The Challenge of Compliance in Jurisdictional Plurality: German Infringement of the Surface Water Directives

(Case 1 reviewed by Gerda Falkner and Nikolas Rajkovic)

Litigation Basics

EU Law at Issue

- Directives 75/440 and 79/869 (Surface Water)

Transposition Deadlines:

● Directive 75/440	25.07.1977
● Directive 79/869	29.10.1981

First Proceedings (C-58/89)

● Letter of Formal Notice:	18.08.1987
● Entrance into Registry:	28.08.1989
● First Judgment:	17.10.1991

Second Proceedings (C-122/97)

● Letter of Formal Notice:	08.12.1992
● Entrance in Court Registry	24.03.1997
● Withdrawal:	18.10.1999

The enactment of EU environmental directives and regulation has grown at an intense pace since the late 1960s. The ensuing size and scope of EU environmental law has produced what some now call the 'environmental *acquis*'.[1] In fact, the Environment Directorate-General of the Commission notes that currently some 200 pieces of environment legislation exist at the European level,[2] with observers advising how that figure increases substantially on an annual basis.[3] This trend should be placed in a context of growing environmental regulation across international, national and even sub-national levels, all occurring with near simultaneity and within a relatively short period of time. This outgrowth of environmental regulation across multiple levels of governance increases prospects for regulatory differences and disputes. The present case involves surface water regulation in Germany, where the Commission and the Conservative Kohl government (1982-1998) disagreed over the proper synchronization of German surface water regulations with the requirements of applicable EU directives.

[1] Christophe Demmke, "Towards Effective Environmental Regulation: Innovative Approaches in Implementing and Enforcing European Environmental Law and Policy", *Jean Monnet Paper 5/01 of the Harvard Law School and New York University*, <http://centers.law.nyu.edu/jeanmonnet/papers/01/010501.html> (Accessed February 24, 2011), 16.
[2] *Environment Directorate-General of the European Commission*, 'Facts Sheet-DG Environment, September 2010', European Union Publications office, 2010, <http://ec.europa.eu/environment/pubs/pdf/factsheets/dg_environment.pdf> (Accessed February 23, 2011).
[3] Demmke, "Towards Effective Environmental Regulation", 16.

EU Water Law and Directives 75/440 and 79/869

The regulation of water under EU law is differentiated and complex. There are a high number of directives addressing different types of water (surface, drinking and groundwater), and with limited attention directed at how these laws interact and/or integrate.[4] Further, EU water laws must interface with established and elaborate national systems of water administration, only adding to the scope for potential legal and administrative conflict. It comes as no surprise, therefore, that EU water directives have attracted a sizeable history of infringement proceedings.[5]

In the extant case, the dispute centred on the proper implementation of Council Directives 75/440[6] and 79/869[7] (Surface Water Directives). The former directive was considered pivotal, as it set out quality, surveillance and treatment standards for surface water intended for use as drinking water. The latter directive was considered companion legislation which elaborated methods, sampling frequency and analysis to be conducted in water controls. The purpose of this legislative scheme was stated as the protection of: "public health...to exercise surveillance over surface water intended for the abstraction of drinking water and over the purification treatment of such water."[8] Member states were required to bring into force laws, regulations and administrative provisions in accordance with Directive 75/440 by July 1977, and subsequently Directive 79/869 by October 1981.

This regulatory framework required classification of surface water into three categories of quality (A1, A2 and A3), as determined by physical, chemical and microbiological characteristics. Each of these categories implies different standards of treatment in order for surface water to be transformed into drinking water. Roughly stated, A1 is the purest classification requiring "simple physical treatment and disinfection" while A3 represents the most polluted category of surface water entailing "intensive" and "extended" methods of treatment and disinfection.[9]

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[4] Ibid., 8.
[5] Ibid., 10.
[6] Council of the European Communities, *Council Directive 75/440/EEC of 16 June 1975 concerning the quality required of surface water intended for the abstraction of drinking water in the Member States*, *O.J. L 194 , 25/07/1975 P. 0026 – 0031,* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31975L0440:EN:HTML> (Accessed November 14, 2013).
[7] Council of the European Communities, *Council Directive 79/869/EEC of 9 October 1979 concerning the methods of measurement and frequencies of sampling and analysis of surface water intended for the abstraction of drinking water in the Member States, O.J. L 271 , 29/10/1979 P. 0044 – 0053,* < http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31979L0869:EN:HTML> (Accessed February 24, 2011).
[8] Council of the European Communities, *Council Directive 75/440/EEC of 16 June 1975 concerning the quality required of surface water intended for the abstraction of drinking water in the Member States*, <, *O.J. L 194 , 25/07/1975 P. 0026 – 0031,* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31975L0440:EN:HTML> > (Accessed November 14, 2013), 2nd consideration.
[9] Opinion of Advocate General Jacobs delivered on 8 May 1991 in European Court of Justice Case C-58/89 *Commission v Germany* [1991] ECR I-04983, para 4.

Theory meets Practice: Contesting Germany's Approach to the Surface Water Directives

The dispute between the Commission and Germany bore a distinct character in that it centred on the details of how the Surface Water Directives should be transposed in practice. Thus, at the outset of the case, it seemed the Commission and Germany had divergent interpretations of what constituted acceptable implementation. This was reflected in the infringement proceedings with, first, the opinion of the Advocate General and, later, the Court's judgment itself; where little attention was directed at the litigation history of the case and emphasis placed on practice principles that the parties disputed.

The aforesaid judgments revolved around four heads of infringement claimed by the Commission against Germany: (1) breach of an obligation to classify water into the three categories; (2) breach of the obligations to set and maintain quality levels for the water; (3) failure to draw up a plan of action for water improvement and communicate it to the Commission; and (4) failure to provide the Commission with information required under the sampling directive.[10] On each of these counts, the Commission and Germany disputed implementation practices which were required by the Surface Water Directives. Ultimately, the Commission prevailed on three of four of its assertions in the judgment issued by the ECJ in October 1991,[11] with the Court often scrutinizing the language of the Directives to arrive at its determination. We now review in brief the ECJ's determinations on each of the four counts.

In the first claim, the Commission alleged that Germany had failed to make an independent and formal classification of waters prior to treatment, which the Commission argued was a requirement under the Surface Water Directives. However, Germany asserted that a classification of waters did take place whenever a method of purification was selected.[12] The ECJ, referring to Article 2 of Directive 75/440, found that the language of the Directive did not impose any separate obligation, as alleged by the Commission, such that a member state had to classify waters through a formal act which was distinguished from procedures on purification assessment.[13]

The second allegation made by the Commission asserted that Germany had failed to set "binding and adequately published" standards on sampling as required by the Directive 75/440. The issue

[10] Ibid., para. 3.
[11] Judgment of the Court of 17 October 1991 in European Court of Justice Case C-58/89 *Commission v Germany* [1991] ECR I-04983.
[12] Opinion of Advocate General Jacobs delivered on 8 May 1991 in European Court of Justice Case C-58/89 *Commission v Germany* [1991] ECR I-04983, para. 14.
[13] Judgment of the Court of 17 October 1991 in European Court of Justice Case C-58/89 *Commission v Germany* [1991] ECR I-04983, para. 8.

revolved around Germany's federal system of water regulation,[14] and how drinking water management was delegated to the German *Länder* and their issuance of licences for the abstraction of drinking water.[15] The German government argued that necessary measures were taken in different ways by the various *Länder*, however that the *Länder* ministries did issue binding instructions to local licensing authorities concerning water quality and sampling standards.[16] The Court took issue with the quality of these administrative instructions given by the *Länder*, as it discovered that some instructions merely drew attention to the provisions of the Directive 75/440, and thus lacked precision and clarity for binding force.[17]

In the third instance, the Commission and Germany disputed the extent of the obligation under Directive 75/440 for the provision of a systematic plan of action to improve surface water quality. The German government asserted that that obligation did not extend to waters which were clearly influenced by soil type, and affected *Länder* had in fact submitted plans.[18] Again, the ECJ referred to the language of directive, and specifically Article 4(2), to find that the German government had a responsibility to produce a whole systemic plan and that blanket exemptions pertaining to soil quality were not authorized.

Finally, on the fourth count, the Commission alleged that Germany had failed to provide a full reply to the Commission's request for information on frequency of analysis. At issue was whether Germany was obligated by Directive 79/860 to provide figures for the population served by sampling points.[19] With reference to Article 8(1) of the Directive, the Court held that the wording and aim of the Directive required such information as requested by the Commission, so as to assess implementation and compliance.[20]

Following the issuance of the October 1991 judgment, Germany was required to comply with the courts' order vis-à-vis the provision of binding legal rules, a systematic plan and full information disclosure. However, the problem was that while Germany had federal law dealing with water administration, the *Länder* still set out the specific provisions on licensing and water controls.

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[14] Pursuant to federal framework law on the management of water resources, the *Wasserhaushaltsgesetz* (WHG).
[15] Opinion of Advocate General Jacobs delivered on 8 May 1991 in European Court of Justice Case C-58/89 *Commission v Germany* [1991] ECR I-04983, para. 18-21.
[16] Ibid., para. 19.
[17] Judgment of the Court of 17 October 1991 in European Court of Justice Case C-58/89 *Commission v Germany* [1991] ECR I-04983, para. 15-18.
[18] Ibid., para. 23 & 27-32.
[19] Ibid., para. 34.
[20] Ibid., para. 35.

This required the amendment of legislation in 16 different *Länder* jurisdictions to attain compliance, even though many *Länder* did not abstract drinking water from surface water. [21]

In addition to these legal amendments, each *Land* had to deliver systemic plans on water improvement and enhance information reporting on sampling points and populations. While there was no indication that particular *Länder* opposed such measures, the scope and plural nature of the undertaking contributed toward a slow process of compliance with the Court's initial judgment. This slowness translated into a number of years of delay, provoking the Commission, in March 1997, to file a penalty proceeding against Germany asking a payment of 158 400 Euro for each day of non-compliance with the October 1991 judgment.[22] It took Germany until June 1997 [23] to adopt all the laws and decree-laws necessary and systemic plans were finally communicated in 1998. Following these endeavours, Germany did ultimately satisfy the Commission and, in October 1999, the case was withdrawn from the ECJ register. [24]

Case Notes

- **Problem**: The decentralized nature of German water administration, with its *Länder*-run licensing system for water abstraction, left discretion at the local level for the transposition and implementation of water standards. This did not interface well with the standardized implementation and information requirements imposed by the EU Surface Water Directives.
- **Causes of Infringement**: The infringement proceedings were driven by a dispute over interpretation, however the subsequent penalty proceedings revolved around the complications over the German *Länder*. Specifically, owing to Germany's federal system, each *Land* had to deliver systemic plans on water improvement and enhance information reporting on sampling points and populations, even on aspects not of relevance for some, and this created a slow process toward the Court's initial judgment.
- **Outcome**: Amendments and systemic plans finally communicated in 1998 satisfied the Commission and the case was withdrawn from the ECJ register in October 1999.

[21] Reasoned Opinion issued on 21 November 1995, K(95)2431 endg., 2.
[22] Action brought on 24 March 1997 in European Court of Justice Case C-122/97 *Commission v the Federal Republic of Germany* [1997] OJ, C166/11.
[23] Cf. Letter from Germany to the European Commission from 10 June 1997, SG(1997)A-009692.
[24] Withdrawal in ECJ Case C-122/97 from 18 October 1999 (2000/C 63/39).

"Faithful" Transposition?
French and German Compliance with the Wild Birds Directive

(Cases 2 & 5 reviewed by Gerda Falkner and Nikolas Rajkovic)

Litigation Basics

EU Law at Issue
- Directive 79/409 (Wild Birds Directive)

Transposition Deadline: 06.04.1981

France

First Proceedings (C-252/85)
- Letter of Formal Notice: 22.02.1984
- Entrance in Court Registry: 13.08.1985
- First Judgment: 27.04.1988

Second Proceedings (C-373/98)
- Letter of Formal Notice: 24.02.1992
- Entrance in Court Registry 16.10.1998
- Withdrawal: 09.11.1999

Germany

First Proceedings (C-288/88)
- Letter of Formal Notice: 30.07.1986
- First Judgment: 03.07.1990

Second Proceedings (C-121/97)
- Letter of Formal Notice: 13.01.1994
- Entrance in Registry: 24.03.1997
- Withdrawal: 07.05.1997

Already case 1 has highlighted that the EU's environmental laws are dependent upon a decentralized structure of transposition, meaning that EU environmental protection is only as effective as instituted by national, regional and sometimes local rules. This places special importance on transposition which is complete and consistent with EU law. The challenge, however, is that legal transposition may not always be straightforward in light of various levels of laws and/or decrees that may be needed.

In the two combined cases at hand, involving France and Germany, the Commission wanted to safeguard the integrity and force of the Wild Birds Directive in the face of pre-existing frameworks of applicable national and local legislation. Yet, the two country cases also reveal quite different histories of compliance. For instance, the French case was marked by a combination of resistance from locally affected interests (e.g. hunting, fishing and air travel), transposition below Directive standards, and gaps in follow up between France and the Commission. The German case, by contrast, had a more constitutional bend, with the German government stating its desire[25] to fulfill compliance which was frustrated by the lag in *Länder* transposition. Further, there was some difference in the way the two countries were pursued, where the Commission appears to have been stricter on timelines and in demands with Germany relative to France which had displayed greater obstinacies.

The Wild Birds Directive and the Challenges of Transposition

Directive 79/409, otherwise known as the Wild Birds Directive, came into force in April 1979 and required transposition by April 1981. The Directive, adopted by a unanimous decision of the governments, was considered a landmark EU law on the protection of nature[26] and its purpose was to conserve "all species of naturally occurring birds in a wild state in the European Territory",[27] this including eggs, nests and habitat. The practical effect of the Directive was the imposition of obligations on member states for the maintenance of wild bird populations, in the form of habitat maintenance and the regulation of killing, hunting and trade practices.[28] However, these duties were balanced by Article 2 of the Directive, which stated that the population level of species could take account of economic and recreational requirements.

