Olympic.

²¹⁸ Thanks to Zoe Lefkofridi for discussing aspects of the Greek cases with Gerda Falkner.

²¹⁹ Dimiter Toshkov, Mortiz Knoll and Lisa Wewerka, "Connecting the Dots: Case Studies and EU Implementation Research", *Working Paper Series: Institute for European Integration Research No. 10/2010* (December 2010), <<http://www.eif.oeaw.ac.at/downloads/workingpapers/wp2010-10.pdf>> (Accessed on May 26, 2011), 13; Gerda Falkner, Miriam Hartlapp and Simone Leiber and Oliver Treib, *Complying with Europe: EU Harmonisation and Soft Law in the Member States* (Cambridge: Cambridge University Press, 2005), 336; Tanja A. Börzel, "Non-compliance in the European Union: Pathology or Statistical Artefact?", *Journal of European Public Policy* 8, no. 5 (2001), 813; Gerda Falkner, Miriam Hartlapp and Simone Leiber and Oliver Treib, "Non-compliance with EU Directives in the Member States: Opposition through the Backdoor?", *West European Politics* 27, no. 3 (2004): 452-473.

Background: Olympic Airways and EU Liberalization

The intersection of two trajectories feeds this prolonged compliance controversy: the political and economic legacy of Olympic Airways and the political economy of airline deregulation in the EU. Each dimension will be discussed here in brief as important background for fuller case examination.²²⁰

Olympic Airways was founded in 1957 as a private company by Greek industrialist Aristotle Onassis.²²¹ In 1975, the company was purchased by the Greek state and became re-categorized as a public utility.²²² This status enabled the airline to forgo detailed financial accounts and escape national tax and insurance arrears, as well as airport taxes and handling fees.²²³ Further, the Greek state and all political parties came to habitually intervene and tamper with Olympic, reshuffling upper management and influencing management decisions to service clientelistic and political aims.²²⁴ State interest in Olympic was further induced by how thousands of current and former Olympic employees resided largely in the “Athens B” district²²⁵ that elected some 15 percent of the Greek parliament.²²⁶

A chief beneficiary of state interventions at Olympic was alleged to be the Federation of Civil Aviation Unions (OSPA), which gained steady influence over airline management through well-placed political connections. Featherstone and Papadimitrou note that this became visible, in the 1980s, when Greek Prime Minister Andreas Papandreou married reportedly influential mistress and one-time OSPA figure, later producing the so-called “Dimitra” laws that increased union power and privileges at Olympic.²²⁷ A new law followed in 1994 which granted OSPA two non-executive seats on the Olympic board, and thus inside access to management decisions.²²⁸

²²⁰ We would like to acknowledge that the Greek side of the story in this background section was aided by the excellent work of Kevin Featherstone and Dimitris Papadimitrou in “Manipulating Rules, Contesting Solutions: Europeanization and the Politics of Restructuring Olympic Airways”, *Government and Opposition* 42, no. 1 (2007): 46-72.

²²¹ Featherstone and Papadimitrou, “Manipulating Rules”, 55.

²²² Greek Law no. 96 of 26 June 1975 (Olympic Airways), as cited in *Commission of the European Communities*, ‘Report by the Commission to the Council and the European Parliament on the evaluation of aid schemes established in favour of Community air carriers’, Doc SEC(92) 431 final, <http://aci.pitt.edu/4822/01/000980_1.pdf> (Accessed on October 12, 2010), 16.

²²³ *Ibid.*, 17.

²²⁴ Featherstone and Papadimitrou, “Manipulating Rules”, 55.

²²⁵ For a breakdown of Greece’s national electoral districts, please see: <<http://www.ypes.gr/en/Elections/NationalElections/DeputyElections/InterestCitizen/>> (Accessed on October 20, 2010).

²²⁶ Featherstone and Papadimitrou, “Manipulating Rules”, 57.

²²⁷ *Ibid.*

²²⁸ *Ibid.*

The apparent result of this entanglement of state, party politics and unionism at Olympic was that, since the late 1970s, the national carrier was amassing substantial deficits and debts,²²⁹ which prompted greater amounts of direct and, foremost, indirect aid (e.g. loan guarantees and tax concessions) from the Greek state so that Olympic could remain operational and formally solvent.²³⁰ The arrangement endured despite its poor viability owing to the political services it performed for an intertwined network of clients and interests in Greek domestic politics; allowing Olympic to escape serious scrutiny and protest at home.

However, the arrangement became problematic for Brussels in light of plans and laws designed to create a liberalized air transport market across the EC. EU air transport liberalization was initiated in the late 1980s, and reforms were rolled out in three stages between 1987 and 1993. The final “third package” had the purpose of enabling “an airline of one member state to operate a route within another member state”, and implemented full competition rules pursuant to the EC Treaty and the European Court of Justice’s decision in *Nouvelle Frontière* (1986).²³¹ This placed both Greece and Olympic in general contravention of Article 87 of the EC Treaty, which disallowed “state aid” in the forms of state grants, interest relief, tax relief or relief of airport charges, and state guarantee or holdings.²³² Further, the general practice of member states using flag carriers to satisfy domestic interests became identified by the Commission as a key factor for the “fragmentation” of European air transport and the competitive distortions of European civil aviation.²³³

Thus, Greece’s sponsorship of Olympic came to the immediate attention of the Commission in the 1992 State aids report.²³⁴ The intricate legal and financial protections built into state ownership of Olympic was noted in the 1992 Report; with particular concern raised about the “poor financial performance of Olympic Airways” and lack of transparency available on financial

²²⁹ *Commission of the European Communities*, ‘Report by the Commission to the Council and the European Parliament on the evaluation of aid schemes established in favour of Community air carriers’, Doc. SEC(92) 431 final, <http://aei.pitt.edu/4822/01/000980_1.pdf> (Accessed on October 12, 2010), 17.

²³⁰ *Ibid*, 18-19.

²³¹ The case held that competition rules applied to air transport notwithstanding the absence of implementing regulation. See Lars Gorton, “Air Transport and EC Competition Law”, *Fordham International Law Journal* 21, no. 3 (1997-98), 614.

²³² *Directorate General for Energy and Transport, European Commission*, ‘Guide to European Community Legislation in the field of civil aviation’, June 2007 <http://ec.europa.eu/transport/air/internal_market/doc/acquis_handbook.pdf> (Accessed on October 12, 2010), 5.

²³³ *Commission of the European Communities*, “Expanding Horizons: A report by the Comité des Sages for Air Transport to the European Commission”, January 1994, <http://aei.pitt.edu/8690/01/31735055263937_1.pdf> (Accessed on October 12, 2010), 5-9, 21-22.

²³⁴ *Commission of the European Communities*, ‘Report by the Commission to the Council and the European Parliament on the evaluation of aid schemes established in favour of Community air carriers’, Doc. SEC(92) 431 final, <http://aei.pitt.edu/4822/01/000980_1.pdf> (Accessed on October 12, 2010).

support given to Olympic by Greek authorities.²³⁵ However, Greece was not solely identified for closeness with its national carrier, as serious state aid concerns were also flagged with regard to Aer Lingus (Ireland), TAP (Portugal), Sabena (Belgium), Air France, Alitalia and Iberia (Spain).

Figurative Partnership 1993-2000: A “Joint” Attempt to “restructure” Olympic Airways

The historical practice of member states sponsoring national carriers set the stage for the Commission’s gradual enforcement of liberalization over much of the 1990s. The Commission seemed empathetic to the need for industry restructuring in light of liberalization, and thus engaged in a number of rescue and restructure agreements with various member states: Belgium (1991, 1995), France (1991-92), Spain (1992, 1996), Ireland (1994), Portugal (1994), Germany (1995) and Italy (1997).²³⁶ This was also reflective of general guidelines developed by the Commission that approved of specified aid as a “short-term, transitional device preceding a restructuring operation.”²³⁷ In the case of Greece and Olympic, the state’s plan to rescue, restructure and privatize Olympic obtained agreement between Papandreou’s PASOK government and the Commission in July 1994. This consisted of an aid package worth 2 000 000 000 Euros by the Greek government to Olympic Airways, which would be paid in three instalments following the fulfillment of twenty-one conditions.²³⁸ Key among them was that the government would enact staffing and route cuts, make Olympic a private company free from state interference, and fully implement the EU’s “third package” on air transport by the end of 1994.²³⁹

Yet, fierce union opposition, continued influence upon Olympic management, and Greece’s unauthorized injection of 36 000 000 ECU prompted the Commission to refuse, in April of 1996, the second instalment of “rescue” aid for Olympic.²⁴⁰ Yet, matters came to be rectified under the shadow of Greece’s attempt to enter ERM II in 1998, which produced a new law on fiscal discipline that endorsed a “revised restructuring”²⁴¹ of Olympic in terms of cost-cutting measures and employment changes. These “tentative reforms” persuaded the Commission to release the second instalment of the 1994 “rescue” package.