The subject matter of the Directive made implementation a distinct challenge for a number of member states, where protection of animal species often involved an array of national and regional laws, as well as legislation on different types of subjects and activities (e.g. habitat areas, species, hunting and sport). There was the problem that the scheme of the Directive would have

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[25] E.g. letter by then Environmental Minister Angela Merkel to then Commissioner Ritt Bjerregaard from 17 December 1996: "Ich möchte hiermit nochmals mein Bedauern über das langwierige Umsetzungsverfahren in Deutschland in diesen Fällen zum Ausdruck bringen. … Ich werde mich mit allen mir zur Verfügung stehenden Mitteln für eine beschleunigte Umsetzung der genannten Richtlinien einsetzen.".

[26] Wouter P.J. Wils, "The Birds Directive 15 Years Later: A Survey of the Case Law and a Comparison with the Habitats Directive", *Journal of Environmental Law* 6, no. 2 (1994), 219.

[27] Council of the European Communities, *Council Directive of 2 April 1979 on the conservation of wild birds* (79/409/EEC), O.J. L. 103, 25.4.1979, 1. <http://eur-lex.europa.eu/LexUriServ/site/en/consleg/1979/L/01979L0409-20070101-en.pdf> (Accessed March 7, 2011).

[28] David Freestone, "European Community Environmental Policy and Law", *Journal of Law and Society* 18, no. 1 (1991), 142.

to alter established local hunting practices.[29] Thus, as Riechenberg notes, no member state was able to transpose the Directive using "a single legislative instrument or set of rules," and, what is more: "rule-making powers in the sphere of nature conservation are often delegated to the regions, as is the case in Belgium, Germany, Italy and Spain. Even in a country like France, the rules governing hunting are laid down partly at the departmental level."[30]

Transposition and Faith: The case of France

Following a review of France's transposition of the Wild Birds Directive, a reasoned opinion was delivered to the French government in February 1985.[31] However, no reply was made by French authorities, prompting an infringement action by the Commission on six counts, two of which were later dropped. Each of the four remaining counts related to what the Commission considered to be imperfect transposition of the Directive, with the French government contesting these assertions. The ECJ issued its judgment in April 1988, and its rulings on each of the four issues raised are now summarized in turn.

First, the Commission complained that the French *Code Rural* did not provide adequate protection for wild bird nests and eggs, because French law only applied protective status during the close season rather than throughout the year, including the hunting season.[32] Further, French law even excluded some species of birds from protection entirely, such as sea birds, because of their alleged threats posed to mussel farming.[33] The Court held French law to be incompatible with the Directive, finding that "an uninterrupted protection of the birds' habitat is necessary since many species re-use each year nests built in earlier years."[34] Moreover, the Court did not find that the French government had satisfied strict conditions required for valid and specific derogations to be obtained from the Directive.

Second, dispute was made with how French law tied bird protection to the preservation of "national biological heritage."[35] Here, the Commission, with the Court concurring, disputed the character of the French protections as not providing "complete and effective protection."[36]

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[29] Ibid.
[30] Kurt Riechenberg, "Local Administration and the Binding Nature of Community Directives: A Lesser Known Side of European Legal Intervention", *Fordham International Law Journal* 22, no. 3 (1998), 720.
[31] Judgment of the Court of 27 April 1988 in European Court of Justice Case C-252/85 *Commission v. France* [1988], <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61985J0252:EN:HTML> or <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61985CJ0252:EN:PDF> (Accessed March 7, 2011), 2.
[32] Ibid., para 7.
[33] Ibid..
[34] Ibid., para 9.
[35] Ibid. para 13.
[36] Ibid., para 15.

Therefore, protection tied to areas of biological heritage was not seen to be a proper transposition of the Directive.

Third, concern was raised regarding a specific French law (No. 76/629) that the Commission alleged gave general authorization for the keeping of bird species, which the Directive prohibited from capture or hunting.[37] In its defence, the French government noted that an overlapping Decree of 17 April 1981 had to be read together with the impugned law, which establishes that prohibitions of the Directive were nonetheless overriding. Here, the ECJ made clear that the prohibitions of the Directive had to be expressly embodied in national law, and therefore the Commission's complaint was justified.

Finally, the Commission contested applicable law in certain French departments, which allowed for the capture of Thrushes and Skylarks using particular horizontal nets known as "Pantes" and "Matoles."[38] The Commission asserted that such nets did not constitute "selective methods" of capture which could be permitted under the Wild Birds Directive. The ECJ took a meticulous look at the legal and practical relations involving the horizontal nets in question. In particular, the Court took note of how precise Departmental regulations were concerning the use of such nets.[39] Further, the ECJ expressed its approval of the willingness of French officials to reach agreement with the Commission on detailed rules of use; and that the number of birds captured using such methods were in fact low and undisputed. Only on this specific point the Court held in favour of France, asserting that French provisions were "very precise"[40] and not incompatible with the requirements of the Directive:

> "The transposition of a directive into national law does not necessarily require the provisions of the directive to be enacted in precisely the same words in a specific express legal provision; a general legal context may be sufficient if it actually ensures the full application of the directive in a sufficiently clear and precise manner."[41]

After the infringement judgment of the ECJ, French officials did not inform the Commission on measures taken to fulfil the Court's order. This led the Commission, in February 1992,[42] to issue a formal letter of notice and, second, in April 1993, provide a reasoned opinion.[43] These actions prompted French officials into pursuing a planned modification of the *Code Rural*. However, the

[37] Ibid.
[38] Ibid., para 23.
[39] Ibid.
[40] Ibid., para 29.
[41] Ibid. para 5.
[42] Letter of Formal Notice from Carlo Ripa di Meana, European Commission, to His Excellency Roland Dumas, French Foreign Minister, 24 February 1992.
[43] Reasoned Opinion of the European Commission by Ioannis Paleokrassas to His Excellency Alain Juppé of France, 29 April 1993.

results of that initiative did not satisfy the Commission, and consequently, in October 1997, a supplementary reasoned opinion was issued.[44] At the crux of contention was the Commission's insistence that specific ministerial orders were required for penalty proceedings to be withdrawn. The French government replied to the Commission that efforts to complete compliance with a final decree ran into substantial local opposition on the specification of the species of wild birds to be protected, and this prompted the invocation of a "concertation procedure" to devise a consensus.[45] How much of this opposition flowed from concerns regarding economic costs related to hunting, tourism and trade in birds is hard to say. Notwithstanding, the local impasse appears to have been addressed as, finally, in March 1999, France put through the required ministerial orders[46] and the case was subsequently closed.[47]

What is good for the Goose is good for the *Länder*: The case of Germany

The Commission similarly brought Germany to Court over inadequate transposition of Directive 79/409/EEC. However, specific material breaches were not at issue,[48] rather the dispute centred on how Germany dealt with its overall transposition of the Directive, which required transposition by each German *Land*. In particular, the infringement proceedings dealt with dissatisfaction over Germany's federal law on the protection of the environment (*Bundesnaturschutzgesetz*), German federal law on hunting (*Bundesjagdgesetz*) and, finally, applicable laws made by the *Länder*.

This latter category of *Länder* law and its distinctive function within Germany's constitutional order of shared competences informed the core of German defence arguments. First, Germany underlined how its constitutional division of powers dictated that federal law provided only legal frameworks (*Rahmengesetze*) while operative details were supplied by the *Länder*. Thus, since member states were free to ascertain which governmental bodies or administrative organs were responsible for the execution of a Directive, this meant that Germany's *Länder* were ultimately

[44] Supplementary Reasoned Opinion from 28 June 1997, C(97)3158 final, para 9.
[45] Letter from the French Permanent Representation to the European Commission from 9 March 1999, Nr. 698, para 5.
[46] Letter from the French Permanent Representation to the European Commission from 9 March 1999, Nr. 698, para 5.
[47] Withdrawal of ECJ Case C-373/98 from 9 November 1999, JURM (99)8177, para 3.
[48] In fact, the German government asserted in the first proceedings that the requirements of the Directive were already met. See: "Dabei ging die Bundesregierung davon aus, daß die Richtlinie auch die innerstaatlich jeweils zuständigen Legislativ- und Exekutivorgane bereits unmittelbar verpflichte, ohne daß es darauf ankomme, ob eine Rahmenvorschrift wie das Bundesjagdgesetz die Richtlinie bereits vollständig umsetze." Minutes from the European Commission to Germany from 30 July 1986, SG(86)D/9253, 1.

responsible in the case at hand.[49] Second, Germany held that the Directive already had binding effect on all national legislative and executive bodies and, as such, the burden of transposition rested with *Länder* law. Further, the relative precision in how the Directive was formulated would suffice as the basis for the *Länder* to act and thereby transpose the Directive dutifully. Third, the German government argued, the Directive did not establish a formal or specific requirement vis-a-vis reporting for those cases where a *Land* had exercised its right of derogation under Article 9 of the Directive. Moreover, it was noted, the *Länder* already reported to Germany's independent *Umweltbundesamt* which, in turn, forwarded those findings onto the Commission. [50]

At face value, the defence arguments made by Germany were not ill-founded and in fact displayed an elaboration and constitutional grounding that exceeded many defences voiced by other member states over the breadth of the 29 cases we examined. Nonetheless, Germany's principled claims did not appear to convince the ECJ, as the Court found that Germany had failed to correctly transpose the Directive at both federal and regional levels. [51]

After the judgment had been handed down, the process towards compliance was initiated immediately, with the federal law on hunting being amended in 1990. However, the Commission remained dissatisfied with the amendments undertaken since a provision had not been included which would force the *Länder* to report to the federal government each case where the exemption clause under Article 9 of the Wild Birds Directive had been exercised. [52]

The issue was soon addressed in line with the Commission's requests, and the German government followed frequently and dutifully in its reporting. Yet, the speed and consistency of compliance was not as forthcoming with respect to the *Länder*. For instance, in 1996, the region of *Saarland* had still to amend its provisions while all other German *Länder* had complied. [53] Among the reasons given was that the elected term of the *Saarland* Parliament had expired. The specific issue raised by the Commission related to how all nests and eggs of rare birds were not properly protected since the relevant sub-national law included a provision which would have allowed the *Land* in principle to adopt exemptions for certain birds. [54]

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[49] Letter from the German Government to the European Commission from 26 January 1987, SG(87) A/1520, 3.
[50] Mitteilung der Bundesregierung an die Kommission, 14 April 1994, transmitted by German Permanent Representation on 6 May 1994 in SG(94) A/11730.
[51] It needs mentioning that the judgment (of 3 July 1990) is only available without the Court's reasoning; and follow-up correspondence with the ECJ directly did not yield to any copy of the judgment with reasons.
[52] Letter of Formal Notice from 13 January 1994, SG (94) D/336.
[53] Letter from the German Minister for Environment to the European Commission from 17 December 1996, SG(1996)A-020329, 3.
[54] Reasoned Opinion from 13 November 1995, K(95)2142 endg., 2. The Commission did acknowledge the 'rather formal' character of this issue as demonstrated in its complaint to the Court as an alleviating factor in the calculation

This problem of slow action by the *Länder* became a source of consternation for the German government, and in fact the *Bundestag* triggered a debate on making the *Länder* financially responsible for fines resulting from *Länder* breaches of EU law.[55] However, Germany so far never had to test that resolve since *Saarland* amended the provisions at issue in due time, and the Commission closed the case on 17 May 1997.[56]

Case Notes

- **Problem**: Germany and France both failed to transpose the Wild Birds Directive dutifully. Commission and member state officials could not agree on the adequate standard of transposition, and this was further complicated when regional and local governments were involved as well. The German case seems to have included only formal complaints regarding the procedure of transposition, not the substance of bird protection in the country.
- **Causes of Infringement**: Transposition became complicated owing to reliance upon lower levels of government and authority. France had quite a different policy, initially, because its Wild Birds regime focused mostly on protection in specific habitats and did not sufficiently protect birds that threatened mussel farming. In the German case, a difference in interpretation played great a role during the first proceedings but later, in the penalty phase, complications resulted from delays in transposition in specific German *Länder*.
- **Outcome**: Both cases were closed once compliance had been complete, before penalty proceedings could be concluded.

of proposed penalty, see Klage an den Herrn Präsidenten und die Herren Mitglieder des Gerichtshofs der Europäischen Gemeinschaften, 3 March 1997, JUR(97) 8051, no. 17.

[55] Decision of the *Bundestag* of 5 June 1997, see *Deutscher Bundestag 15. Wahlperiode, Drucksache* 17/2805 of 24 March 2004. The requested government report was only delivered in 2004 (*Drucksache* just cited), and it reveals that there was a split of opinion with the *Länder* arguing against their obligation to pay. In this report, the government held that it would be in a position, if a penalty should be imposed caused by a *Land* non-compliance, to seize the courts to 'gets its money back' or to offset the penalty against money owed to the *Land*.

[56] Désistement dans l'affaire C-121-97, 7 May 1997, JUR(97) 8086.

Reform and Refuse:
Greek Waste Infringements and the novelty of Penalty Payment[57]

(Case 3 reviewed by Gerda Falkner and Nikolas Rajkovic)

Litigation Basics

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.

EU Law and Protection of the Environment

[57] Thanks to Zoe Lefkofridi for discussing aspects of the Greek cases with Gerda Falkner.

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.[58] 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;[59] here the Court held that the EC's fundamental freedoms were to be construed together with 'objectives of general interest,' such as environmental protection.[60] 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.[61]

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.[62] This move was endorsed further by a resolution of the European Parliament in 1983 supporting the imposition of penalties.[63] The Maastricht Treaty enabled the Commission to ask for a lump sum or daily penalty payment in light of non-compliance. 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.

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[58] European 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.

[59] Judgment 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 usagees* (ADBHU) [1985] ECR 531.

[60] Ibid, 187.

[61] Ibid, 186.

[62] Levente Borzsak, "Punishing Member States or Influencing Their Behaviour or *Iudex (non) calculate*", *Journal of Environmental Law* 13, no. 2 (2001), 245.

[63] Ibid.

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).[64] 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. [65] 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."[66] 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.[67]

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 to 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.

In April of 1992 the Court ruled that Greece had not fulfilled its obligations to ensure waste was disposed of in a secure manner.[68] After receiving no further information regarding steps towards compliance after the first judgment, the Commission sent an informal letter in October 1993

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[64] 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."

[65] 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.

[66] 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.

[67] Ibid.

[68] Judgment European Court of Justice of 7 April 1002 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).