²³⁵ Ibid, 18.

²³⁶ John Balfour, “State Aid and the Aviation Industry-Unfair Competition”, mimeo, *American Bar Association, Section of International Law and Practice*, 2003 Fall Meeting, Brussels, 15-18 October 2003, 2-4.

²³⁷ Claus-Dieter Ehlermann, “State Aid Control in the European Union: Success or Failure”, *Fordham International Law Journal* 18, no. 4 (1994-1995), 1222-1223.

²³⁸ Lars Gorton, “Air Transport and EC Competition Law”, 626.

²³⁹ Featherstone and Papadimitrou, “Manipulating Rules”, 58.

²⁴⁰ Ibid, 59.

²⁴¹ Judgment of the Court of First Instance 12 September 2007 T-68/03 *Greece v. Commission* [2007], para. 7.

However, the relative accommodation that Greece had enjoyed ended with the arrival of Loyola De Palacio as EU transport commissioner between September 1999 and November 2004. De Palacio insisted on the “consolidation” of European air transport and thus the end of state aid for national carriers.²⁴² Further, she was prepared to confront member states that did not comply with this EU policy and law. De Palacio’s vigour lent a new dynamic to relations between Greece and the Commission over Olympic, where enforcement gained priority over a past approach of gradual restructuring through defined aid tolerance. Yet, an overall change in dynamic was also facilitated by the arrival, in 2000, of a touted public utilities modernizer, Christos Verelis, as Greece’s new transportation and telecommunications minister following PASOK’s return to government. The determined interchange between De Palacio and Verelis would make a profound mark on the course of the Olympic saga; most notably because Verelis’ priority of privatizing Olympic versus De Palacio’s emphasis on market liberalization led to dispute over which concern would take precedence.

Clash of Priorities? Unilateralism as aggravator of the Olympic Problem

Verelis’ arrival as transport minister was greeted by a worsening crisis at Olympic. An attempted and failed partnership with British Airways followed by damaging strike action by OSPA meant further deviation from restructuring promises made to the Commission in 1994 and 1998. The consequences were an increase in Olympic losses by another 75 000 000 Euros in 1999 and the Commission’s refusal to release the third and final instalment of the 1994 “rescue” package.²⁴³ Verelis’ response was swift and decisive: in August 2000 he announced that the government was prepared to sell a 65 percent stake in Olympic Airways to a private investor, and grant independent management of the airline.²⁴⁴ Further, his plan envisioned splitting Olympic in two, “with one half holding the company’s huge debt and the other retaining all airline operations,”²⁴⁵ and the possibility that the government would assume all of Olympics’ debt and excess staff.²⁴⁶

²⁴² “EU expected to probe Olympic Failed to follow pledges”, *Financial Times*, 19 February 2002, FP13.

²⁴³ Featherstone and Papadimitrou, “Manipulating Rules”, 60.

²⁴⁴ “Greek government applies to cover national carrier’s debt”, *Airline Industry Information*, 8 August 2000, <http://0-www.lexisnexis.com.biblio.eui.eu/hottopic/lnacademic/?shr=t&sf=AC00NBGenSrch&csi=293847> (Accessed on October 12, 2010).

²⁴⁵ Laura Hailstone, “Greece Plans to break-up of Olympic to cut airline debt”, *Flight International*, 12 September 2000, <<http://0-www.lexisnexis.com.biblio.eui.eu/hottopic/lnacademic/?shr=t&sf=AC00NBGenSrch&csi=293847>> (Accessed on October 12, 2010).

²⁴⁶ “Greek government applies to cover national carrier’s debt”, *Airline Industry Information*, 8 August 2000, <http://0-www.lexisnexis.com.biblio.eui.eu/hottopic/lnacademic/?shr=t&sf=AC00NBGenSrch&csi=293847> (Accessed on October 12, 2010).

Yet, it seems that Verelis only once formally discussed his plan with Commissioner De Palacio in October 2000, which is a pivotal point of contention for this compliance story. Verelis believed De Palacio had consented to his elaborate privatization scheme during their personal encounter.²⁴⁷ Whether this was true becomes difficult to assess, *inter alia* in light of how the international tender for Olympic, published in December 2000, failed to yield an acceptable buyer, and the subsequent downturn of air travel, following the events of 9/11, further diminished finances and conditions at Olympic vis-a-vis its intended privatization. Additionally, at around the time of Verelis' meeting with De Palacio, the Hellenic Carriers' Association lodged a complaint against the Greek government claiming it was still aiding Olympic in contravention of the 1994 and 1998 agreements.²⁴⁸ Additional complaints were further filed in 2002 to the same effect.

Thus, the investigatory action launched by De Palacio in the March of 2002, over Greece's failure to comply with terms of aid as agreed in 1994, may be interpreted as reflecting changed and deteriorating circumstances rather than the Commission renegeing on tacit consent which Verelis thought he had attained back in fall 2000. In any event, what became clear by the latter half of 2002 was that Verelis and De Palacio were intent upon their respective missions with seemingly limited regard for mutual coordination. This was foremost manifest in December following the government's announcement that Greek shipping tycoon, Stamatis Restis, was in serious negotiations to buy Olympic.²⁴⁹ Yet, soon after, the Commission released its damning Decision (2003/372/EC)²⁵⁰ regarding Olympics' "restructuring" since 1994, and demanded that the government recover 153 000 000 Euro in illegal state aid plus an additional 41 000 000 Euro which Olympic received in the second instalment of the 1994 "rescue" package.²⁵¹ In a public statement, De Palacio declared: "The commission is guaranteeing to everyone on the European market that they can benefit from equal conditions. We are avoiding cheating."²⁵²

²⁴⁷ Featherstone and Papadimitrou, "Manipulating Rules", 63-64. In December 2000, Verelis met Palacio again and then declared that the Greek government and the Commission were in "total harmony" and that the "government informed the Commission about every step it took"

(<http://www.greekembassy.org/embassy/content/en/Article.aspx?office=5&folder=291&article=5030>).

²⁴⁸ Judgment of the Court of First Instance 12 September 2007 T-68/03 *Greece v. Commission* [2007], para. 18.

²⁴⁹ Tom Bawden, Ingrid Mansell and Neelam Verjee, "Need to Know: The Essential daily guide to the sectors", *The Times (London)*, 7 December 2002, 63.

²⁵⁰ The Decision itself referred to: "...the existence of new operating aid, which consists, in essence, in the toleration by the Greek State of the non-payment, or deferment of the payment dates, of social security contributions for October to December 2001, value added tax ("VAT") on fuel and spare parts, rent payable to airports for the period 1998 to 2001, airport charges and a tax imposed on passengers on departure from Greek airports...." See Judgment of the Court of 12 May 2005 in European Court of Justice Case C-415/03 *Commission v Greece* [2005] ECR I-03875, para 5.

²⁵¹ Russell Hotten, "Olympic told to repay Pounds 130m to Athens", *The Times (London)*, 12 December 2002, 29.

²⁵² Paul Meller, "Olympic Airways Ordered to Return State Aid", *New York Times*, 12 December, 2002, 1.

Following this announcement, the attempted Restis deal became tattered over fears that Olympic would go bankrupt,²⁵³ and an angered Greek transport minister proclaimed that the government would use “all available means” to overturn the Commission’s decision in European Courts.²⁵⁴ Olympic Airways itself contested the 2002 Decision before the Court of First Instance (now called General Court), which in 2007 struck down only some of the Commission’s claims regarding airport charges and VAT debts.²⁵⁵ Further, Verelis proceeded with his plans to split up and partly privatize Olympic²⁵⁶ irrespective of the Commission’s warnings of infringement proceedings,²⁵⁷ and informed the Commission as such in March of 2003.²⁵⁸ Despite Greek claims that repayment totals were miscalculated, the Commission announced in April that it had initiated infringement proceedings at the ECJ pursuant to Article 88, paragraph 2 of the EC Treaty, with respect to illegal state aid.²⁵⁹

Yet, before the infringement judgment could be handed down, Olympic Airways was restructured, despite significant labour unrest,²⁶⁰ in December 2003;²⁶¹ with the profitable parts of the company responsible for handling flights (the airline in a narrow sense) transferred to a new company, Olympic Airlines. This reshuffle of assets from Olympic Airways to Olympic Airlines, with the former retaining only the indebted liabilities of the business caused foreseeable concern²⁶² for Brussels, since it:

“...made it impossible to recover the former company’s debts from the new firm. The latter, to which the liabilities of Olympic Airways were not transferred, is therefore placed under a regime of special protection with regard to the creditors of the former. According to the Commission, by that transfer, the Greek authorities have prevented the recovery of the aid, since Olympic Airways mainly retains the liabilities without having assets capable of discharging the corresponding debts.”²⁶³

²⁵³ “Greece’s Olympic Airways may face bankruptcy”, *The Irish Times*, 9 December 2002, 16.

²⁵⁴ Andrew Osborn, “Ryanair to face EC investigation: Crackdown on state aid to airlines as Olympic is ordered to repay pounds 125m”, *The Guardian*, 12 December 2002, 29.

²⁵⁵ Judgment of the Court of First Instance 12 September 2007 T-68/03 *Greece v. Commission* [2007].

²⁵⁶ Paul Meller, “EU draws the line on state aid to carriers”, *International Herald Tribune*, 24 April 2003, 14.

²⁵⁷ “European Commission threatens to take Greece to court over illegal state aid”, *Airline Industry Information*, 18 February.

²⁵⁸ Opinion of the Advocate General of 5 February 2009 C-369/07 *Commission v Greece* [2009], para. 8.

²⁵⁹ “Brussels to Launch Court Case against Greece”, *The Independent (London)*, 23 April 2003, 20.

²⁶⁰ Edward H. Phillips, “Greek Airline Changes Name”, *Airline Outlook*, no. 159(25), 15; “Staff at Olympic Airways to stage strike action over financial rescue plan”, *Airline Industry Information*, 4 September 2003; “Flight attendants at Olympic Airways hold strike action”, *Airline Industry Information*, 3 October 2003; “Flight disruptions across Greece due to civil servant strike”, *Airline Industry Information*, 20 November 2003.

²⁶¹ “Olympic gets a new name but debts remain”, *Flight International*, 23 December 2003, 20.

²⁶² “European Commission seeks details of Greece’s plan for Olympic Airways”, *Airline Industry Information*, 7 August 2003; “EU Orders Greece to dislodge plans on Olympic Airways”, *Airline Industry Information*, 8 September 2003.

²⁶³ Judgment of the Court of 12 May 2005 in European Court of Justice Case C-415/03 *Commission v Greece* [2005] ECR I-03875, para 16-17.

Accordingly, following the ruling of the European Court of Justice (C-415/03) that Greece had failed to recover illegal aids, the Commission on 14 September 2005 issued a new Decision including Olympic Airlines; which again became contested by Greece, Olympic Airways and Olympic Airlines before the Court of First Instance.²⁶⁴ Moreover, in 2006, the Commission brought Greece before the ECJ a further time for failure to fulfill the obligations flowing from the 2005 Decision²⁶⁵, as no illegal aid had been recovered. In 2008, the ECJ found Greece to be infringing its obligations despite the fact that the annulment application of the 2005 Decision was still pending before the Court of First Instance.²⁶⁶

In the meantime, penalty infringement proceedings with regard to the 2002 Decision were in course. The Commission argued that Greece had not recovered illegal aids in the amount of 133 400 000 Euro from Olympic Airways; while Greece counter claimed that most of those charges had, it was argued, been set-off against State debts to that company, totalling 564 000 000 Euro, stemming from an agreement struck in 1956:

“The damages in question were awarded to the company by an arbitration tribunal established pursuant to an arbitration agreement provided for in Article 27 of Legislative Decree 3560/1956 validating a contract concluded between Aristotle Onassis and the State.”²⁶⁷

In 2009, the ECJ brought a seeming conclusion to this protracted dispute when it delivered its judgment in the penalty proceedings.²⁶⁸ The Court found that Greece had failed to recover illegal state aids as assessed in the 2002 Decision, and that Greece’s claim of financial set-off against pre-existing state debts were inadequately proven. In addition, the ECJ imposed a penalty payment of 16 000 Euro per day and a lump sum of 2 000 000 Euro, which was, however, considerably lower relative to the penalty of 53 611 Euro per day sought by the Commission.

²⁶⁴ Action brought on 25 November 2005 Case T-415/05 *Greece v Commission* [2005] OJ C22/19; Action brought on 25 November 2005 Case T-416/05 *Olympic Airlines S.A. v Commission* [2005] OJ C22/19; Action brought on 25 November 2005 Case T-423/05 *Olympic Airways Services S.A. v Commission* [2005] OJ C22/21.

²⁶⁵ Judgment of the Court of 14 February 2008 Case C-419/06 *Commission v Greece* [2008] ECR I-00027.

²⁶⁶ « Il convient de relever que, dans le cadre d’un recours en manquement introduit par la Commission sur le fondement de l’article 88, paragraphe 2, CE, un État membre destinataire d’une décision en matière d’aide d’État ne saurait valablement justifier la non-exécution de celle-ci sur la base de sa prétendue illégalité. C’est dans le cadre d’une procédure distincte, à savoir celle d’un recours en annulation visé à l’article 230 CE, que toute contestation de la légalité d’un tel acte communautaire doit s’effectuer. Par conséquent, la qualification, dans la décision du 14 septembre 2005, des mesures qui y sont énoncées comme des aides d’État ne saurait être mise en cause dans le cadre de la présente affaire. » See Judgment of the Court of 14 February 2008 in European Court of Justice Case C-419/06 *Commission v Greece* [2008] ECR I-00027, para 52.

²⁶⁷ Judgement of the Court of 7 July 2009 in the European Court of Justice Case C-369/07 *Commission v Greece* [2009], para.17-19.

²⁶⁸ Judgement of the Court of 7 July 2009 in the European Court of Justice Case C-369/07 *Commission v Greece* [2009].

In a further twist to the case, in September of 2010, the General Court (Court of First Instance) delivered its judgment regarding the application for annulment by Greece, Olympic Airways and Olympic Airlines regarding the Commission's 2005 Decision regarding required restitution of illegal state aids.²⁶⁹ In a surprising, partial victory for Greece, the Court questioned the calculation methods employed by the Commission in the determination of specific illegal aids, and consequently annulled repayment orders of the 2005 Decision pertaining to the impugned sub-leasing of aircraft (40 000 000 Euro) and asset transfers to Olympic Airlines (91 500 000 Euro).²⁷⁰ However, the ruling by the Court did ultimately uphold findings of illegal state aids on other counts totalling over 400 000 000 Euro.²⁷¹

Case Notes

- **Problem:** EU liberalization of the airline industry came into conflict with various kinds of domestic interests that came to use Olympic Airways to fulfill political patronage. The EU's competition rules clashed with Greece's intentions on how to privatize Olympic with Government assistance.
- **Causes of Infringement:** For the most part, this seems to be a case of motivated non-compliance for reasons of protectionism, vote-seeking and clientelism.
- **Outcome:** The case could only be closed after the 2nd judgment where fines were imposed, however not on all claims sought by the Commission.

²⁶⁹ Judgment of the General Court of 13 September 2010 Joined Cases T-415/05, T-416/05 and T-423/05 *Greece and Others v Commission* [2010].

²⁷⁰ Sophie Mosca, "Court of Justice: Commission Decision on Aid to Olympic Airways partially annulled", *Europolitics*, 14 September 2010.

²⁷¹ *Ibid.*

**10th JUDGMENT:
To Certify a Certificate?
Portugal, Italian Water Pipes and the Free Movement of Goods**

(Case 27 reviewed by Gerda Falkner and Nikolas Rajkovic)

<i>Litigation Basics</i>	
EU Law at Issue	
●	EC Treaty, Articles 28 and 30 (Free Movement of Goods)
●	Directive 89/106 (Testing and Approval of Construction Products)
●	Decision No. 3052/95 (Notification of Market Barriers)
Transposition Deadline:	05.08.1998
First Proceedings (C-432/03)	
●	Letter of Formal Notice: 12.09.2000
●	Entrance into Registry: 10.10.2003
●	First Judgment: 10.11.2005
Second Proceedings (C-457/07)	
●	Letter of Formal Notice: 04.07.2006
●	Entrance in Court Registry: 09.10.2007
●	Judgment: 10.09.2009

One of the crucial challenges facing the internal market has been the treatment of various technical and product standards. Since the mid-1980s and the invocation of the Single Market, the EU mostly relied upon a system of mutual recognition between national regimes. However, the sheer principle of mutual recognition did not mean that anything goes, and coordination and administration was still required between national regimes in practice. It is this coordination and practice between national regimes as the basis for mutual recognition which has sometimes provoked administrative and bureaucratic problems, and in turn led to allegations of infringement under the EC Treaty. In the present case, the intended use of Italian water pipes in Portugal came to reveal how mutual recognition required active cooperation and association between national certification authorities.