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.[69]

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...."[70] The ECJ, referring to established case law that internal circumstances were not a defence to non-compliance,[71] 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...."[72] 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.[73] 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".[74] 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 alternate location.[75] 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 site[76]

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[69] 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.
[70] 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.
[71] Ibid, para. 70.
[72] Ibid., para. 91-99.
[73] Borzsak, "Punishing Member States", 261.
[74] Borzsak, "Punishing Member States", 261.
[75] *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).
[76] *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).

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.[77] Further, an additional dispute developed when Greece was delayed in paying the imposed penalties, which totalled 4 720 000 Euros.[78] This drew the public rebuke of the European Parliament's Committee on the Environment, Public Health and Consumer Affairs[79] (EPC) and warnings from the Commission that aid payments would be stopped.[80] The matter was ultimately concluded by March 2001 when the Commission advised the EPC that outstanding fines were in the process of payment.[81]

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.

[77] 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.
[78] Written Question E-0491/03, Answer given by Mrs Wallström on behalf of the Commission [2003] OJ C222E/236.
[79] "MEPS maintain pressure on Greek waste dumping", *European Report*, 3 March 2001.
[80] "Greece pays up over Kouroupitos fine", *ENDSEurope*, 8 January 2001, <http://www.endseurope.com/2767> (May 19, 2011).
[81] "Greece breaks rules on waste disposal directive but case soon to be dosed", *European Report*, 24 March 2001.

Legislating Free Movement in Slow Motion: Greece's delay in transposing the Higher Diplomas Directive[82]

(Case 4 reviewed by Gerda Falkner and Nikolas Rajkovic)

Litigation Basics	
EU Law at Issue	
• Articles 52 and 59 EC Treaty (Free movement of goods, persons and services)	
• Directive 89/48 EEC (Recognition of Higher Diplomas)	
Transposition Deadline:	04.01.1991
First Proceedings (C-365/93)	
• Letter of Formal Notice:	28.07.1991
• Entrance into Registry:	27.07.1993
• First Judgment:	23.03.1995
Second Proceedings (C-197/98)	
• Letter of Formal Notice:	02.05.1996
• Entrance in Court Registry:	20.05.1998

Freedom of movement is a principle central to the construction of the Internal Market. Typically, the principle is associated with the movement of goods and services; however a further feature involves the free movement of persons and labour within the EU. The creation of a market without internal frontiers requires that the qualifications and education of all EU nationals be recognized throughout the union. However, while that principle strikes intuitive appeal, its practical implementation has meant undoing numerous professional and academic regulations which have denied recognition to credentials attained beyond national borders. The complex nature of the task became apparent with the invocation of Directive 89/48/EEC[83] (Higher Diploma Directive) and its requirement that higher diplomas were to receive mutual recognition across all member states. Most EU states were late with transposition of the Directive,[84] and in many cases due to the web of sectoral restrictions that member states had to repeal or amend.

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[82] Thanks to Zoe Lefkofridi for discussing aspects of the Greek cases with Gerda Falkner.

[83] European Council, Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration, O.J. L 019, *24/01/1989 P. 0016 – 0023* <http://eurolex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31989L0048:EN:HTML> (April 6, 2011).

[84] Hildegard Schneider and Sjoerd Claessens, "The Recognition of Diplomas and the Free Movement of Professionals in the European Union: Fifty Years of Experiences", In International Association of Law Schools, *Conference proceedings IALS* (Montreal: IALS, 2008), <http://www.ialsnet.org/meetings/assembly/HildegardSchneider.pdf> (April 6, 2011), 22.

The present Greek case was one of the first proceedings initiated under the then newly inscribed Article 228. This novelty might explain why the Hellenic Republic seemed to under appreciate the severity of the action for a considerable length of time. It was only once the Advocate General recommended major penalties for the impending decision, which happened to coincide with the penalization of Greece in the waste dump case (see case review no. 3)—that the Greek government began to show haste and action.

Background: Freedom of Movement and the Recognition of Higher Diplomas

The Treaty of Rome intended to create a common market for economic activity among member states. Integral to that goal was the freedom of citizens and professionals to establish themselves in other member states, and this was reflected in the Treaty under Articles 52 and 59 which granted to EU nationals the "Freedom to Provide Services" and the "Right to Establishment."[85] However, the broad strokes of the Treaty would require elaboration to ensure that various educational and administrative barriers were dissolved to allow persons to freely perform cross-border activities. Initially, such support came via key interventions by the ECJ. Most notable decisions were made on the provision of cross-border legal services in the so-called *Reyners*,[86] *Van Binsbergen*[87] and *Vlassopoulou*[88] cases. Together, these rulings were construed to assert that member states were required to take into account all education and training obtained by EU nationals, irrespective of whether qualifications were obtained beyond national borders. These interventions of the Court were then followed by legislative efforts by the EU Council.

In fact, lawmaking initiatives to recognize diplomas and qualifications were a long time in the making, begun in earnest through the 1970s and 1980s. The initial thrust came in the form of the "sectoral harmonization method", which tried to harmonize qualification standards in various sectors, e.g. architecture, pharmacy and engineering, and thus lead to Directives on recognition on a sector-by-sector basis. However, the arduous nature of bargaining and legal drafting on sectoral standards led to the abandonment of the harmonization approach by the mid-1980s.[89] Thus, it was only with the Fontainebleau Council of June 1984 that new life was gained with the pursuit of an "equivalence" or mutual recognition approach to education and qualifications. This approach became articulated as the "horizontal" method and produced the Higher Diploma

[85] Florence R. Liu, "The Establishment of a Cross-Border Legal Practice in the European Union", *Boston College International and Comparative Law Review* 20, no. 2 (1997), 369.
[86] Case 2/74, *Reyners* v. *Belgium* [1974] ECR 631.
[87] Case 33/74, *Van Binsbergen* v. *Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299.
[88] Case C-340/89, *Vlassopoulou* v. *Ministerium fur Justiz, Bundes- und Europaangelegenheiten Baden-Wurttemberg* [1991] ECR I-2357.
[89] Schneider and Claessens, "The Recognition of Diplomas", 18.

Directive in December 1988.[90] At its core, the Directive prescribed that "any professional who is fully qualified in one Member State possesses the qualifications needed to practice the same profession in another Member State."[91] Member states were given until January 1991 to transpose and implement its provisions on mutual recognition.

Delayed Transposition of Directive 89/48 and the Greek Example

However, transposition of the Higher Diploma Directive became notable for how the vast majority of the then 12 EU member states were late in passing implementing measures.[92] In fact, only Ireland had passed the measures necessary to attain compliance by the Directive's deadline. Three states were considerably late in their transposition, Belgium, Greece and the Netherlands, and this prompted the Commission to initiate infringement proceedings. However, of the three, it was only Greece which took proceedings to the brink of a penalty judgment before the ECJ.

A distinguishing feature of the Greek case regarded the government's sectoral approach toward implementation of the Directive. In contrast to countries such as Ireland, Denmark or the UK, which used an omnibus and general package of legislation and regulations, the Greek government sought to transpose the Directive through a differentiated series of sectoral measures.[93] This approach did not prove problematic for states such as Germany or France, which also employed sector specific measures to transpose the Directive. Yet, in the Greek case, as well as with Belgium,[94] the sectoral approach proved prolonged and led to infringement problems with the Commission.[95]

The chronic delay in Greece's transposition became manifest during the very course of infringement proceedings where, foremost, Greek authorities did not deny that transposition had been partial.[96] For instance, following both the letter of formal notice and the reasoned opinion, in February 1993 the Greek government informed the Commission that the Directive had been transposed by decree for health and welfare professionals.[97] In further submissions before the Court, the government stressed that transposition neared completion, such that new decrees respecting lawyers and auditors had been implemented and that a draft Presidential decree was

[90] Ibid.
[91] Ibid, 20.
[92] Ibid, 22.
[93] Ibid.
[94] Case C-216/94, *Commission v. Belgium* [1995] ECR I-2155.
[95] Liu, "The Establishment of a Cross-Border Legal Practice", 379.
[96] Judgment of the Court of 23 March 1995 in European Court of Justice Case C-365/93 *Commission v Greece* [1995] ECR I-00499, para. 4.
[97] Ibid.

forthcoming on remaining professional categories to "ensure that the directive is fully transposed into national law".[98] Yet, this did not dissuade the Court from ruling in March 1995 that Greece had been in breach.

Deja vu was palpable with the onset of penalty proceedings. In a pre-litigation pattern resembling the initial case, the Greek government failed to communicate measures fulfilling compliance with the Directive. Further, the earlier promised Presidential decree had failed to materialise. This led to a letter of formal notice in May 1996, and a reasoned opinion in July 1997.[99] The Greek government waited until 24 June 1998 to issue its first written reply to the Commission. The continued lack of Greek compliance prompted an action with the Court in May 1998, where the Commission requested a daily penalty payment of 41 000 Euro. During the course of penalty proceedings, the lack of Greece's responsiveness was duly noted and provoked irritation, something revealed by the Advocate General:

> "I am somewhat perplexed, … by the Commission's assertion that it took account of all the measures adopted by the Greek authorities to deal with this problem, when neither party has shown, to cite the Commission's agent at the hearing in Case C-387/97, the shadow of an outline of a suggestion of a commencement to respect the original judgment. The failure of a Member State to take any concrete action to comply with a judgment finding an infringement must be considered an aggravating factor."[100]

Notwithstanding, the Greek government reiterated its earlier claims before the Advocate General that full transposition was imminent following the signing of a draft Presidential decree by "competent ministers."[101] Further, the government excused its prolonged delay by noting "objective difficulties arising from differences between the Member States in the organization of certain professions."[102] Lastly, Greek authorities emphasized that the incomplete framework should not overshadow how Greece's existing laws did provide for "systems, rules and mechanisms" that allowed for "recognition of diplomas and access to legally protected professions."[103]

The Advocate General (AG) Fennelly proved unconvinced by Greece's submissions and assurances. Foremost, Fennelly took direct aim at Greece's claim of adequate recognition

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[98] Judgment of the Court of 23 March 1995 in European Court of Justice Case C-365/93 *Commission v Greece* [1995] ECR I-00499, para. 5.
[99] Opinion of Advocate General Fennelly delivered on 9 December 1999 in European Court of Justice Case C-197/98 *Commission v Greece* [2000] ECR I-08609, para. 4.
[100] Opinion of Advocate General Fennelly delivered on 9 December 1999 in European Court of Justice Case C-197/98 *Commission v Greece* [2000] ECR I-08609, para 47.
[101] Ibid, para. 7.
[102] Ibid.
[103] Ibid, para. 8.

notwithstanding partial compliance with the Directive. In particular, the AG noted how within a 22-month period ending in October 1999, some two-thirds of 12 000 applications for diploma recognition had been rejected by the competent Greek authorities.[104] This finding in combination with the government's admission of only partial compliance, led the AG to conclude, on 9 December 1999, that not only had Greece remained in breach but also the fine rate should be increased to 67 240 Euro per day.[105] As a corollary, it should be noted that the Advocate General became further displeased by Greece's attempt to question the admissibility of the action on the grounds that the Commission had omitted to state the required form of penalty payment. This technical and perhaps pedantic form of defence tactic worked to convey an obstructionist, rather than remedial, approach to a *prima facie* case of incomplete transposition.[106]

However, following the AG's adverse opinion, the Greek government took haste to implement the outstanding measures required by the Directive. By late January 2000, the Commission was informed that a draft Presidential Decree had been signed by the Ministers responsible and was "being transmitted to the Council of State for legislative processing."[107] By mid-February, the Greek government confirmed that the draft Presidential Decree "has been sent to the Council of State for legislative processing."[108] Following signature, the case was withdrawn by the Commission in August 2000 and removed from the ECJ registry on 6 October 2000.

However, despite the case closing, controversies involving Greece have persisted over diplomas and professional qualifications. After the second proceedings discussed here were withdrawn in 2000, another first judgment against Greece has been handed down in relation to the same Directive: on 23 October 2008,[109] further law suits have been filed by the Commission targeting individual professions' protection in Greece and several judgments were triggered by discriminated individuals or firms under the preliminary rulings procedure.[110] Since EU Directive 89/48 had covered only the recognition of diplomas earned in three or more years of higher duration, Directive 92/51 later added recognition of qualifications earned in one to three years of formation.[111] In December 2008, the ECJ decided that the Hellenic Republic had failed to

[104] Ibid, para. 46.
[105] Ibid, para. 48.
[106] Ibid., para 6.
[107] Letter from Dimitrios Rallis, Deputy Permanent Representative of Greece, to Carlo Trojan, Secretary-General of the European Commission, 25 January 2000.
[108] Letter from Dimitrios Rallis, Deputy Permanent Representative of Greece, to Carlo Trojan, Secretary-General of the European Commission, 14 February 2000.
[109] The court ruled that Greece had failed to fulfil its obligations under Artides 1, 3, 4, 8 and 10 of Directive 89/48; Case C-274/05, Commission against Greece, 23 October 2008.
[110] E.g. Case numbers C-42/99; C-151/07; C-422, 425, 426/09; C-186/08; C-142/04; C-225/95; C-141/04.
[111] Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC.

comply also with that Directive, by not recognising diplomas granted by the competent Italian authority for opticians' studies[112] completed in an "independent study centre" in Greece.[113]

Not only these continued controversies indicate the depth of protection still afforded to Greek professionals notwithstanding the prohibitions of EU law long after the second proceedings discussed here were ended. Even in the instructions given to Greece by the so-called "Troika" composed by the International Monetary Fund, the EU, and the European Central Bank, the need of reforming the recognition in the higher education areas has been highlighted.[114] It has in that context been argued that Greece still violated Directive 89/48 and should settle the recognition of college graduates degrees, following proposals to "harmonize" private degrees with the corresponding state degrees.[115]

Case Notes

- **Problem**: The Hellenic Republic did not implement in due time various sectoral laws and regulations governing higher diploma recognition and the free movement of professionals. The Ministry of National Education drafted a Presidential decree applicable to all professional occupations as late as in the autumn of 1994, when the end of the first proceeding neared. Yet, approval by competent politicians seems to have taken until May 2000, when a second judgment was looming.
- **Causes of Infringement**: The main problem seems to have been less a structural blockage and more wilful delay motivated by economic protectionism. It seems probable that this was spurred by the influence of vested professions in Greece and perhaps a sign of this country's much-quoted clientelism; although it needs mentioning that some important professions were actually liberalised under the sector-by-sector approach. However, many other professions would be significantly delayed with their recognition, hence giving advantage to those educational institutions or persons who would otherwise have been affected by international competition.
- **Outcome:** The case was closed shortly after the Advocate General expressed strong criticisms of Greece and recommended high penalties. At approximately the same time, Greece was fined with high penalties in the landmark Crete waste disposal case.