Polyethylene Pipes and Portuguese Certification

The case arises from a Portuguese company which attempted to use “PEX” polyethylene pipes (PEX) imported from Italy and Spain for a construction project in Lisbon.²⁷² The company applied for approval, as per Portuguese law, to the responsible Portuguese authority, *Empresa Publica de Aguas de Lisboa* (EPAL). However, required authorization was denied by EPAL on the grounds that the PEX pipes had not received quality approval from the (Portuguese) National Laboratory of Civil Engineering of the Ministry of Public Works (*Laboratorio Nacional de Engenharia Civil*) (LNEC). According to EPAL, authorization was refused on the basis of the Portuguese Law on Urban Construction and two Decrees from the Ministry of Public Works. The law required that all new construction materials for which “no official specifications and sufficient practical experience” existed required the prior opinion of LNEC. The latter Decrees held that “only plastic materials which have been approved by the LNEC may be used in the water distribution system.”²⁷³ Notably, the PEX pipes had already been tested and approved by the Italian Institute of Plastics (IIP); however when the Portuguese company turned to LNEC for an attestation of the equivalence of the certificate issued by IIP, LNEC denied equivalence because “IIP was not a member of the *European Union of Agrément* (UEAtc), nor “one of the other bodies with which the LNEC had concluded an agreement.”²⁷⁴ Thus, a gap seemed to exist in the Portuguese legislative framework, such that LNEC had no positive duty to seek out and use testing results from other member states.

This sequence of refusals led to complaints to the Commission in April and May 2000, with a letter of formal notice being delivered to the Portuguese government in September 2000.²⁷⁵ The letter alleged that Portugal’s making PEX pipes subject to an approval procedure, “...without taking into account...approval certificates issued by those other Member States,” meant Portugal had failed to fulfill its obligations under Articles 28 EC and 30 EC and Articles 1 and 4(2) of

²⁷² Judgment of the Court of 10 November 2005 in European Court of Justice Case C-432/03 *Commission v Portugal* [2005], para 16 .

²⁷³ Judgment of the Court of 10 November 2005 in European Court of Justice Case C-432/03 *Commission v Portugal* [2005], para. 14 & 15.

²⁷⁴ Judgment of the Court of 10 November 2005 in European Court of Justice Case C-432/03 *Commission v Portugal* [2005], para 17 .

²⁷⁵ Judgment of the Court of 10 November 2005 in European Court of Justice Case C-432/03 *Commission v Portugal* [2005], para 18 .

Decision No. 3052/95.²⁷⁶ In May 2001, the Commission issued a further reasoned opinion, and in October 2003 infringement proceedings were begun before the ECJ.

Infringement Proceedings: The Need to Facilitate Certification

In its judgment of November 2005, the Court expressed its concern that obtaining equivalence of certificates for products already tested and approved in other member states could eventually lead to a restriction of imports.²⁷⁷ At the time of infringement proceedings, no EU standards were set for the polyethylene pipes in question and therefore member states were allowed under Directive 89/106 to require testing prior to authorization.²⁷⁸ However, the ECJ warned that the execution of this testing right should not produce “duplicate controls” and unnecessary analyses:

“...whilst a Member State is free to require a product which has already received approval in another Member State to undergo a fresh procedure of examination and approval, the authorities of the Member States are nevertheless required to assist in bringing about a relaxation of the controls existing in intra-Community trade. It follows that they are not entitled unnecessarily to require technical or chemical or laboratory tests where those analyses and tests have already been carried out in another Member State and their results are available to those authorities, or may at their request be placed at their disposal.”²⁷⁹

Penalty Proceedings: Proof of an Ongoing Infringement

Following the ECJ’s infringement judgement, EU standards were introduced with respect to polyethylene pipes, and this led to several modifications in Portuguese law by January 2006.²⁸⁰ Notwithstanding these changes, the Commission initiated penalty proceedings against Portugal with the delivery of a letter of formal notice in July 2006.²⁸¹ It claimed that the new measures had failed to comply with the infringement judgment. The Commission argued, first, that Portugal’s attempt to make changes via Decree were ineffective because the applicable provision was part of a Decree-Law. Since Decrees had a lower rank in the hierarchy of legal norms, Decrees were incapable of amending Decree-laws. Second, the Commission argued that the new measures

²⁷⁶ Ibid.

²⁷⁷ Judgment of the Court of 10 November 2005 in European Court of Justice Case C-432/03 *Commission v Portugal* [2005], para 41.

²⁷⁸ Judgment of the Court of 10 November 2005 in European Court of Justice Case C-432/03 *Commission v Portugal* [2005], para 27.

²⁷⁹ Judgment of the Court of 10 November 2005 in European Court of Justice Case C-432/03 *Commission v Portugal* [2005], para 46.

²⁸⁰ Judgment of the Court of 10 September 2009 in European Court of Justice Case C-457/07 *Commission v Portugal* [2009], para 25.

²⁸¹ Judgment of the Court of 10 September 2009 in European Court of Justice Case C-457/07 *Commission v Portugal* [2009], para 27.

affected pipe systems only, not individual pipes and therefore did not comply with the judgment since they had only provided the possibility – and not the obligation - to take into account tests and inspections performed in other member states.²⁸² Third, Portugal did not communicate any measures to the Commission intending to remedy the adverse effects resulting from the infringement.²⁸³

Following the issuance of a reasoned opinion in January 2007, the deadline of which the Portuguese administration failed to meet in reply, Portugal took further steps to try and meet the Commission’s concerns. Foremost, the government introduced a Decree in order to facilitate the acceptance of test results and quality certificates from other member states.²⁸⁴ However, the Commission remained doubtful as to whether Decree amendments were legally adequate; and therefore it referred the case to Court asking for a daily penalty payment of 37 400 Euro and a lump sum penalty. During the action, Portugal enacted a Decree-Law (March 2008) to remedy the Commission’s concerns.²⁸⁵ Subsequently, the Commission expressed satisfaction and dropped the request for a daily penalty payment. However, a lump sum penalty was still sought for late compliance.²⁸⁶

In its judgment of September 2009, the Court dismissed the application lodged by the Commission for reason that all claims were insufficiently specified within the pre-litigation procedure and not closely related to the infringement judgment.²⁸⁷ While the Commission held that some aspects were “implicitly”²⁸⁸ included in the Court’s initial judgment, Portugal rejected such an interpretation; and the Court affirmed Portugal position. In other words, the Commission had failed to prove an ongoing infringement. The Court expressed the view that Portugal’s multiple amendments of applicable law had addressed the substance of the initial judgment.²⁸⁹ Therefore, the ECJ emphasized, the Commission’s later concerns fell outside the precise subject-matter of the infringement judgment:

²⁸² Letter of Formal Notice, issued on 04 July 2006, SG-Greffé (2006)D/203702, 3.

²⁸³ Judgment of the Court of 10 September 2009 in European Court of Justice Case C-457/07 *Commission v Portugal* [2009], para 27.

²⁸⁴ Judgment of the Court of 10 September 2009 in European Court of Justice Case C-457/07 *Commission v Portugal* [2009], para 29-33.

²⁸⁵ Judgment of the Court of 10 September 2009 in European Court of Justice Case C-457/07 *Commission v Portugal* [2009], para 35.

²⁸⁶ Judgment of the Court of 10 September 2009 in European Court of Justice Case C-457/07 *Commission v Portugal* [2009], para 36.

²⁸⁷ Judgment of the Court of 10 September 2009 in European Court of Justice Case C-457/07 *Commission v Portugal* [2009], para 60-61.

²⁸⁸ Judgment of the Court of 10 September 2009 in European Court of Justice Case C-457/07 *Commission v Portugal* [2009] para 98.

²⁸⁹ Judgment of the Court of 10 September 2009 in European Court of Justice Case C-457/07 *Commission v Portugal* [2009], para 75-79.

“...the Commission has not adduced any information liable to refute the Portuguese Republic’s assertion that, apart from the situation of the undertaking whose compliant led to the [initial] judgment, there has been no incident detected of an undertaking’s having encountered difficulties in obtaining approval for products or recognition of certificates issued by other Member States....”²⁹⁰

Case Notes

- **Problem:** Despite the EU’s rules of mutual recognition, Portuguese authorities denied authorization for Italian-made and certified water pipes which had not yet received approval from Portuguese licensors.
- **Causes of Infringement:** This case shows signs of neglect by the Portuguese government, resulting in protectionist effects. The Commission and the ECJ found that Portuguese authorities should have sought out existing approval and testing results from Italy. The series of statutory amendments made by the Portuguese government in response to the initial judgment were found by the Commission to be legally inadequate. Further, there was evident delay: Portugal only corrected its laws 14 months after the Commission’s reasoned opinion and 5 months after second referral.
- **Outcome:** This second referral was a failure for the European Commission. The action was dismissed and the Commission as the unsuccessful party was ordered to pay the costs.

²⁹⁰ Judgment of the Court of 10 September 2009 in European Court of Justice Case C-457/07 *Commission v Portugal* [2009], para 98.

11th JUDGMENT: Out of Sight? Greece's Restrictions on Opticians' Shops²⁹¹

(Case 28 reviewed by Gerda Falkner and Nikolas Rajkovic)

<i>Litigation Basics</i>	
EU Law at Issue:	
•	Article 43 EC Treaty (freedom of establishment)
•	Article 48 EC Treaty (right to provide services)
First Proceedings (C-140/03)	
•	Letter of Formal Notice: 06.11.1998
•	Entrance into Registry: 27.03.2003
•	First Judgment: 21.04.2005
Second Proceedings (C-568/07)	
•	Letter of Formal Notice: 13.12.2005
•	Entrance in Court Registry: 18.12.2007
•	Judgment: 04.06.2009

Member states have a right and responsibility to regulate concerns regarding public health. This is confirmed in Article 6 of the Treaty on the Functioning of the European Union, which states that Union actions are to “support, coordinate or supplement” member states in the “protection and improvement of human health”. Yet, to what extent can member states exercise their primacy over public health within the larger framework of EU law? Does an assertion of public health grant a member state the liberty of imposing laws and regulations which restrict essential freedoms provided for under the EC Treaty? Clearly, answers to such questions must refer to circumstances and context; but member states should expect that encroachments of the EC Treaty will be subject to scrutiny. In the extant case, the Greek government had a longstanding Opticians' Law (Law No. 971/79) which did not “permit a qualified optician as a natural person to operate more than one optician's shop.”²⁹² Greece attempted to justify maintenance of that law with reference to its jurisdiction to regulate professions and uphold high levels of health protection. Whether this claim would support a consequent breach of the EC Treaty thus became a central issue before the ECJ.

²⁹¹ Thanks to Zoe Lefkofridi for discussing aspects of the Greek cases with Gerda Falkner.

²⁹² Judgment of the Court of 21 April 2005 in European Court of Justice Case C-140/03 *Commission v Greece* [2005] ECR, para. 1.

One Optician, One Shop?

According to Greece's Opticians' Law those wanting to own or run opticians' shops had to fulfil certain strict conditions. Foremost, they had to be a natural person educated as an optician, and the legal entity of the optician shop had to be at least 50% owned by that optician. Further, the natural person educated as an optician would be permitted to run only one optician shop.²⁹³

The Commission received complaints in the mid to late 1990s from two companies which had been denied authorization to open opticians' shops.²⁹⁴ The complainants consisted of a parent company domiciled in another member state and its Greek subsidiary. Although the Opticians' Law did not specifically refer to nationality, the Commission took the opinion that the Law's provisions were an obstacle to the fundamental freedoms guaranteed by the EC Treaty. This resulted in written dialogue and clarifications done through a series of formal notices between the Commission and the Greek government in November 1998, August 1999 and January 2000.²⁹⁵

The reason for these multiple notices related to Greek Law No. 2646/98 which had amended the Opticians' Law; the effect of which the Commission and the Greek government disputed because amendments removed the so-called one-shop-provision but upheld restrictions on share ownership. Foremost, an optician had to maintain more than 50 percent ownership in a shop and could only have partial ownership in a further store. Greek authorities justified the continued restrictions on the grounds of protecting public health. The Commission, however, argued that the restrictions were disproportionate and infringed—albeit indirectly—upon the establishment right (Article 43 EC) of non-national companies in the Greek optical market. Nonetheless, in May 2000, Greece issued a steadfast reply on the legality of its Opticians' Law: “...in the absence of harmonisation at Community level, each Member State remains free to regulate the exercise of professions within its territory.”²⁹⁶

The ECJ: One Market, Open Services

This prompted the Commission to issue a reasoned opinion in January 2001. In December 2002, the Greek government advised of its intention to further amend the Opticians' Law to: “...allow

²⁹³ Ibid.

²⁹⁴ Judgment of the Court of 21 April 2005 in European Court of Justice Case C-140/03 *Commission v Greece* [2005] ECR, para. 6.

²⁹⁵ Judgment of the Court of 21 April 2005 in European Court of Justice Case C-140/03 *Commission v Greece* [2005] ECR, para 8-10.

²⁹⁶ Judgment of the Court of 21 April 2005 in European Court of Justice Case C-140/03 *Commission v Greece* [2005] ECR, para. 11.

opticians from within the Community and, subject to certain conditions...irrespective of their legal form...to establish and operate opticians' shops."²⁹⁷ The Commission nonetheless initiated an infringement action with the ECJ in March 2003.

In its decision of April 2005, the Court held Greece to be in breach of its obligations. The ECJ found that share ownership restrictions for opticians constituted an obstacle to the freedom to provide services, as they went beyond what was necessary to achieve the goals of the Greek legislator. Those goals were:

“The Hellenic Republic claims that the prohibition of the operation of more than one shop by any natural person was enacted for overriding reasons of general interest in relation to the protection of public health. The Greek legislature wished to safeguard the personal relationship of trust within the optician's shop, as well as, in case of fault, the absolute and unlimited liability of the optician who operates or owns the shop. Only an optician, a qualified specialist, who participates directly in the running of his shop without expending physical and mental energy on running other shops can guarantee the desired result.”²⁹⁸

The Court countered that milder means to assure public health would have been available, e.g. that exclusively trained opticians (including hired ones) could have been allowed to perform certain tasks in optician's shops, regardless of ownership.²⁹⁹

After the judgment in the infringement proceedings, the Greek government still appeared slow to amend the provisions requested. This led to the delivery of a letter of formal notice in December 2005, followed by a reasoned opinion in July 2006.³⁰⁰ In reply, Greek authorities in February 2006 referred to proceedings on a draft law which would “make it possible for all types of companies or firms to establish opticians' shops without requiring a majority shareholding by opticians.”³⁰¹ However, this amending law was not realized in time, and the Commission referred the case to the ECJ on 18 December 2007 requesting a daily penalty payment of 70 956 Euro and a lump sum penalty.³⁰² In its submissions to the Court, the Commission stressed that the delay in compliance related not to stated health concerns but rather Greece's ulterior aim of preserving

²⁹⁷ Judgment of the Court of 21 April 2005 in European Court of Justice Case C-140/03 *Commission v Greece* [2005] ECR, para. 13.

²⁹⁸ Judgment of the Court of 21 April 2005 in European Court of Justice Case C-140/03 *Commission v Greece* [2005] ECR, para. 31.

²⁹⁹ “the objective of protecting public health upon which the Hellenic Republic relies may be achieved by measures which are less restrictive of the freedom of establishment both for natural and legal persons, for example by requiring the presence of qualified, salaried opticians or associates in each optician's shop, rules concerning civil liability for the actions of others, and rules requiring professional indemnity insurance” (Ibid., para. 35).

³⁰⁰ Judgment of the Court of 4 June 2009 in European Court of Justice Case C-568/07 *Commission v Greece* [2009], para. 10-12.

³⁰¹ Judgment of the Court of 4 June 2009 in European Court of Justice Case C-568/07 *Commission v Greece* [2009], para. 11.

³⁰² Action brought on 21 December 2007 in the European Court of Justice Case C-568/07 *Commission v Greece* [2007] (2008/C 64/37).

“protective arrangements favouring a certain category of professionals, prohibiting access by legal persons from other Member States to that market.”³⁰³ When arguing its proposed amount of lump sum to be paid, the Commission took

“the view that the consequences of the infringement for general and individual interests are particularly serious, as the legislative provisions in question are primarily aimed at protecting the Greek market and at blocking access to it for opticians’ companies or firms established in other Member States.”³⁰⁴

Following general elections in Greece in 2007 the purported draft law was finally adopted on 8 May 2008. After examining the new law, the Commission informed the Court that compliance had been restored and accordingly withdrew its claim for a daily penalty payment.³⁰⁵ However, the Commission maintained its claim for the imposition of a lump sum owing to excessive delay. The Greek government argued that the delay resulted from the holding of elections and that the Greek Parliament had rejected an initial draft law. The Court, citing the principle that problems of internal law are not a relevant justification,³⁰⁶ ordered Greece to pay the amount of 1 000 000 Euro in lump sum:

“...almost 37 months elapsed between the date of delivery of the [initial] judgment and the date on which the Hellenic Republic brought its legislation fully into line... Clearly...the infringement...persisted for a significant period of time, particularly when account is taken of the fact that full compliance with the judgment...was hardly a complex matter.”³⁰⁷

Case Notes

- **Problem:** Greek law prescribed, on the stated grounds of public health protection, that a qualified optician could operate no more than one shop. This law ran into conflict with the EC Treaty and its essential freedoms.
- **Causes of Infringement:** This seems a case of motivated noncompliance due to protectionism. In the final stages, delay was aggravated both by opposition in the Parliament and national elections.
- **Fine imposed:** The ECJ declared a lump sum penalty of 1 000 000 Euro.

³⁰³ Ibid.

³⁰⁴ Ibid.

³⁰⁵ Judgment of the Court of 4 June 2009 in European Court of Justice Case C-568/07 *Commission v Greece* [2009], para. 16.