[112] See also the opticians' law case discussed in case analysis 29.

[113] Case C 84/07. The difference to the earlier case on the same Directive is that now, the recognition of diplomas awarded in an individual's own member state, by the authorities of another member state, were at stake, not diplomas awarded abroad.

[114] Andritsaki, Anna 2011. Colleges with Businessmen and Troika, via the Automatic Recognition of Diplomas. *Newspaper Eleftherotypia*, July 21, 2011. Available online at: http://www.enet.gr/?i=news.el.article&id=295077 (accessed 1 August 2011).

[115] Daratos Giorgos and Triga Nikolitsa 2011: The road to recognition of college degrees opens. *Newspaper To Ethnos*, July 28, 2011. Available online at: http://www.ethnos.gr/artide.asp?catid=22768&subid=2&pubid=104685 (accessed 1 August 2011).

A Conflict of Supranational Laws?
France's Prohibition of Female Night Work

(Case 6 reviewed by Gerda Falkner and Nikolas Rajkovic)

Litigation Basics	
EU Law at Issue	
● Directives 75/117 and 76/207 (Night work of women)	
First Proceedings (C-197/96)	
● Letter of Formal Notice:	02.03.1994
● Entrance into Registry:	10.06.1996
● First Judgment:	13.03.1997
Second Proceedings (C-224/99)	
● Letter of Formal Notice:	30.01.1998
● Entrance in Court Registry:	10.06.1999
● Withdrawal:	20.06.2001

The principle of equality occupies a central place in EU law, reinforced by the ECJ as a fundamental right and constitutional concept from which national statutes cannot deviate.[116] Applied to gender, the equality principle has been the source behind a number of EU anti-discrimination Directives in areas such as equal pay (75/117) and equal treatment (76/207).[117] The present case concerns the application of the latter Directive in relation to the French Labour Code's (*Code du Travail*) prohibition of night work by women under Article L 213-1. The case arose from a distinct conflict between EU and International Law, in that France's prohibition emanated from Convention No. 89 of the International Labour Organization (ILO) which restricted the night work of women. This placed France's obligations under International Law in contest with France's simultaneous commitment to gender equality under EU law.

Follow which Rule? Directive 76/207 versus Convention No. 89 ILO

Directive 76/207/EEC (Equal Treatment Directive) laid down provisions "on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions." Specifically, Article 5

[116] Chris Docksey, "The Principle of Equality between Women and Men as a Fundamental Right under Community Law", *Industrial Law Journal* 20, no. 4 (December 1991), 258.
[117] Chloe J. Wallace, "European Integration and legal culture: indirect sex discrimination in the French legal system", *Legal Studies* 19, no. 2 (1999), 400.

of the Directive prohibited discrimination in the workplace on the basis of sex; and derogations were permitted only under Article 2(2) with regard to "occupation activities" where "the sex of the worker constitutes a determining factor." All member states were required to implement all aspects of the Directive by February 1980.

However, the seemingly straightforward character of the equal treatment principle came into conflict with what had become an established rule of both domestic and international law: the prohibition of night work for women. For instance, France had a long industrial and legal tradition prohibiting such work, with legal restrictions in place since 1892.[118] Further, French trade unionism had come to consider this prohibition an inviolable right;[119] which may have had an influence on the Socialist government of Lionel Jospin (1997-2002) and its decision-making vis-a-vis second proceedings.

In 1953, Convention No. 89 of the ILO became ratified by France and most EU member states (except the UK) promoting an international ban on female night work save for certain exceptions.[120] The result was Article L 213-1 of the French Labour Code which prescribed that:

> "…women may not be employed for any night work, *inter alia*, in plants, factories and workshops, of any kind whatsoever. It does provide, however, for a number of exceptions in respect, for example, of women holding responsible positions of a managerial or technical character and in case of serious circumstances where the national interest demands that the prohibition on night work be suspended in the case of shift workers on the terms and in accordance with the procedure laid down by the Code."[121]

Ascendance of the Equal Treatment Directive: the *Stoeckel*, *Levy* and *Minne* References

This prohibition came under scrutiny in the late 1980s and early 1990s following a series of references to the ECJ. Specifically, a number of labour prosecutions in France (the *Stoeckel*,[122] *Levy*[123] and *Minne*[124] cases) involving alleged violations of the female night work ban led impugned managers to cite the Equal Treatment Directive in defence. In sequential rulings between 1991 and 1994, the ECJ established the principle that Article 5 of the Directive "is sufficiently precise

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[118] "Travail de Nuit et due Soir depuis Dix ans: une progression plus rapide pour les femmes que pour les hommes", *Premieres Information et Premiere Syntheses* 40, no. 2 (October 2005) <http://www.travail-emploi-sante.gouv.fr/IMG/pdf/Travail-nuit-progression-plus-rapide-pour-les-femmes.pdf > (Accessed March 30, 2011).
[119] Claire Kirkpatrick, "Production and Circulation of EC Night Work Jurisprudence", *Industrial Law Journal* 25, no. 3 (1996), 175.
[120] Ibid.
[121] Judgment of the Court of 13 March 1997 in European Court of Justice Case C-197/96 *Commission v France* [1997] ECR I-01489, para 5.
[122] Case 345/89 *Criminal Proceedings against Alfred Stoeckel* [1991] ECR I-404.
[123] Case 158/91 *Ministere Public et Direction du travail et de l'emploi v. Levy* [1993] ECR I-4287.
[124] Case 13/93 *Office national de l'emploi (ONEM) v. Madeleine Minne* [1994] ECR I-371.

to impose on the Member States the obligation not to lay down by legislation the principle that night work by women is prohibited, even if that is subject to exceptions, where night work by men is not prohibited."[125] In the *Levy* case, the Court further underlined how the Equal Treatment Directive was to be applied with full effect relative to all other legislation.[126] Following the outcome in the *Stoeckl* reference, the French government denounced the ILO convention on the prohibition of female night work, with effect from February 1993.[127]

However, the denunciation by French authorities drew the attention of the Commission regarding the incompatibility of the French Labour Code with the Equal Treatment Directive. In particular, Article L 213-1 remained on the books and with France's rejection of the ILO Convention no excuse existed with reference to international law. This discrepancy led to a formal letter of notice in March 1994 and a subsequent reasoned opinion in November 1994. With the continued failure of France to repeal Article L 213-I, the Commission then pursued an infringement application before the ECJ. At court, the French government did not contest that the retention of the provision constituted an infringement, but rather asserted that:

> "...there is no longer any discrimination in law or in fact in France between night work by men or women. Since ILO Convention No 89 was denounced, Article L 213-1 of the Code du Travail has no longer been applicable in France because Article 5 of the directive has direct effect and consequently individuals are entitled to rely on it before national courts in order to have the contested provision set aside."[128]

In its decision of March 1997, the Court rejected France's argument by citing established case law that national provisions not in line with European rules had to be amended, even if the principle of "direct effect" avoids adverse effects for individuals. Additionally, the Court declined France's further claim that the relevant provision of the Code was without scope of application due to the existence of labour agreements which regulated night work by women in those sectors where such work was most widespread.[129] Consequently, the Court found France to be in breach of its obligations.

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[125] Judgment of the Court of 25 July 1991 in European Court of Justice Case C-345/89 *Criminal Proceedings against Alfred Stoeckel* [1991] ECR I-04047, para 20.
[126] Judgment of the Court of 2 August 1993 in European Court of Justice Case C-158/91 *Criminal Proceedings against Jean-Claude Levy* [1993] ECR I-04287.
[127] Judgment of the Court of 13 March 1997 in European Court of Justice Case C-197/96 *Commission v France* [1997] ECR I-01489, para. 7.
[128] Judgment of the Court of 13 March 1997 in European Court of Justice Case C-197/96 *Commission v France* [1997] ECR I-01489, para 11.
[129] Judgment of the Court of 13 March 1997 in European Court of Justice Case C-197/96 *Commission v France* [1997] ECR I-01489, para 12.

The French government's effort to comply with the ECJ's initial ruling by removing Article L 213-I appears to have suffered from continued insistence[130] by French unions and employers' associations that the law against female night work should not be amended but simply revised through relevant labour agreements in affected sectors. Further, the attempt at repealing the night work prohibition became linked with union demands for a reduction in working time limits.[131] These political complications, however, did not placate the Commission's scrutiny, and in June 1999 a second referral was made to the ECJ asking for a daily penalty payment of 142 425 Euro. In its application to the Court, the Commission made specific mention of its disregard for France's claims that the lack of agreement with social partners justified non-compliance:

> "In its reply to the reasoned opinion, the French Government acknowledged that no measure had been adopted to implement the judgment (...). The French Government's argument that it had not been possible to initiate consultations with labour and employers with a view to submitting legislation to Parliament on night work is wholly without foundation."[132]

However, the case was ultimately resolved without judgment in June 2001, and withdrawn. The breakthrough came following a number of amendments to the French Labour Code which repealed Article L 213-I and made night work and working time subject to collective agreements between social partners.[133]

Case Notes

- **Problem**: The case originated due to a conflict between EU Law and International Law. EU law required equal treatment in the workplace between men and women while France had ratified an International Labour Organization convention which prohibited the night work of woman. The Commission argued that repeal of the corresponding national law was required for legal certainty while the French government held that principle of direct effect made French law prohibiting night work by women void, in any case.
- **Causes of infringement**: The existence of laws in France since 1892 on the prohibition of night work (industrial) by women contributed toward an industrial relations culture which viewed the prohibition as sacrosanct. Against this background, the French government was delayed to repeal established night work laws.
- **Outcome**: Amendments to the French Labour Code made night work and working time subject to collective agreements, and subsequently penalty proceedings were withdrawn by the Commission.

[130] Opinion of Advocate General Tesauro delivered on 16 January 1997 in European Court of Justice Case C-197/96 *Commission v France* [1997] ECR I-01489, para 8.
[131] Letter from the French Permanent Representation from 26 November 1998, CA/jF n° 2182, 2.
[132] Action brought on 10 June 1999 in European Court of Justice Case C-224/99 *Commission v France* [1999] OJ C226/25.
[133] Letter of Jean-Luc Vielleribiere, Representation Permanente de la France aupres de l'Union Europeenne, to Odile Quintin, Directrice Generale, Commission Europeenne-DG-Emploi, 27 April 2001.

Legal Uncertainty in Shallow Waters: What counts as a "bathing area" in the United Kingdom?

(Case 7 reviewed by Gerda Falkner and Nikolas Rajkovic)

Litigation Basics

EU Law at Issue

- Directive 76/160 (Bathing Water Quality)

Transposition Deadline:	10.12.1977
First Proceedings (C-56/90)	
● Letter of Formal Notice:	30.07.1986
● Entrance into Registry:	07.03.1990
● First Judgment:	14.07.1993
Second Proceedings (C-85/01)	
● Letter of Formal Notice:	30.10.1998
● Entrance in Court Registry	20.02.2001
● Withdrawal:	14.01.2002

Compliance disputes are often rooted in a practice central to the performance of law and the legal profession: interpretation. Differences in interpretation are more likely and more profound when legal statutes lack adequate specification of legal obligations, rights and prescriptions. This can be especially the case when operative articles or clauses fail to define, in the best detail possible, precisely what is required and/or what must be done. Of course, no law can achieve infinite precision and sometimes over-specification can be problematic as well; however, problems of practical implementation do necessarily arise when key concepts and standards suffer from vagueness. The case at hand, regarding bathing water in Blackpool, provides a useful illustration where the United Kingdom (UK) attempted to use gaps in the bathing water directive (Directive 76/160) so as to counter the Commission's allegations of non-compliance with bathing water standards.

Directive 76/160 and its Legal "Loopholes"

Directive 76/160 dealt with regulation of bathing water quality, requiring member states to adhere to minimum physical, chemical and microbiological standards.[134] The adoption of the Directive, however, involved some controversy, owing to questions over whether the then EC possessed "necessary competence" and whether the microbiological standards proposed were genuinely necessary for human protection.[135] Notwithstanding, the Directive was finally passed under the unanimity procedure on 8 December 1975 and provided for the following deadlines: transposition and application within two years, and water quality conformity with ten years.[136] The Directive set rules on sampling frequency and methods of analysis, obligating member states to report their findings to the Commission at regular intervals.[137] At the heart of the Directive was Article 1(2)(a) and the concept of "bathing water", defined broadly as "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."[138]

Yet, the broad manner in which this provision was drafted became a source of contention between the UK and the Commission.[139] First, the UK did not possess a system of "authorized" bathing areas as presumed by the Directive and, second, the Directive did not provide sufficient specification on what constituted "a large number of bathers." In its delayed transposition of the Directive, the UK government, in July 1979, set national thresholds for the identification of "bathing waters" with regard to bathing numbers.[140] The UK Environment Department instructed that stretches of water could be classified as "bathing areas" where the number of bathers became assessed between 500 to 1 500 people per mile.[141] Yet, these guidelines produced

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

135 Han Somsen, "Bathing Water Standards", *European Environmental Law Review* 2 (December 1993), 303.

136 However, for those bathing areas specially equipped for bathing and created by national authorities after notification, water standards were to be observed from when bathing is first permitted.

137 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).

138 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).

139 This leaves room to question why "bathing water" was defined in such a general manner by the Directive: did it facilitate the Directive's passage to only pass on the problem of substantive definition until later application and enforcement stages? Or, did the drafters of the Directive envisage, by defining "bathing water" broadly, a more fragmented system of regulation which was discarded however in later years and phases of bureaucratic enactment?

140 Somsen, "Bathing Water Standards", 302-304.

141 Ibid.

a curious result: the UK advised the Commission that only 27 bathing areas were identified in the UK, none of which were located in Northern Ireland and Scotland.[142]

This led to a reasoned opinion from the Commission in July 1980 alleging that the UK had failed to implement the Directive.[143] The UK's reply, in September 1980, asserted that no other stretch of water came within the criteria set out by the government.[144] Yet, the Commission failed to issue a formal rebuttal or to challenge the aforesaid criteria. Notably, in 1985, the UK government did revise its "bathing water" guidelines, following pressure from the UK tourist industry and the Commission. These revised criteria included certain facilities (e.g. toilets, changing huts, lifeguards) as indicative of "bathing waters" and thus, by 1987, 389 "bathing waters" became identified.[145]

Infringement Proceedings over bathing waters in Blackpool

In the spring and summer of 1986, the Commission investigated complaints regarding bathing water quality in Blackpool, Formby and Southport.[146] This was followed by a reasoned opinion in February 1988, where the Commission requested that water quality had to comply with Directive standards within two months.[147] In March 1990, the Commission filed an infringement action with the Court. In July 1993, the ECJ issued its judgment, finding the UK in breach of the Directive.

At Court, the UK government raised a number of intricate procedural and substantive arguments intended to thwart the Commission's suit. With regard to the former category, the UK asserted that the action was inadmissible on three grounds. First, since the Commission had failed to challenge the UK's "bathing water" criteria on time in the early 1980s, the Commission was now prevented from raising legal objections on the grounds of legal uncertainty.[148] Second, the UK argued impossibility regarding the Commission's demand of water quality compliance within two months of the reasoned opinion.[149] Third, the UK government asserted that the Directive did not "impose an obligation to achieve a result" but merely that a member state had to take all

[142] Judgment of the Court of 14 July 1993 in European Court of Justice Case C-56/90 *Commission v United Kingdom* [1993] ECR I-04109, para. 11.
[143] Ibid., para. 12.
[144] Ibid.
[145] Somsen, "Bathing Water Standards", 303.
[146] Judgment of the Court of 14 July 1993 in European Court of Justice Case C-56/90 *Commission v United Kingdom* [1993] ECR I-04109, para. 19.
[147] Ibid., para. 16.
[148] Ibid., para. 13.
[149] Ibid., para. 16.

necessary steps.[150] The Court dismissed these inadmissibility claims stating, one, that the Commission had never consented to the UK "bathing water" criteria, and two, the UK had formal notice of water quality problems two years prior to the reasoned opinion and, three, the question of results versus measures was a matter for the merits of the application.

Pertaining to the merits of the proceedings, the Court addressed two key claims made by the UK. First, the imprecise definition of "bathing waters" implied discretionary power to member states to define the scope of waters falling within the Directive. The Court concurred with this assertion, however only to the extent that discretion was reasonable and conformed to the purpose of the Directive as expressed in its preamble: "in order to protect the environment and public health, it is necessary to reduce the pollution of bathing water and to protect such water against further deterioration."[151] This meant that the failure of the UK to ensure its criteria would capture long-time bathing resorts, such as Blackpool, demonstrated a lack of compliance with the Directive.

Second, the UK argued that the nature of the obligation imposed by the Directive pertained only to necessary measures and not attained results. Yet, the Court noted the framework of the Directive and how the 10-year deadline provided member states with reasonable time to attain water quality standards. At no time had the UK adduced evidence which showed that 10 years were inadequate for the attainment of water quality standards in Blackpool and surroundings.[152]

Penalty Proceedings and Compliance in Blackpool

In the years following the 1993 judgment, Commission and UK officials were in regular correspondence on the progress of measures to implement the Directive. UK officials disclosed a total of 117 initiatives, many involving public infrastructure improvements, being undertaken to fulfil compliance in Blackpool.[153] However, steady accomplishments on that list of measures did not translate into commensurate improvements in bathing water quality. In 1999, test results confirmed that only one of the bathing areas between Blackpool and Southport complied with Directive thresholds.[154] Thus, dissatisfaction grew and, in February 2001, the Commission

[150] Ibid., para. 20.
[151] Ibid., para. 33.
[152] Ibid., para. 46-47.
[153] Letter to Marius Enthoven, Director-General, European Commission, from David Prout, First Secretary, (Environment) United Kingdom permanent representation to the European Union, 24 September 1997; See also Letter to Tom Garvey *Esq*, Acting Director-General, European Commission, from David R. Durie, United Kingdom Permanent Representation to the European Union, 29 July 1994.
[154] Letter to Jim Currie, Director General, European Commission, from C. A. Capella, Counsellor Social, Regional and Environmental, United Kingdom Permanent Representation to the European Union, 7 January 1999.

initiated second proceedings which claimed a daily penalty payment of 106 800 Euro. The application to the Court emphasized:

> "There cannot be any doubt that, in the present case, the United Kingdom should long since have taken all the necessary measures to ensure that the quality of the bathing waters in Blackpool and of those adjacent to Southport conform to the limit values set in accordance with Article 3 of the aforementioned directive. Over six years had already passed since the Court gave its judgment by the time the Commission issued its reasoned opinion [in the second proceedings]. At this time, six out of the nine bathing waters in question still failed to comply with the directive."[155]

Yet, correspondence between the Commission and the UK government suggests that the Commission's filing of penalty proceedings was more likely an insurance gambit than a needed measure. Letters between the UK government and the Commission disclose that test results between 1999 and 2001 were improving decisively.[156] For instance, in October 2000, tests showed that 7 out of 9 bathing waters had in fact achieved compliance.[157] Thus, there should have been no surprise that by September 2001 the UK government could confirm that 9 out of 9 bathing areas in Blackpool had attained compliance.[158] Consequently, in January 2002, the case was withdrawn and closed by order of the Court.[159]

Case Notes

- **Problem**: The UK government asserted that because the term "bathing waters" had been left underspecified, this gave the UK the discretion to determine the criteria. The UK did not have a system of bathing water control and protection that seemed presumed by the Directive.
- **Causes of Infringement**: This is a case of motivated non-compliance which seems to have arisen, initially, from an interpretive dispute over the meaning of the Directive and, later, over economic costs of fulfilling compliance. Specifically, the criteria imposed by the UK left long-time bathing areas, such as Blackpool, curiously beyond the regulations of the Directive.
- **Outcome**: By September 2001, the UK government confirmed that 9 out of 9 testing areas in the Blackpool area had attained compliance and thus the case was withdrawn by the Commission.

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155 Action brought on 20 February 2001 in European Court of Justice Case C-85/01 *Commission v United Kingdom* [2002] OJ, C134/7.

156 Letter to Mme M Wallstrom, Member of the European Commission from W L Stow, United Kingdom Permanent Representation to the European Union, 18 April 2000; Letter to Jim Currie esq, Director-General DG Environment, from Chris Capella, Counsellor Social, Environment and Regional Policy, United Kingdom Permanent Representation to the European Union, 16 October 2000.

157 Ibid.

158 Letter to James Currie, Director-General DG Environment, from W. L. Stow, Deputy Permanent Representative, United Kingdom Permanent Representation to the European Union, 26 September 2001.

159 Withdrawal in ECJ Case C-85/01, JURT(2002)8012.

"Goldplating" in a Federal Context: Germany's enactment of the Environmental Impact Assessment Directive

(Case 8 reviewed by Gerda Falkner and Nikolas Rajkovic)

Litigation Basics	
EU Law at Issue	
● Directive 85/337 (Environmental Impact Assessment)	
Transposition Deadline:	**03.07.1988**
First Proceedings (C-301/95)	
● Letter of Formal Notice:	04.02.1994
● Entrance in Court Registry:	20.09.1995
● First Judgment:	22.10.1998
Second Proceedings (C-41/01)	
● Letter of Formal Notice:	14.07.1999
● Entrance in Court Registry	10.03.2001
● Withdrawal:	23.11.2001

A failure to properly transpose an EU directive not only undermines the EU's authority but also compromises the certainty and consistency of regulations and standards across the Union. However, infringement cases can be less intentional and more the result of structural complications which arise when member states proceed to enact required EU directives. In particular, states with a federal system are presumed to have distinct compliance challenges relative to those states with unitary systems, owing to political and legal autonomy afforded to sub-national actors which circumscribe the authority and responsibility of national (federal) governments.[160] These latter questions of authority and responsibility became a key feature in the present case, where Germany's red-green government attempted to transpose the Environmental Impact Assessment Directive (EIA) via a substantial reform and codification of German environmental law. Yet, this ambition caused prolonged delay since the intended legal changes would have needed constitutional reform under the German federal system, requiring *Länder* assent.

[160] Heather A.D. Mbaye, "Why National States Comply with Supranational Law", *European Union Politics* 2, no. 3 (2001), 264; Michael Kaeding, "Determinants of Transposition Delay in the European Union", *Journal of Public Policy* 26, no. 3 (2006), 231; William Lowry, *The Dimensions of Federalism* (Durham, NC: Duke University Press, 1992), 4. See also Mark Levy, Oran Young and Michael Zürn, "The Study of International Regimes", *European Journal of International Relations* 1, no. 3 (1995), 289.

The EIA and problems with German Transposition

Directive 85/337, or the EIA, has reflected the EU's growing policy competence in environmental protection. The EIA stipulates that specific public and private projects must be assessed for their effect on the environment. The aim of the Directive has been broad-ranging, endeavouring to protect human health, species diversity, ecosystem reproduction, as well as cultural heritage.[161] The EIA came into existence on 3 July 1985, and required member states to take necessary compliance measures within three years.

Germany's problems with the EIA were multiple and arose in a snowball-like fashion. The first instance pertained to delay, where Germany's transposition of the EIA took shape in February 1990, in the form of the Environmental Impact Assessment Law (*Gesetz über die Umweltvertraglichkeitsprüfung*, UVPG), and only came into effect on 1 August 1990—some two years past the transposition deadline.[162] Further, following examination of the UVPG, the Commission determined that Germany's transposition had been defective in several areas and issued a warning via letter of formal notice in February 1992.[163] A reasoned opinion came thereafter in July 1994, which specified six formal headings of infringement: delayed transposition; failure to communicate all provisions adopted; failure to relate the Directive to all relevant projects; incomplete transposition of Article 2 of the Directive; incomplete transposition of Article 5(2) of the Directive; and the failure to apply the Directive to two specific projects.[164] With exception of the last heading, the Commission and Germany did not resolve these grievances and the case proceeded to Court in September 1995,[165] with a judgment ensuing in October 1998.

The Infringement Proceeding and its Aftermath

The first of the five claims against Germany, delay, was of a procedural nature, and easily dispensed via factual finding: Germany was two years past the implementation deadline and

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[161] Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, 85/337/EEC, O.J. NO. L 175, 05/07/1985 P. 0040 – 0048, <http://ec.europa.eu/environment/eia/full-legal-text/85337.htm> (Accessed February 10, 2011).

[162] Judgment of the Court of 22 October 1998 in European Court of Justice Case C-301/95 *Commission v Germany* [1998] ECR I-06135, para. 11.

[163] Judgment of the Court of 22 October 1998 in European Court of Justice Case C-301/95 *Commission v Germany* [1998] ECR I-06135, para. 7.

[164] Judgment of the Court of 22 October 1998 in European Court of Justice Case C-301/95 *Commission v Germany* [1998] ECR I-06135, para. 8.

[165] Judgment of the Court of 22 October 1998 in European Court of Justice Case C-301/95 *Commission v Germany* [1998] ECR I-06135, para. 1.

therefore *ipso facto* in breach of its obligations.[166] Yet, the remaining four issues were of a more substantive nature, and thus open to argument. Two of the four claims, in fact, related to the interaction of the EIA with German federal system. Thus, the analysis which ensues distinguishes between these two sets of litigation issues.

Questions on federalism related to, first, the Commission's dissatisfaction with information provided on provisions implementing the EIA, and, second, whether the UVPG's deference to German law for details of developer disclosure were permitted. The former issue reflected the Commission's concern that Germany's federal government was responsible for not only communicating all national provisions transposing the EIA, but also those provisions adopted by the German *Länder*. The German government countered there was no legal authority to support such a broad reporting obligation, and further this concern was moot owing to how the UVPG took precedence over all national and *Länder* laws. Ultimately, the Court held that the EIA's reporting obligation should be treated as blind between federal and unitary state structures, and thus Germany had been in breach for not reporting federal and *Länder* provisions.[167]

The latter issue on developer disclosure, and Germany's alleged incomplete transposition of disclosure requirements, centred on the appropriateness of paragraph 6 of the UVPG.[168] The aforesaid provision permitted federal or *Länder* statutes to supplant the disclosure requirements of the EIA, should such statutes enumerate more specific obligations. The Commission alleged that this enabled German laws to surpass and even replace the EIA and its standards. The German government clarified that this could only happen when federal or *Länder* provisions surpassed EIA standards, otherwise the general requirements laid down by the EIA and, consequently the UVPG, would remain in effect. The ECJ notably sided with Germany's reading of the UVPG, noting how Article 13 of the EIA enabled member states to lay stricter rules than those contained in the Directive.[169]

The second grouping, of non-federal claims, addressed concerns regarding proper and complete transposition of the EIA. First, the Commission contended Germany's use of a transition provision in the UVPG, which held that development projects started between 3 July 1988 and 1

[166] Judgment of the Court of 22 October 1998 in European Court of Justice Case C-301/95 *Commission v Germany* [1998] ECR I-06135, para. 17.
[167] Judgment of the Court of 22 October 1998 in European Court of Justice Case C-301/95 *Commission v Germany* [1998] ECR I-06135, para. 22-24.
[168] Judgment of the Court of 22 October 1998 in European Court of Justice Case C-301/95 *Commission v Germany* [1998] ECR I-06135, para. 48.
[169] Judgment of the Court of 22 October 1998 in European Court of Justice Case C-301/95 *Commission v Germany* [1998] ECR I-06135, para. 52.

August 1990 would not require an environmental impact assessment.[170] Here, the Court held that the EIA did not permit such a transitional period and Germany was in clear breach of its obligation. Second, the Commission disputed how Germany dealt with its obligations under Annex II of the EIA, regarding classes of projects that were to be subject to assessment vis-a-vis specified criteria and/or thresholds. Here, the Commission argued that Germany did not include all the classes of projects listed in Annex II within the UVPG. Germany, in reply, claimed that it excluded, pursuant to its discretion under the EIA, only certain projects as opposed to whole classes of projects—an argument echoed by Ireland in its infringement proceedings over the EIA (see case 10). The ECJ was unconvinced by Germany's conceptual finesse, and held that the UVPG had excluded whole classes of projects that had been listed and required under Annex II of EIA.[171] In sum, Germany was held in breach on four of the five claims brought forth by the Commission regarding infringement. This meant that restoring compliance would require amendment of the UVPG.