³⁰⁶ Ibid., para. 23 and 50.

³⁰⁷ Judgment of the Court of 4 June 2009 in European Court of Justice Case C-568/07 *Commission v Greece* [2009], para. 52-53.

12th JUDGMENT:
Crime and Proportionality –
Social versus Market conflict in Greece’s Prohibition of Gaming Machines³⁰⁸

(Case 29 reviewed by Gerda Falkner and Nikolas Rajkovic)

<i>Litigation Basics</i>	
EU Law at Issue	
●	Article 28, 43, 49 EC Treaty (Free Movement of Goods, Services, Establishment)
●	Directives 1998/34 and 1998/48 (information re technical standards on Information Society services)
First Proceedings (C-65/05)	
●	Letter of Formal Notice: 18.10.2002
●	Entrance into Registry: 10.02.2005
●	First Judgment: 26.10.2006
Second Proceedings (C-109/08)	
●	Letter of Formal Notice: 23.03.2007
●	Entrance into Registry: 10.03.2008
●	Judgment: 04.06.2009

When faced with social problems in need of remedy, member states that seek a legislative fix must tread carefully over a number of legal eggshells. The first of these concerns relates to the domestic legal order, and such issues as legal certainty, consistency and internal constitutionality. A second dimension regards the extent to which legislative moves implicate the EU legal order and, specifically, do not cross the EC Treaty and corresponding directives. In some instances, as in the present case involving Greece and its prohibition of gaming machines, a member state might believe that the severity of the problem provides an exemption with respect to EU obligations. However, as the ECJ eventually ruled in this case, severity does not exempt a member state from ensuring that legislative remedies remain as consistent as possible with EU law and foremost display proportionality in remedy.

³⁰⁸ Thanks to Zoe Lefkofridi for discussing aspects of the Greek cases with Gerda Falkner.

The Greek “gambling epidemic”³⁰⁹ and its Political Crisis

Illegal games of chance indeed appear to have provoked a serious social problem in Greece, costing the average Greek 359 Euros per year³¹⁰ and the Greek state “an estimated \$5 million daily in lost revenue, according to government officials.”³¹¹ A Finance Ministry spokesman pointed at the “highest incidence of gambling in the 15-nation European Union.”³¹² Further, some 200 000 unlicensed gambling machines were said to be in operation in Greece by 2002,³¹³ and this despite an existing prohibition against gambling outside licensed casinos.³¹⁴

However, the problem of gaming machines only assumed centre stage in Greece with the outbreak of political scandal. In January 2002, the head of an informal parliamentary committee to combat illegal gambling was suspended after a private TV channel allegedly showed him playing on unlicensed gambling machines. Soon thereafter, TV shows reportedly began “linking the arcade games played by the filmed politician to a businessman with alleged links to politicians in both the governing party and opposition.”³¹⁵ What is more, snapshots of a senior Minister “seated in the cozy company of a reputed gambling baron” also made newspaper front pages³¹⁶. Even Greece’s President threatened to resign over a TV program’s allegation to possibly have rented out a building in Patras to a businessman who allegedly used it to house arcade games modified for illegal gambling.³¹⁷ This scandal came at a precarious time for the ruling PASOK party, preceding municipal elections later that year and following a string of other scandals.³¹⁸ There was “a strong public perception of corruption in Greek society” and there had been growing calls for the ruling socialists—in power for 17 of the past 20 years—to crack down.³¹⁹ This likely precipitated Premier Costas Simitis to declare “war on corruption and public sector graft” in an effort to improve the image of his government, which had been “buffeted for weeks by strikes, demonstrations and widespread public disaffection over economic policy.”³²⁰ A government spokesman said that the government would root out, *inter alia*, “financial crimes that

³⁰⁹ “Scandals Drive a Crackdown on Illegal Gambling in Greece”, *New York Times*, 24 March 2002, 24.

³¹⁰ “Greek govt deals out blow to gamblers”, *Agence France Presse*, 21 February 2002; “Greek parliament outlaws electronic gambling”, *Agence France Presse*, 11 July 2002.

³¹¹ “Scandals Drive a Crackdown”, 24.

³¹² *Ibid.*

³¹³ *Ibid.*

³¹⁴ *Ibid.* See also “Government condemns report linking president to illegal gambling scandal”, *Associated Press Worldstream*, 31 January 2002.

³¹⁵ “Government condemns report”.

³¹⁶ “Scandals Drive a Crackdown”, 24.

³¹⁷ “Government condemns report”.

³¹⁸ “Scandals Drive a Crackdown”, 24.

³¹⁹ “Premier dedares war on corruption in wake of illegal gambling scandal”, *Associated Press Worldstream*, 6 February 2002.

³²⁰ *Ibid.*

have gone unpunished because of lax enforcement of laws.”³²¹ And enforcement seems, in fact, to have been the main problem in the fight against unlicensed gambling.

To Game or not to Game: What kind of Penalty?

In July 2002, the Greek parliament adopted Law 3037/2002 (2002 Law) which prohibited “...the installation and operation of all electrical, electromechanical and electronic games, including all computer games, on all public or private premises apart from casinos.”³²² Most notably, the law provided for both administrative and criminal sanctions, with a first-time offence punishable with three months imprisonment and/or a fine of 5 000 Euro. Repeated offences were punishable with a minimum of one year imprisonment and a fine between 25 000 and 75 000 Euro. Administrative penalties could range as high as 10 000 Euro per impugned game and the removal of an undertakings’ operating licence.³²³

What drew greatest controversy was the extent of prohibition imposed by the 2002 Law. The ban was strict in nature, extending to all kinds of slot-machines, computer games (e.g. software), and online games, irrespective of purpose and without regard for context such as whether games were so-called “games of chance”, for profit, or just for innocent enjoyment. In particular, the wording of Law 3037/2002 made it even illegal to play solitaire on one’s home computer. This was later corrected by the Greek government with an amendment which clarified that private persons would not be prosecuted should they not use their games for financial gain.³²⁴

The Greek government justified the 2002 Law for the purposes of protecting its citizens from the social consequences of gambling, addiction, fraud, and the general waste of economic resources.³²⁵ Specifically, the government argued that a blanket ban on electronic gaming in public places, with the exception of casinos,³²⁶ became necessary because it was practically impossible to monitor the legality of each gaming machine.³²⁷ This aggressive approach seemed to have broad partisan support because, reportedly, each of the bill’s articles were passed

³²¹ Ibid.

³²² Judgment of the Court of 26 October 2006 in European Court of Justice Case C-65/05 *Commission v Greece* [2006] ECR I-10341, para 68.

³²³ Judgment of the Court of 26 October 2006 in European Court of Justice Case C-65/05 *Commission v Greece* [2006] ECR I-10341, para 9-11.

³²⁴ Decision 1107414/1491/T. & E. F., published in the Government Gazette issue 1827, on December 8, 2003.

³²⁵ Judgment of the Court of 26 October 2006 in European Court of Justice Case C-65/05 *Commission v Greece* [2006] ECR I-10341, para 20.

³²⁶ Greek parliament outlaws electronic gambling”, *Agence France Presse*, 11 July 2002.

³²⁷ Ibid.

unanimously in Parliament,³²⁸ which suggests that later retraction by a different government might have had political costs. Within Greek society, however, it seemed that the decision was considered to be “overly repressive.”³²⁹ In the words of an Athens sociologist, it “is a well known social problem and the government appears to be reacting rather late in the day, repressively and nervously shooting from the hip...”³³⁰ According to a political analyst, there “are more than enough laws out there to fight this ... It’s all about making a qualitative leap forward in Greece’s ... political culture.”³³¹ Additionally, it deserves mentioning that undue advantages for state-owned casinos have repeatedly been an issue on the EU level and that Greece has been proven guilty in such proceedings.³³²

Social versus Market Imperatives? The ECJ and the Importance of Proportionality

At the same time, the 2002 Law also ran afoul of key EU obligations, which suggests that the government might have overlooked the importance of EU law. For instance, a strict prohibition against electronic gaming was in conflict with fundamental EU rules on the free movement of goods and services, and the right of free establishment for foreign firms, and procedural rules regarding public information in the field of rules on Information Society services (Directives 1998/48 and 1998/34). Once the Anti-Gaming Law came into force, gaming imports were reported to have stopped completely.³³³ This triggered foreseeable complaints to the European Commission about the law and its adverse consequences, and an investigation was begun which led to letters of formal notice in October 2002 and July 2003.³³⁴ This was followed by a reasoned opinion in March 2004 to which the Greek government replied. Dissatisfied with Greece’s response, the Commission brought forward infringement proceedings in February 2005.