Based on correspondence between the Commission and the German government, this amendment process was initiated in 1999.[172] However, new complications emerged on several fronts. Foremost, the longtime conservative government of Helmut Kohl, which had been responsible for unsuccessful transposition[173], was succeeded by a centre-left coalition government just five days after the infringement judgment in the case. Based on several communications to the EU Commission, it became clear that the new government considered the case of great importance. The Green Party's Minister for the Environment, Jürgen Trittin, considered the case a risk to the new government's reputation, and thus various pleas were made to the Commission to not trigger second proceedings in light of potential political consequences.[174] At the same time, the new red-green government devised an ambitious goal of sweeping reform and codification of Germany's environmental law into a so-called 'First Book on Environmental Law' (*Erstes Buch zu einem Umweltgesetzbuch*[175]). This attempted 'goldplating' of environmental standards, however, would have affected powers of the *Länder* and have only been possible on the basis of a

[170] Judgment of the Court of 22 October 1998 in European Court of Justice Case C-301/95 *Commission v Germany* [1998] ECR I-06135, para. 26.
[171] Judgment of the Court of 22 October 1998 in European Court of Justice Case C-301/95 *Commission v Germany* [1998] ECR I-06135, para. 45-46.
[172] Letter from the German government to the European Commission, 15 March 2000, SG (2000) A/4094.
[173] The Kohl government had been in power from 1982 to 1998 and the Directive received adoption in 1985 pursuant to Artides 100 and 235 of the EC Treaty.
[174] In German: "Angesichts … der verheerenden politischen Wirkung einer entsprechenden Verurteilung … alle Möglichkeiten ausgeschöpft werden sollten, um die Erhebung der Zwangsgeldklagen zu verhindern" (Letter from the German Environmental Minister Trittin to the EU Commissioner Verheugen from 27 June 2000).
[175] Letter from the German government to the European Commission from 16 November 1999, transmitted a second time on 15 March 2000 after the initial letter inexplicably disappeared on its way to Brussels, as the Minister mentions in his second letter, SG (2000) A/4094.

constitutional reform. The red-green coalition therefore had to reconsider its approach, and this led to another reform attempt of the UVPG but again encountering delay; since a full legislative process was required, inclusive of statements by the *Länder* and social partner interest groups. Nonetheless, a meticulous and incremental plan was presented to the Commission, and it was hoped this would forestall the Commission from initiating second proceedings.[176] However, this latest effort encountered further difficulty in that the EU's EIA Directive in 1997 was amended and this slowed down Germany's compliance process once more so that the amendments could be accepted and incorporated into Germany's multi-level federal system.[177]

All in all, despite the new government's stated commitment and the responsible Minister's assurance to direct his most personal attention,[178] Germany remained plagued by delays, in making necessary amendments to the UVPG and thus adopting measures which fully complied with the Court's judgment. As a result, in March 2001, the Commission decided to initiate court proceedings against Germany under Article 228. However, soon thereafter the German government notified the Commission that all required amendments had been completed, which the Commission responded to by withdrawing its action and closing the case in in November 2001.[179]

Case Notes

- **Problem**: Germany was unduly late in transposing and implementing the Environmental Impact Assessment Directive. The Commission and German government disagreed on how the Directive interfaced with German federal law. For example, the German government attempted to introduce its own categorization scheme for development projects that would be assessed upon triggering certain criteria and thresholds. After the judgment in first proceedings, the federal system aborted an attempt to goldplate the Directive, which caused second proceedings.
- **Causes of Infringement**: During the first proceedings, the conservative Kohl government seemed to lack commitment, and this did not bode well when considering the complexity of the Directive and the German multi-level legislative process. Second proceedings were characterised by a change in government in 1998 (red-green), with the Green coalition partners falling victim to overambitious reform plans and a consequent failure to secure *Länder* agreement and hence realize compliance in due time.
- **Outcome**: German federal law was amended to ensure that EU standards were paramount, and the Commission withdrew its second referral action.

[176] Letter from the German government to the European Commission from 8 December 2000, SG (2001) A/42).
[177] Letter from the German government to the European Commission from 28 April 2000, SG (2000) A/5673.
[178] Letter from the German Minister Trittin to EU Commission Wallström 27 June 2000.
[179] Removal from the register of Case C-41/01 by Order of 23 November 2001 *Commission v Germany*.

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

(Case 9 reviewed by Gerda Falkner and Nikolas Rajkovic)

Litigation Basics	
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.[180] 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.[181] 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.[182] 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.

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

[181] 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.

[182] See Artide 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."[183] 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.[184] Information obtained from water analysis was to be reported to the Commission at regular intervals.[185]

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.[186] The reply provided by the Spanish government did not mitigate the dispute, which prompted the Commission to issue a Reasoned Opinion in November 1990.[187] 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.[188]

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.[189] Spanish authorities argued that Spain had undergone

[183] 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).

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

[185] 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).

[186] 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.

[187] Ibid., para. 15-16.

[188] Ibid., para. 17-18.

[189] 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.[190] 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.[191] 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.[192] 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.[193] 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.[194] 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.[195] 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,

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[190] Ibid., para. 18-19.
[191] 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.
[192] Ibid., para. 32.
[193] Ibid.
[194] 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/communiques/cp03/aff/cp03105en.htm> (Accessed January 17, 2011).
[195] 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.[196] 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."[197] 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.[198]

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.

[196] 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.
[197] 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/communiques/cp03/aff/cp03105en.htm> (Accessed January 17, 2011).
[198] 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.

Compliance and the Problem of Thresholds: Ireland's Transposition of the Environmental Impact Assessment Directive

(Case 10 reviewed by Gerda Falkner and Nikolas Rajkovic)

Litigation Basics

EU Law at Issue

- Directive 85/337 (Environmental Impact Assessment)

Transposition Deadline:	03.07.1988
First Proceedings (C-392/96)	
● Letter of Formal Notice:	13.10.1989
● Entrance into Registry:	05.12.1996
● First Judgment:	21.09.1999
Second Proceedings (C-294/03)	
● Letter of Formal Notice:	25.07.2000
● Entrance in Court Registry	26.07.2001
● Withdrawal:	06.10.2005

One of the key challenges of environmental assessment legislation is the regulation of what constitutes an instance requiring evaluation. In other words, when does a land-use project trigger an obligation for environmental assessment? What should the legislative and legal criteria be that define an assessment obligation? How should those criteria be applied? These are the questions which fed the dispute between the Commission and Ireland over the correct transposition of Directive 85/337/EEC. In particular, Commission officials and Irish authorities contested whether the latter's use of size criteria were adequate, or whether more substantive criteria should have been incorporated into transposition.

Environmental Impact Assessment and the Issue of Thresholds

Directive 85/337, otherwise known as the Environmental Impact Assessment (EIA) Directive, affects public and private projects by requiring that an environmental assessment be carried out

by responsible national authorities, where significant environmental effects are likely.[199] The question of "likelihood", however, is a matter determined with reference to the nature, size and location of the prospective land-use project. The EIA directive defines the obligation of assessment between two categories, which are listed in Annexes I and II of the Directive. The former Annex sets out those projects which must be assessed in any case, such as long-distance railway lines, airports, motorways, waste disposal installations and waste water treatment plants. Annex II lists those projects for which assessment is not automatic, but rather determined on a case-by-case basis by threshold criteria on size, location and potential impact.

It is this latter category of threshold cases which became a source of contention between the Commission and the Irish government (see also a related earlier case against Germany, case review no. 8). Brussels and Dublin were in disagreement over whether Irish legislation, which stipulated project size as determinative of assessment need, was in conformity with the EIA Directive. However, the controversy over threshold adequacy was not unique to Ireland. In fact, considerable uncertainty seems to have existed over how to specify and apply the Directive's fundamental objective of assessment where a significant effect on the environment was likely, and it was found that the EIA Directive "generated more case law than any other area of EC or domestic environmental law."[200]

Irish Transposition and 'Absolute' Thresholds

The Irish case centres on the Commission's concern over sections in the Irish transposition dealing with threshold cases under Annex II. Under Article 12(1) of the Directive, member states were to take measures of transposition by 3 July 1988.[201] By way of letter of formal notice in October 1989, the Commission advised the Irish government that the EIA Directive had not been correctly transposed.[202] The Commission alleged that Irish legislation had set absolute thresholds related to size which allowed projects to avoid environmental assessment, specifically uncultivated land for intensive agriculture, afforestation, land reclamation and peat extraction.[203]

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[199] Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, O. J. L 175 , 05/07/1985 P. 0040 – 0048.

[200] Annabel Graham Paul and Sarah Sackman, "The Hottest Environmental Cases of the Year: EIA, SEA, Consultation, Aarhus, Environmental Information and PCOS", *Francis Taylor Building* <http://www.ftb.eu.com/past-seminar-papers/the-hottest-environmental-cases-of-the-year.pdf> (Accessed January 27, 2011).

[201] Council of the European Communities, *Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment 85/337/EEC*, O.J. No. L 175 , 05/07/1985 P. 0040 – 0048, <http://ec.europa.eu/environment/eia/full-legal-text/85337.htm> (Accessed January 27, 2011).

[202] Judgment of the Court of 21 September 1999 in European Court of Justice Case C-392/96 *Commission v Ireland* [1999] ECR I-05901, para 12.

[203] Ibid., para. 19.

In other words, the Irish transposition could be read as permitting projects to forgo scrutiny by simply being below the size threshold. This, the Commission argued, was inadequate because the land uses in question could still have significant environmental effects irrespective of whether projects were below size thresholds. Moreover, the use of what the Commission considered as "absolute" thresholds opened potential for projects to be split and thus individually avoid size triggers; there was alleged to be no consideration in Irish legislation for the cumulative effect of projects.[204]

The dispute between the Commission and Ireland involved a prolonged series of exchanges between 1989 and 1996. The Commission issued its reasoned opinion in April 1993 and, finally, in December 1996 filed its infringement action before the ECJ. During the exchanges, the Irish government defended the quality of its transposition by forwarding a number of arguments. Key among them was that the Commission had not demonstrated an actual abuse of stated thresholds, that certain types of land-use were exempt from the Directive, and finally that no objectively verifiable evidence had been produced to suggest projects below a certain threshold had significant effects on the environment.[205]

However, the Irish government proved unsuccessful in its efforts to assure the Commission that size thresholds were not absolutely determinative and did not contravene the Directive. Further, Irish officials failed to convince the ECJ that Ireland's transposition had fulfilled the requirements of the Directive. In September 1999, the Court issued its judgment and found Ireland to be in breach. The ECJ held that when a member state set criteria or thresholds only on the basis of size, with no regard for the nature of the project or its location, this exceeded the bounds of discretion available to a member state under the Directive.[206] Further, the Court found that the setting of thresholds which enabled projects to have advance exemptions again exceeded the limits of discretion granted to a member state pursuant to the Directive.[207] The Court also accepted the Commission's claim that small-scale projects could have significant environmental effects when located in areas where fauna, flora, soil, water, climate or cultural heritage is sensitive to slightest alternations in the immediate environment. This being especially the case with regard to so-called raised or blanket bogs that allow turf (peat) to develop.[208]

[204] Ibid., para. 21 and 22.
[205] Ibid., para. 40, 42 & 43.
[206] Ibid., para. 65.
[207] Ibid., para. 75.
[208] Ibid., para. 66.

Penalty Proceedings and Resolving the Peatlands Concern

Following the ECJ's judgment, the Commission and Ireland again engaged in a series of correspondences regarding proper transposition of the Directive. The process began, in November 1999, when the Commission requested information on measures taken to implement the judgment.[209] Irish officials initially claimed that the passing of the Planning and Development Act in August 2000 provided new implementing measures that satisfied the judgment, in terms of lower size thresholds and the removal of assessment exemptions for peat extraction and afforestation projects.[210]

However, following review, the Commission concluded that Irish legislation still failed to protect 45 000 hectares of sensitive peatlands, and specifically failed to ensure that "all environmentally significant peat extraction projects below 10 hectares" were subject to assessment.[211] Brussels expressed concern that protected areas of peatland still had to be designated in law. This led the Commission, in December 2000, to pursue penalty proceedings at the ECJ, requesting that daily fines of 21 000 Euro be imposed upon Ireland. The Commission emphasized that:

> "In European and global terms, Irish peatlands of conservation importance represent valuable habitats, hosting rare plant and animal species. Out of the 45,000 hectares of sensitive peatlands in question, about 15,000 consist of raised bogs and 30,000 consist of blanket bogs. The raised bogs are especially at risk, since it is attractive to mine for horticultural peat, i.e. the sort of peat found in garden centres. Formed over thousands of years, they are very sensitive to changes in hydrological conditions and can be quickly damaged or destroyed, especially as a result of the drainage and peat-mining associated with peat extraction."[212]

Yet, after penalty referral, correspondence between the Commission and Irish authorities suggests that Irish officials increased their resolve to find an agreement with Brussels on outstanding peat concerns.[213] This led to the enactment of Planning and Development Regulations in 2005 which required: enhanced planning controls for peat extraction; local

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[209] Letter of Director General James Currie, European Commission, 15 November 1999 to His Excellency Mr. Denis O'Leary, Permanent Representative of Ireland to the European Union.
[210] Letter of Pat Fenton, Environment Attache, Permanent Representation of the Republic of Ireland to the European Union, 14 November 2000 to James Currie Director General.
[211] Commission of the European Communities, "Commission proposes daily fines on Ireland to ensure adequate protection of sensitive peatlands from peat extraction", 20 December 2002 <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/02/1950&format=HTML&aged=1&language=EN&guiLanguage=en> (Accessed January 27, 2011).
[212] Ibid.
[213] Letter of Catherine Day on behalf of D. Grant Lawrence Director General Environment 7 April 2004 to Her Excellency Anne Anderson Permanent Representative of Ireland to the European Union.

planning authorities to take into account the cumulative impact of multiple sub-threshold projects and environmentally sensitive areas; and the active monitoring and enforcement of peat extraction.[214] Further, Irish officials advised in September 2005 that the designation of peatland locations as Natural Heritage Areas reached legislative completion.[215] Thus, flowing from these efforts, it appears the Commission became satisfied about Ireland's transposition and compliance with the EIA Directive, and subsequently, in December 2005, an order was obtained from the ECJ withdrawing the case from the Court's register.[216]

Case Notes

- **Problem**: Irish officials attempted to transpose Directive 85/337 by setting size thresholds on land-use. The Commission became concerned that using 'absolute' size thresholds would enable projects to escape environmental assessments.
- **Causes of Infringement**: Economic interests may trump environmental protection easily where inadequate measures implement the Environmental Impact Assessment Directive. The Commission insisted that compliance required further efforts to ensure that environmental sensitivity of a specific geographical location was taken into account. In addition, Commission officials demanded extra protective measures regarding Irish peatlands.
- **Outcome**: Following legislative changes implemented by Ireland, the Commission withdrew the case before a penalty judgment.