At court, the Commission asserted that Greek measures did not balance adequately the protection of public morality with remedial proportionality, the consequence of which was an infringement of the free movement of goods as guaranteed by Articles 28 and 30 of the Treaty:

³²⁸ Leftist and communist objections prevented a ban on electronic gambling machines even in casinos, while the conservative New Democracy party had proposed even outlawing games with “flippers” and including questions with encyclopaedic content. See “Greek parliament outlaws electronic gambling”, *Agence France Presse*, 11 July 2002.

³²⁹ “Greek govt deals out blow to gamblers”, *Agence France Presse*, 21 February 2002.

³³⁰ *Ibid.*

³³¹ “Scandals Drive a Crackdown”, 24.

³³² European Commission, IP/11/635 24/05/2011, with further references, (<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/635&type=HTML>), accessed 23 November 2013.

³³³ Judgment of the Court of 4 June 2009 in European Court of Justice Case C-109/08 *Commission v Greece* [2009], para 34.

³³⁴ Judgment of the Court of 26 October 2006 in European Court of Justice Case C-65/05 *Commission v Greece* [2006], para 13.

“It [the Commission] maintains that the Greek authorities have not clearly shown what the relationship is between that prohibition and the problem they wish to solve, because they focus in their assessment solely on the negative effects of the uncontrolled use of gaming machines. In that connection, the Commission states that it is possible to put in place other forms of control, such as adding special protection systems to the recreational or skills-based games machines so that those games cannot be converted into games of chance.”³³⁵

In reply, the Greek government did not contest the fact that its 2002 Law did create barriers to intra-Community trade.³³⁶ However, it emphasized that less restrictive measures which had been attempted in 1996 and 2000 proved “insufficient for the purpose of countering effectively the problem created by those games, as a result of the human passion for games of chance.”³³⁷ The Court, in its ruling issued in October 2006, found that the Anti-Gaming ban was in breach of three out of four so-called basic freedoms protected by the EC Treaty (movement of goods and services; establishment), along with reporting duties for technical regulations under Directive 98/34.³³⁸

Yet, the ECJ’s adverse ruling did not prompt Greek authorities into action. The Commission’s enforcement and follow up was met with little response by Athens. As the Court noted: “having been asked by the Commission to report on the implementation of the judgment in Case C-65/05 ... the Greek authorities provided no specific information”³³⁹ Further, subsequent delivery of a letter of formal notice and a reasoned opinion similarly did not garner a reply from the Hellenic Republic.³⁴⁰ Later, the Commission did not receive any reply regarding its observations on a draft amendment to the 2002 Law.³⁴¹

Thus, the Commission, faced with no information on implementing measures taken by Greece, opened an action seeking a daily penalty payment of 31 798,8 Euro and an additional lump sum penalty of 3 420 780 Euro.³⁴² Following this action, the Greek government provided the Commission with a draft amending law in May 2008. Further, representations were given during

³³⁵ Judgment of the Court of 26 October 2006 in European Court of Justice Case C-65/05 *Commission v Greece* [2006], para 17.

³³⁶ Judgment of the Court of 26 October 2006 in European Court of Justice Case C-65/05 *Commission v Greece* [2006], para 18.

³³⁷ Judgment of the Court of 26 October 2006 in European Court of Justice Case C-65/05 *Commission v Greece* [2006], para 21.

³³⁸ Judgment of the Court of 26 October 2006 in European Court of Justice Case C-65/05 *Commission v Greece* [2006], ruling.

³³⁹ Judgment of the Court of 4 June 2009 in European Court of Justice Case C-109/08 *Commission v Greece* [2009] ECR, para 7.

³⁴⁰ Judgment of the Court of 4 June 2009 in European Court of Justice Case C-109/08 *Commission v Greece* [2009] ECR, para 9-10.

³⁴¹ Judgment of the Court of 4 June 2009 in European Court of Justice Case C-109/08 *Commission v Greece* [2009] ECR, para 12.

³⁴² Judgment of the Court of 4 June 2009 in European Court of Justice Case C-109/08 *Commission v Greece* [2009] ECR, para 1.

submissions which asserted that amendments would be approved shortly by the Greek government.³⁴³ However, none of these arguments were successful in obscuring the fact that Greece was significantly late in implementing compliance with the infringement judgment. As Advocate General Bot summarized in opinion:

“Moreover, it seems that, by the time that deadline [given in the Reasoned Opinion] had expired, the Hellenic Republic had not taken any steps to comply with that judgment.”³⁴⁴

Subsequently, the Court ordered Greece to pay a daily penalty payment of 31 536 Euro and even a lump sum payment of 3 000 000 Euro (compared to the 2 000 000 Euro proposed by the Advocate General).³⁴⁵ It was pointed out that no measures to even suspend the 2002 Law had been taken after the infringement judgment, and that traders had been subjected to financial and custodial penalties on the basis of unlawful legislation.³⁴⁶

Case Notes

- **Problem:** Gambling seems to have been a serious problem in Greece, but the ban on gambling outside casinos remained a paper tiger. By 2002, the Greek government – after a series of political scandals – prohibited all kinds of gaming machines outside “casinos”, in order to address social problems related to gambling. This complete ban on commerce related to gaming machines was seen as a disproportionate means by the ECJ and hence as an infringement of the EC Treaty. This judgment seems to have been neglected by the Greek government as long as possible.
- **Causes of Infringement:** This seems to be a case of motivated delay with protectionist (possibly also clientelist) effects. Legal adaptation would have meant a significant change in policy. It may have been thought that any reversal on the prohibition would bring political costs because the law had been adopted unanimously by all parties and broadly advertised as an anti-corruption measure.
- **Outcome:** The Greek government so far did not give in, even after harsh criticism by the Court and the imposition of a daily penalty payment of 31 536 Euro and a lump sum payment of 3 000 000. By mid-2011, the daily penalties are still being paid and have amounted to 24 917 520 Euro. Together with the lump sum, the Greeks have paid 27 917 520 Euro for their illegal ban of gaming machines.

³⁴³ Judgment of the Court of 4 June 2009 in European Court of Justice Case C-109/08 *Commission v Greece* [2009] ECR, para 11-13.

³⁴⁴ Opinion of Mr Advocate General Bot delivered on 12 March 2009 in European Court of Justice Case C-109/08 *Commission v Greece* [2009], para 31.

³⁴⁵ Judgment of the Court of 4 June 2009 in European Court of Justice Case C-109/08 *Commission v Greece* [2009] ECR, para 56.

³⁴⁶ Judgment of the Court of 4 June 2009 in European Court of Justice Case C-109/08 *Commission v Greece* [2009] ECR, para 35.

13th JUDGMENT:

Compensation outstanding? Crime victims versus crisis effects in Greece

(review by Gerda Falkner)

<i>Litigation Basics</i>	
EU Law at Issue	
●	Directive 2004/80/EC, Compensation to crime victims
First Proceedings (C-26/07)	
●	Reasoned Opinion: 04.07.2006
●	Entrance into Registry: 25.01.2007
●	First Judgment: 18.07.2007
Second Proceedings (C-407/09)	
●	Letter of Formal Notice: 23.09.2008
●	Entrance into Registry: 22.10.2009
●	Judgment: 31.03.2011

The Council Directive on compensation to crime victims

On 29 April 2004, the Council adopted provisions³⁴⁷ to ensure that each member state has a scheme in place which guarantees compensation to victims of violent intentional crime committed in their respective territories. In addition, the Directive creates a system for cooperation between national authorities to facilitate easy access to compensation regardless of where in the EU a person actually becomes the victim of a crime. “Assisting Authorities” in the member state where the applicant is residing are responsible for informing the applicant about the compensation scheme, assisting in filling in applications, transmitting them, organising hearings if needed and providing guidance in case further documents are needed. “Deciding Authorities” in the member state whose scheme applies are responsible for acknowledging

³⁴⁷ Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, Official Journal L 261, 06/08/2004 P. 0015 – 0018, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0080:en:HTML> (accessed 25.2.2014).

receipt of application and communicating the decision.³⁴⁸ As long as “fair and appropriate compensation” (Article 12.1.) is guaranteed, the specifications of what compensation should be paid to victims are left to national discretion.³⁴⁹

The Commission’s 2009 report on the application of the Directive 2004/80/EC³⁵⁰ states “a substantial degree of compliance across Member States” regarding the national compensation schemes required (with all countries but Greece having one in place).³⁵¹ However, the application and effectiveness of the Directive in practice seemed limited since the main conclusion was that there had been “very few cases to date”³⁵² and high drop-out rates. Despite rising numbers over time, the success rate remained at only around 10%. In addition, claimants were much less positive than Deciding and Assisting Authorities since they found the process of applying complicated and time-consuming.³⁵³ Nonetheless, the Commission considered the Directive’s period in force too short for proposing amendments and it announced it would use its powers under the Treaty to promote improvements on the basis of the existing provisions.³⁵⁴

While member states (except Bulgaria and Romania) should have complied with the Directive by 1 January 2006, only 15 member states had adopted transposing measures before the deadline and 7 further countries sent notifications in early 2006. In 2006-7, therefore, the Commission launched proceedings under Article 226 EC-Treaty against Greece, Italy, Latvia, Malta and Romania.³⁵⁵ In the case of Greece, the Commission pursued even penalization proceedings.