[214] Letter of Peter Gunning, Deputy Permanent Representative of the Republic of Ireland to the European Union 26 July 2005 to Catherine Day Director General.
[215] Letter of Mark Griffin, Environment Counsellor to the Permanent Representative of the Republic of Ireland to the European Union 21 September 2005 to Catherine Day Director General.
[216] Order of the President of the Court of 1 December 2005 in European Court of Justice Case C-294/03 *Commission v Ireland* [2003].

To Decree or Not to Decree?
Luxembourg and its Implementation of Aviation Accident Investigation

(Case 11 reviewed by Gerda Falkner and Nikolas Rajkovic)

Litigation Basics

EU Law at Issue

- Council Directive 94/56 (Investigating Civil Aviation Accidents)

Transposition Deadline:	21.11.1996
First Proceedings C-138/99	
● Letter of Formal Notice:	30.05.1997
● Entrance in Court Registry:	19.04.1999
● First Judgment:	16.12.1999
Second Proceedings C-121/02	
● Letter of Formal Notice:	27.09.2000
● Entrance in Court Registry	04.04.2002
● Withdrawal:	28.06.2002

The striking feature of this case is its demonstration of how a case can be propelled into infringement proceedings without any reason related to the content of regulation. It was the character of the national transposition act (decree or law) that became a source of dispute between Luxembourg's legislative bodies, resulting in undue delay of implementation and the Commission's subsequent use of infringement proceedings. The subject matter at issue was of scant controversy to Luxembourg and generally across the EU: the need to establish in each member state an independent body responsible for investigating accidents in civil aviation pursuant to Council Directive 94/56/EC.

Air Safety Investigation: Beyond Question?

Council Directive 94/56/EC of 21 November 1994 had the goal of improving air safety in the EU through the establishment of expeditious and technical investigations of civil aviation

accidents and incidents.[217] At the core of this legislation was the creation in each member state of a permanent and independent entity responsible for the investigation of aviation accidents and incidents. Crucial to implementation was an investigatory entity which had functional autonomy from national aviation authorities responsible for airworthiness, certification, flight operation, maintenance, licensing, air traffic control, and control over airport operation.

The Directive set 21 November 1996 as the deadline by which laws, regulations and administrative provisions had to be adopted in each member state. As Luxembourg had not communicated its implementation measures, the Commission opened infringement proceedings against the Grand Duchy in May 1997. In response to the proceedings, Luxembourg authorities explained that they had already drafted the necessary legal requirements, but they had not been adopted thus far:

> "The Luxembourg Government replied to that reasoned opinion on 26 March 1998, indicating that a draft Grand-Ducal regulation intended to transpose the Directive had been approved by the Government in council and had recently been submitted to the Council of State, to the competent professional body and to the Working Committee of the Chamber of Deputies for their views."[218]

The Rules on Implementing Rules: Explaining Luxembourg's Legislative Process

The Luxembourg government argued that its impugned delay resulted from its distinct legislative process, where for every legislative act the Council of State had to give its opinion and various chambers could be invited to give additional opinions. The Council of State, specifically, is a distinguished organ within Luxembourg's unicameral legislature, because it is tasked with providing advice on matters of constitutionality, international and European law;[219] and it is not unusual for legislative delays to occur as a result of this Council's recommendations.[220] In the instant case, this dynamic appears to have taken hold because of disagreement over the legal requirements of proper transposition; where the Luxembourg government was of the opinion that a decree would suffice by way of a Grand-Ducal regulation, but the Council of State had voiced its opinion that a draft law was required. This insistence behind a law was asserted by the

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[217] Council of the European Union, *Council Directive 94/56/EC of 21 November 1994 establishing the fundamental principles governing the investigation of civil aviation accidents and incidents*, http://eccairsportal.jrc.ec.europa.eu/fileadmin/downloads/eu-directives/id-20/0010%20Directive%2094-56-ce.pdf (Accessed October 20, 2010).

[218] Judgment of the Court of 16 December 1999 in European Court of Justice Case C-138/99 *Commission v Luxemburg* [1999] ECR I-09021, para 6.

[219] "Conseil d'Etat" < http://www.luxembourg.public.lu/fr/politique/institutions-politiques/conseil-etat/index.html> (Accessed July 14, 2011).

[220] Judgment of the Court of 16 December 1999 in European Court of Justice Case C-138/99 *Commission v Luxemburg* [1999] ECR I-09021, para 9.

Council of State, stressing that a law could not be amended via decree and that decrees could at best concern matters already delegated to the administration in the original law:

> "De telles dérogations, à l'article 8(2) du code d'instruction criminelle, d'une part, à l'article 458 du code pénal, d'autre part, ne peuvent pas résulter d'un règlement grand-ducal basé sur la loi modifiée du 9 août 1971. Si cette loi autorise les dérogations aux lois existantes, il doit cependant être évident qu'il ne peut s'agir que de dérogations aux législations en vigueur dans les matières pour lesquelles le pouvoir exécutif a reçu l'habilitation du pouvoir législatif. Le Conseil d'Etat ne saurait dès lors marquer son accord au présent projet de règlement grand-ducal. Dans la mesure où la loi modifiée du 31 janvier 1948 relative à la réglementation de la navigation aérienne n'offre pas non plus une base légale adéquate pour le projet de règlement grand-ducal sous rubrique, le Conseil d'Etat invite le Gouvernement à élaborer un projet de loi, qui constitue en l'occurrence la seule voie possible à l'effet de transposer en droit national la directive 94/56/CEE."[221]

The net result was a restart of the legislative process, requiring the government to put forward a new law for consideration to replace the draft decree. During the course of this legislative dispute, the ECJ issued its infringement judgment in December 1999: finding easily that Luxembourg had failed in its obligation to implement the Directive. Moreover, since transposition measures remained outstanding, the Commission further initiated penalty proceedings with a letter of formal notice in September 2000.[222] Again, the Luxembourg government responded with reference to legislative complications, this time owing to how the draft law was now intended to apply beyond the civil aviation sector, to include shipping and railways.[223] This created the corresponding need for approval by the Council of State, with its ensuing time requirements:

> "A ce jour, le Conseil d'Etat n'a pas encore rendu son avis, ce qui explique que ces projets n'ont pas encore pu être adoptés par la Chambre des Députés. Sous reserve de l'avis prochain du Conseil d'Etat, la transposition de la directive 94/56/CE (...) devrait intervener au plus tard dans les six mois à venir."[224]

Yet, ultimately, and following the case's registry with ECJ in April 2002, what seemed an unending legislative circuit came to desired conclusion with the Luxembourg government's

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[221] *Avis du Conseil d'Etat du 23.3.1999*, <http://www.chd.lu/wps/portal/public/!ut/p/c1/jczJDoIwFIXhZ_EJ7u1lapdMVkAxpakBNqQxhJAwuDAa315Wxp3mLP98B1rYttjHONj7uC52ghpav0souVSZSygD5SLlaR4YXTqc-1tv_I4415UMT6kQJsIMY6ZTFRFm9I_-dB6LzUh1LGLmodTOD10e1rmHBtrg60Pke6SSacPV2SmYB83UD_b6gtts6uca7t6WzK08/dl2/d1/L0lJSklna21BL0lKakFBRXlBQkVSQ0pBISEvWUZOQTFOSTUwLTVGd0EhIS83X0QyRFZSSTQyMDg5SkYwMk4xU1U4UU8zSzE1LzIydWRGODMxNzAxMzk!/?PC_7_D2DVRI42089JF02N1SU8QO3K15_selectedDocNum=7&PC_7_D2DVRI42089JF02N1SU8QO3K15_secondList=&PC_7_D2DVRI42089JF02N1SU8QO3K15_action=document#7_D2DVRI42089JF02N1SU8QO3K15> (Accessed March 3, 2010), 1-2.

[222] Action brought on 4 April 2002 in European Court of Justice Case C-121/02 *Commission v Luxembourg* [1999].

[223] ""(…) Il est apparu judicieux de concevoir le champ d'application de la loi en préparation de façon plus large en vue d'y indure aussi les autres modes de transports." See Chambre des Deputes Session Ordinaire 2000-2001, *Projet de loi sur les enquêtes techniques relatives aux accidents et aux incidents graves survenus dans les domaines de l'aviation civile, des transports maritimes et du chemin de fer*, J-2000-O-0784, 6.

[224] Letter from Luxembourg to the European Commission from 14 June 2001, SG(2001)A/6892,1.

notification that the requisite law had been passed and was in effect. [225] This satisfied the Commission and thus closed the litigation in June 2002, five and a half years after the prescribed deadline.

Case Notes

- **Problem:** None of the materials of this case showed any concern with the content of EU rules at stake, which bears resemblance to cases 20 and 21. It seems that stalled transposition flowed from a disagreement occuring during Luxembourg's legislative process over whether transposition should happen via decree or law.
- **Causes of Infringement**: The Luxembourg government suggested a decree intended to transpose the Directive on aviation accident investigation. However, insistence by the Luxembourg Council of State, a consultative body tasked with advising on constitutional and international legal issues, that transposition be made via law rather than decree appears to have instigated a delay in transposition which extended five and a half years beyond the EU's transposition deadline. The problem was further aggravated by how the Commission pursued infringement with relative speed in all phases, and this did not interact well with Luxembourg's administrative and legislative circumstances.
- **Outcome**: In the end, Luxembourg's institutions managed to adopt a law that was compliant with EU requirements, and the case was withdrawn in 2002.

[225] Withdrawal in ECJ Case C-121/02 from 28 June 2002, JURM (2002) 56, para 2.

A *Mutual* Benefit?
The Single Insurance Market encounters French Mutual Aid Societies

(Case 12 reviewed by Gerda Falkner and Nikolas Rajkovic)

Litigation Basics

EU Law at Issue

- Article 51 EC Treaty (liberalization of banking and insurance)
- Article 52 EC Treaty (Free movement of capital)
- Article 56 EC Treaty (Freedom of establishment)
- Directives 92/49 and 92/96 ("Third Package" of Directives establishing the Single Insurance Market).

Directive Transposition Deadline: 31.12.1993

First Proceedings (C-239/98)

- Letter of Formal Notice: 31.01.1996
- Entrance in Court Registry: 07.07.1998
- First Judgment: 16.12.1999

Second Proceedings (C-261/02)

- Letter of Formal Notice: 04.04.2000
- Entrance in Court Registry 15.07.2002
- Withdrawal: 18.02.2004

The creation of a Single Insurance Market (SIM) in the EU emanates from the market-making provisions of the Treaty of Rome. Yet, the objective has always been acknowledged as complex owing to the different regulatory systems in member states for financial and insurance services. This led to a cautious and phased roll-out of directives that gradually set out new rules for a SIM. However, the case of France gave a further challenge to the implementation of the SIM because the country had a long and distinct history of mutual aid societies as providers of insurance and social welfare benefits.[226] Thus, the implementation of the SIM in France meant more than just imposing new insurance regulations; it also required the reorganization of storied philanthropic

[226] Paul V. Dutton, *Origins of the French Welfare State: The Struggle for Social Reform in France, 1914-1947* (Cambridge: Cambridge University Press, 2002), 5-6.

entities rooted since the 18th century which numbered some five thousand[227] and affected tens of millions[228] of French beneficiaries.

Harmonize with Caution: A Single Market for European Insurance?

The construction of the SIM owes its origin to Article 51 of the Rome Treaty, which specifies the liberalization of banking and insurance, and the general "freedoms" of the founding Treaties: the freedom of movement of capital; the freedom of establishment (Art. 52 and 58); and the freedom of movement of services (Art. 59). However, these principles had to interface with national insurance markets with strict and diverse legal regulations, which in effect denied domestic access to foreign companies. This state of affairs left the EU with two regulatory routes for the fulfilment of a SIM: either fully harmonize local regulations or implement liberalization and deregulation through the mutual recognition of existing national rules. The latter option emerged as preferable following a failure to agree upon the 1979 Draft Directive which intended to harmonize laws, regulations and administrative provisions on insurance contracts.[229] Thus, the EU's blueprint for the SIM relied upon the more limited harmonization of laws only relating to authorization and supervision of insurers.[230]

The actual legislative steps behind the SIM came in three generations of insurance Directives spanning some 30 years,[231] with the most pronounced of changes occurring during the final two stages. For instance, the second generation Directives (1988-1990) enabled insurance firms in one member state to offer services in other member states without having to establish a local branch or agency.[232] The third generation of Directives (1994) consolidated the SIM, instituting the so-called "single passport" which allowed member state firms free access to establish offices in any EU country.[233] At the heart of this regulatory regime was the principle that each member

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227 "Le gouvernement va adapter les mutuelles a l'Europe par voie d'ordonnance", *Le Monde* 1 August 2000.
228 Bertrand Vernard, "The French Insurance Market: Background and Trends", in J. David Cummins and Bertrand Vernard (eds.), *Handbook of International Insurance: Between Global Dynamics and Local Contingencies* (New York: Springer, 2007), 267-268.
229 European Economic and Social Committee, *413th plenary session of 15 and 16 December 2004, Opinion of the European Economic and Social Committee on 'The European Insurance Contract'*, 2005/C 157/01, 9.
230 Iain MacNeil, "The Legal Framework in the United Kingdom for Insurance Policies Sold by EC Insurers under Freedom of Services", *International and Comparative Law Quarterly* 44, no. 1 (1995), 19.
231 Maciej Sterzynski, "The European Single Insurance Market: Overview and impact of the liberalization and deregulation process", *Belgian Actuarial Bulletin*, 3, no. 1 (2003), 42.
232 Directives 88/357 (1988) O.J. L172/1 (non-life); 90/619 (1990) O.J. L330/50 (life).
233 Directives 92/49 (1992) O.J. L228/1 (non-life); 92/96 (1992) O.J. L360/1 (life).