³⁴⁸ European Commission (2009a), Brussels, 20.4.2009, COM(2009) 170 final, REPORT FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN PARLIAMENT AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE on the application of Council Directive 2004/80/EC relating to compensation to crime victims [SEC(2009) 495], 3, http://www.asser.nl/upload/euowarrant-webroot/documents/cms_eaw_id1897_1_52009DC0170.pdf, (accessed 25.2.2014);

³⁴⁹ See explanation in: European Commission (2009), Compensation to crime victims - Community law, http://ec.europa.eu/civiljustice/comp_crime_victim/comp_crime_victim_ec_en.htm, (accessed 25.2.2014).

³⁵⁰ European Commission (2009a), above. European Commission (2009b), Brussels, 20.4.2009, SEC (2009) 495, COMMISSION STAFF WORKING DOCUMENT accompanying document TO THE REPORT FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN PARLIAMENT AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE on the application of Council Directive 2004/80/EC relating to compensation to crime victims [COM (2009) 170 final], http://www.asser.nl/upload/euowarrant-webroot/documents/cms_eaw_id1898_2_SEC.2009.495.pdf, (accessed 25.2.2014).

³⁵¹ Ibid., Commission 2009a, 10.

³⁵² Ibid., Commission 2009a, 5.

³⁵³ Ibid., Commission 2009a, 6.

³⁵⁴ Ibid., Commission 2009a, 11. Activities in the European Judicial Network in Civil and Commercial Matters and the Commission’s manual on the internet containing information in all languages in an Atlas are mentioned in the report. The accompanying document’s (Commission 2009b) Annex 2 contains information regarding information campaigns and other dissemination measures.

³⁵⁵ Ibid., Commission 2009a, 4.

The infringement proceedings

On 18 July 2007, Greece was found guilty by the ECJ in first proceedings of failing to comply with the Council Directive relating to the compensation of victims of violent intentional crime in its territory.³⁵⁶ Greece seems to not have replied to the Commission's earlier requests for notification or information. After receiving a reasoned opinion in July 2006 with a deadline of two months, it stated that a draft law was soon to be adopted.³⁵⁷ However, this was, according to standing practice, clearly not a good enough defence.

After the judgment, the Commission followed up on the case quite decidedly. Already on 29 February 2008, it asked again to be informed of successful transposition within no more than two months. The Greek Republic did not reply until 10 September 2008 and stated that a draft law was in final stage of preparation. Another delayed reply (to the Commission's reasoned opinion of 23 September 2008 with another two month deadline) on 22 June 2009 informed that the draft law would be introduced in Parliament in summer of that year.³⁵⁸ That prompted the Commission to introduce the second proceedings with the ECJ. Since all the other states provided the protection required, it argued that the Greek failure to transpose the Directive obstructed achievement of the fundamental objective of freedom of movement for persons in a uniform area of freedom, security and justice.³⁵⁹

The Advocate General's December 2010 statement criticized Greek demeanor in various aspects: firstly, Greece had not replied to the Commission's enquiries in time. Second, belatedly, the Hellenic Republic had then referred to a legal project allegedly in the final stages of drafting – the very same argument it had already used when confronted with the Commission's first proceedings in early 2007. Finally, the Advocate General did not accept the Greek request to dismiss the action on grounds of "good cooperation with the Commission" since the authorities had indeed only changed their neglecting attitude once the Commission had lodged the second proceedings.³⁶⁰ Further aggravating factors mentioned were the simplicity of the Directive

³⁵⁶ Arrêt de la cour dans l'affaire C-26/07, 18.7.2007 (only available in Greek and French), <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-26/07>, accessed 25.2.2014.

³⁵⁷ Ibid., par. 3 and 5.

³⁵⁸ Opinion of Advocate General Mazák delivered on 16 December 2010 in European Court of Justice Case C-407/09 Commission v Hellenic Republic, para. 4-6.

³⁵⁹ Action brought on 22 October 2009, Commission v Hellenic Republic, OJ 2010/C 11/27, 17.

³⁶⁰ Opinion of Advocate General Mazák delivered on 16 December 2010 in European Court of Justice Case C-407/09 Commission v Hellenic Republic, para. 16 and 37.

compared to the long duration of non-compliance with the Directive (almost 4 years) and with the first judgment (29 months).³⁶¹

The judgment basically followed the Advocate General's direction. It highlighted that the draft law transposing the Directive had not even been introduced in Parliament when Greece transmitted its letter on 22 June 2009. The Hellenic Republic, by contrast, stressed that on 10 September 2009, the Commission had been informed that due to early elections, the Greek Parliament had suspended the process of adopting laws on 7 September (in Greece, all projects must be returned to the administration with a view to reopening the legislative procedure following the election of the new members of Parliament).³⁶² Therefore, it considered that the Commission in fact had "infringed its duty to cooperate in good faith by bringing this action shortly before the adoption of the law bringing an end to the infringement."³⁶³

Indeed, following Greek elections on 4 October 2009, the adoption of the provisions necessary to comply with the Directive on compensation to crime victims was accomplished rather speedily, on 18 December 2009.³⁶⁴ If that would have happened without the penalization proceedings is impossible to establish. In any case, the Greek defence was not acceptable to the Court. As unfortunate as the early elections may have been for the project at hand, such issues cannot serve as an excuse since the ECJ "has repeatedly held (that) a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order to justify failure to observe obligations arising under European Union law"³⁶⁵.

Regarding the financial penalty, the Commission repeated its arguments from the first proceedings (see above) and argued that next to the long delay in transposing the Directive, the seriousness of the infringement also had to be taken into account: the failure had cross-border implications, covering both persons residing in Greece and the citizens of other member states who fell victim to criminal acts while exercising their right to free movement in Greece.³⁶⁶ It initially proposed both a daily fine and a lump sum but at the hearing later withdrew the daily fine request (the infringement had already been ended) and reduced the requested lump sum based on latest annual data indicating more limited economic capacities. The ECJ even went further in this direction and accepted up-to-date data provided by Greece in court: "it is appropriate to take into

³⁶¹ Ibid., para. 38 - 40.

³⁶² Judgment of the Court of 31 March 2011 in European Court of Justice Case C-407/09 Commission v Hellenic Republic, para. 7.

³⁶³ Ibid., judgment C-407/09, para. 15.

³⁶⁴ Ibid., judgment C-407/09, para. 20.

³⁶⁵ Ibid., judgment C-407/09, para. 36.

³⁶⁶ Ibid., judgment C-407/09, para. 20.

account a Member State's ability to pay as it stands in the light of latest economic data submitted for appraisal by the Court"³⁶⁷. Since the Commission's general arguments regarding the infringement were supported by the ECJ, the Hellenic Republic was nonetheless asked to pay a lump sum of EUR 3 million.³⁶⁸

Case Notes

- **Problem:** The 2004 Directive providing that each member state have a scheme in place to guarantee compensation to victims of violent intentional crime committed in their respective territories and creating a system for cooperation between national authorities to facilitate easy access to compensation was not implemented in Greece in due time, which led to an infringement judgment in first proceedings. The Hellenic Republic subsequently let about two more years elapse between that judgment and the introduction of a related draft bill in Parliament. Soon thereafter, the legislative assembly was dissolved and all legal projects were sent back to the administration following Greek custom for such cases. Only in December 2009, two and a half years after the first judgment, was the infringement put to an end.
- **Causes of Infringement:** The Greek authorities stressed "unforeseeable circumstances connected, inter alia, with finding the financial resources to pay the compensation provided for by the system established by the Directive and with the calling of early elections." (judgment para. 14) During the early phases of the proceedings, in any case, the EU institutions found clearly visible signs of neglect on the part of the Greek administration since the upcoming transposition deadline and ensuing requests by the Commission were left without timely response. Overall, it seems the main motive causing the persistent infringement was sparing the financial consequences of adaptation to agreed EU standards. Like in many other penalization proceedings, disadvantages for citizens of other EU member states resulted.
- **Outcome:** After Greece had paid the EUR 3 million lump sum imposed by the ECJ in its penalization judgment, the European Commission closed the case in February 2012.

³⁶⁷ Ibid., judgment C-407/09, para. 42.

³⁶⁸ Ibid., judgment C-407/09, para. 44 and European Commission (2012), Press release IP/12/168, 27/02/2012, Compensation to crime victims: Greece complies with Court of Justice ruling, adopts EU law, http://europa.eu/rapid/press-release_IP-12-168_en.htm?locale=en, (accessed 25.2.2014).