state had to permit the operation of branches from other member states' firms, so long as the regulatory authority of the parent firm's domicile gave appropriate authorizations.[234]

Le Marché et Mutualité! Harmonization versus the *solidarity* of French Mutual Societies

These changes imposed by the SIM had to be taken into account of the distinct mix of insurance providers in France. Notably, in addition to conventional insurance companies, France had two further kinds of insurance providers: provident institutions and mutual societies. The former category involved non-profit entities managed by employee and employer representatives, governed under the *Social Security Act*, and dealing with health insurance beyond the coverage provided for by French social security.[235] The latter category of insurance providers, mutual societies, consisted of non-profit, civil societies which provided a variety of social welfare services for the betterment of members.[236] The origin of such *Mutuelles* had a storied social past, emanating from associations of urban artisans and wage-earners in Post-Revolutionary France which became concerned with mutual assistance in instances of sickness, disability, old age and death.[237] Put together, these two categories of French insurance providers were sizable players in France, as together they claimed some 52 million insured.[238]

With the third generation of Insurance Directives, in 1994 the French government, lead by conservative Prime Minister Balladur,[239] insisted upon the inclusion of provident institutions and mutual societies within SIM regulations to secure benefit from the commercial advantages of the "single passport", i.e. marketing insurance services in other member states without the need for local authorization.[240] This was accepted with the obligation that, when the insurance Directives were transposed, French law would require that provident institutions and mutual societies would separate their insurance business from their welfare operations (e.g. pharmacies, opticians, leisure and travel services), and ensure that all insurance undertakings were conducted in full accordance with the SIM's financial, solvency and liberalization rules. Yet, upon transposition of the

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234 Cynthia J. Campbell, Lawrence Goldberg and Anoop Rai, "The Impact of the European Union Insurance Directives on Insurance Company Stocks", *Journal of Risk and Insurance* 70, no. 1 (2003), 127.
235 Vernard, "The French Insurance Market: Background and Trends", 268-269.
236 Ibid, 267.
237 Michael David Sibalis, "The Mutual Aid Societies of Paris, 1789-1848", *French History* 3, no. 1 (1989), 1-3.
238 Vernard, "The French Insurance Market: Background and Trends", 267-268.
239 In co-habitation with the Socialist Presidency of Francois Mitterrand.
240 *Commission of the European Communities*, "Insurance: Infringement proceedings against France concerning mutual societies and the requirement of a marketing information sheet", Brussels, 28 July 2000, IP/00/876 <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/00/876&format=HTML&aged=1&language=EN&guiLanguage=en> (Accessed November 10, 2010).

Directives, the Balladur government only implemented the Directives vis-a-vis insurance companies and provident institutions, failing to adopt measures for mutual societies.[241]

Consequently, in January 1996, the Commission initiated infringement proceedings against France. During pre-litigation, the French government expressed its difficulty in adapting the *Mutual Societies Code* in accordance with the latest Directives. This initiated a series of exchanges between the Commission and France over the complexities of reforming the *Code*, a process that would endure over two years.[242] It appears the Commission pursued this compliance dialogue owing to France's stated plan to submit a package of legislation and regulations which would gradually reform the *Mutual Societies Code*. Yet, in 1998, the new Socialist government of Lionel Jospin, in co-habitation with the Conservative Presidency of Jacques Chirac, announced a different legislative course with a law that would not require French mutual societies to separate insurance from philanthropic operations, but merely distinguish between the aforesaid operations and thus ensure the prudential rules of Directives were followed.[243] This revised view appeared to reflect the public lobbying efforts of French mutual society federations[244] and also the later conclusions of a governmental inquiry (1999) led by Michel Rocard on the future of French mutual societies in light of the SIM.[245] The French government emphasized that the unique character of mutual societies should be respected in the application of the Directives: "The 'mutelles' were non-profit-making and were bound by the concept of solidarity. They operated as welfare institutions for the mutual support of the members, and as a result there could be no selection of the risks to be covered."[246] This change of approach seemed to follow the mutual associations' concerns that "the application of Directives 92/49 and 92/96 to their activities would call into question the specific nature of mutual societies."[247] However, this new policy was not accepted by the Commission, which insisted that the "specialization principle" had to be respected such that "commercial and philanthropic activities pursued by mutual societies should

[241] Judgment of the Court of 16 December 1999 in European Court of Justice Case C-239/98 *Commission v France* [1999] ECR I-08935, para 6-7.
[242] Judgment of the Court of 16 December 1999 in European Court of Justice Case C-239/98 *Commission v France* [1999] ECR I-08935, para 9-13.
[243] Judgment of the Court of 16 December 1999 in European Court of Justice Case C-239/98 *Commission v France* [1999] ECR I-08935, para 14.
[244] "Directives europeennes: Les mutelles se mobilisent pour sauvegarder leurs specificites", *La Tribune*, 5 June 1998, 6; Claire Bommelaer, "Protection Sociale: Lionel Jospin ouvre demain le congres de la Mutualite francaise; Les mutuelles a l'heure europeene", *Le Figaro*, 7 June 2000; "Le role des mutuelles est conforte par Jacques Chirac et Lionel Jospin", 13 June 2000, *La-Croix*, 3.
[245] "Une decision en partie impose par le droit europeen des assurances", *Le Monde*, 30 December 2000.
[246] Opinion of the Advocate General, delivered on 29 September 1999, Case C-239/98, *Commission of the European Communities v. French Republic*, para. 9.
[247] Judgment of the Court of 16 December 1999 in European Court of Justice Case C-239/98 *Commission v France* [1999] ECR I-08935, para. 21.

not be managed by the same legal entity."[248] Subsequently, in July of 1998, the Commission went forward with its infringement action against France.

The initial judgment by the Court, in December of 1999, had little difficulty in finding that France was in breach, owing to the fact that the French government did not contest non-transposition vis-à-vis mutual societies. Following this judgment, the Commission did not engage in extended dialogue with the French government, and quickly initiated penalty proceedings with a letter of formal notice and a reasoned opinion in the spring of 2000. In reply, the French government stated that a draft law "modernizing" the Mutual Societies Code was to be adopted by the French Council of Ministers by July of 2000, with the aim of introducing the draft law into the parliamentary programme for October 2000 to March 2001 and likely implementation not being prior to 2003.[249] The Commission asserted its readiness to proceed to court if "the French authorities did not respond quickly…or if their response is unsatisfactory."[250]

In July 2002, the Commission went forward with its penalty action to the ECJ, declaring that: "the texts communicated by the French authorities subsequent to the reply to the reasoned opinion still represent merely a very fragmented and unsatisfactory implementation of the judgment of 16 December 1999."[251] Further, the Commission asked for a penalty payment of 242 650 Euro per day owing to the severity and duration of the infringement. This final push of litigation appeared to reach the Commission's desired goal, as France subsequently adopted new legislation which fully transposed the Directives; leading to an application for withdrawal in November 2003 [252] and formal order of removal by the Court in February 2004.[253]

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[248] Judgment of the Court of 16 December 1999 in European Court of Justice Case C-239/98 *Commission v France* [1999] ECR I-08935, para. 18.
[249] *Commission of the European Communities*, "Insurance: Infringement proceedings against France concerning mutual societies and the requirement of a marketing information sheet", Brussels, 28 July 2000, IP/00/876 <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/00/876&format=HTML&aged=1&language=EN&guiLanguage=en> (November 10, 2010).
[250] Ibid.
[251] Action brought on 15 July 2002 in European Court of Justice Case C-261/02 *Commission v France* [2002] OJ C202/17.
[252] Withdrawal in ECJ case C-261/02 from 5 November 2003, JURM(2003)122, 2.
[253] Removal from the Register of the Case C-261/02 (2004/C94/86).

Case Notes

- **Problem**: The Third Generation of Insurance Directives became applied on a French insurance market characterized by non-profit mutual societies; which provided additional social welfare services for their members, mixing insurance and philanthropic activities. A significant portion of the French public held benefits with mutual societies and the latter fiercely opposed the legal and organizational separation of insurance and social welfare operations as required by the Directives.
- **Causes of infringement:** The French did not contest the alleged infringements. This seems a case of motivated delay due to policy misfit and political costs arising from the public resistance of the big mutual societies, aggravated in the context of a governmental 'cohabitation' with a socialist Prime Minister. While the conservative governments before had even promoted the Mutuelles' inclusion in the Single Insurance Market, the mixed government later argued (in vain) that mutual societies need only distinguish between their insurance and philanthropic business, as opposed to separate them. Only the impending fines made an end to this disagreement between the French government and the Commission over appropriate implementation measures.
- **Outcome**: Following the quick implementation of required legislative reforms in the last minute, the Commission withdrew its penalty application.

Compliance and Confidence: 'Mad Cow' Disease and French blockage of British Beef

(Case 13 reviewed by Gerda Falkner and Nikolas Rajkovic)

Litigation Basics

EU Law at Issue

- Commission Decision 98/692 (restart of import of British beef following the Mad Cow Crisis)

Transposition Deadline:	25.11.1998
First Proceedings (C-1/00)	
Letter of Formal Notice:	17.11.1999
Entrance into Registry:	04.01.2000
First Judgment:	13.12.2001
Second Proceedings (C-274/02)	
Letter of Formal Notice:	20.03.2002
Entrance in Court Registry	25.07.2002

The outbreak of Bovine Spongiform Encephalopathy (BSE), popularly known as 'Mad Cow' Disease, produced not just a food safety emergency but also an administrative crisis for the EU over how to properly assess and manage the risk of contagion. At the core of the problem was the unfolding nature of BSE and the *ad hoc* way in which scientists and officials had to learn about, and contain, the disease. Further, the concentration of the outbreak in the United Kingdom meant that appropriateness of containment measures became a key controversy between the UK government, the Commission and concerned member states. As time unfolded and more became known about BSE, and its potential spread, criticisms grew over the adequacy of UK and EU measures to contain the illness and ensure food safety. Ultimately, France's refusal to allow the re-import of British beef products, as required by Commission Decision 98/692, came to reflect this shaken confidence and contention over scientific assessment and the quality of safety implementation.

EC Law and Food Regulation

Historically speaking, food regulation was a confined area of EC law and policy. For instance, the Treaty of Rome dealt with food in terms of its free movement as a "good."[254] This was later emphasized in the landmark *Cassis de Dijon* case, where the ECJ instituted the principle of mutual recognition to ensure free circulation of goods produced in conformity with equivalent standards in other member states. The later adoption of the Single European Act and qualified majority voting further enabled the EC to adopt a number of harmonization measures on food standards, but with a focus on balancing the single market with culinary cultures.[255]

A number of food scares in the mid-1990s, however, would profoundly alter this approach on food in the EU. The most profound of these crises was the BSE outbreak in the United Kingdom;[256] which provoked a veterinary, health, trade and administrative crisis for the EU. Foremost, the BSE affair instigated a re-categorization of food in EU law beyond the concept of trade to encompass safety and public health as well. Yet, this expanded and heightened treatment exposed the Commission to burgeoning problems of scientific assessment and conflicting national expectations over risk management; something which France's anxieties over British beef controls soon made apparent.

BSE: The 'Mad Cow' Outbreak and the EU's initial Regulatory Response

[254] Emilie H. Leibovitch, "Food Safety Regulation in the European Union: Toward an Unavoidable Centralization of Regulatory Powers", *Texas International Law Journal* 43, no. 3 (2008), 432.
[255] Ibid., 433.
[256] Another mid-90s food crisis in the EU was the dioxin contamination in Belgium.

What has become known as the 'Mad Cow' Crisis goes back to what British veterinarians discovered on an English cattle farm between 1984 and 1985. Two cows in particular developed arched backs and profound losses of coordination. Later testing of these cows revealed that a new form of degenerative brain disorder (i.e. BSE) had emerged, previously thought to occur only in sheep. It soon became established that this sheep variant had in fact made a "species jump" to cows. In the years following that initial discovery in Sussex, approximately 186 559 total cases have been reported throughout the EU, with the vast majority concentrated in the UK.[257]

The EU's initial response to the BSE outbreak was Decision 89/469/EEC, which imposed an export ban on all cattle born before 18 July 1988 and offspring of confirmed or suspected livestock.[258] This was amended with Decision 90/59/EEC which revised the ban to calves under six months and calves which originated from cattle confirmed or suspected to have BSE.[259] Starting in May 1990, France, Austria,[260] West Germany[261] and Italy all imposed import bans on British beef,[262] which was followed in June with an EU-wide restriction on bone-in beef exports to only those holdings from which there had been no confirmed BSE cases in the previous two years.[263] In 1994, this stipulation was expanded to six years.[264] Finally, Decision 92/290/EEC required that all cases of BSE were to be reported to the European Commission.[265]

The Human Transmission Threat and the Revelations of Regulatory Lapses

The situation began to deteriorate further, however, upon accumulation of scientific evidence which revealed that BSE could pass to not only mice, cats,[266] pigs and deer, but also humans. Particular concern was directed at whether BSE was related to, or could cause, a human form of brain degeneration known as Creutzfeld-Jakob Disease. The scientific tipping point came in

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[257] Keith Vincent, "'Made Cows' and Eurocrats—Community Responses to the BSE Crisis", *European Law Journal* 10, no. 5 (2004), 501.
[258] European Commission, Commission Decision of July 28 1989 concerning certain protections measures relating to bovine spongiform encephalopathy in the United Kingdom", <http://ec.europa.eu/food/food/biosafety/tse_bse/docs/d89-469.pdf> (Accessed February 7, 2011).
[259] European Commission, Commission Decision of 7 February 1990 amending Decision 89/469 concerning certain protection measures relating to bovine spongiform encephalopathy in the United Kingdom", <http://ec.europa.eu/food/food/biosafety/tse_bse/docs/d90-59.pdf> (Accessed February 7, 2011).
[260] Paul Meyers, "Austria bans British beef", *The Guardian*, 30 May 1990.
[261] David Usborne, "Beef Ultimatum defied by France and Germany", *The Independent* (London), 5 June 1990.
[262] Michael Hornsby and Ian Murray, "EC sets 'beef war' deadline", *The Times* (London), 2 June 1990.
[263] Vincent, "'Made Cows' and Eurocrats", 502.
[264] European Commission, Commission Decision of 27 July 1994 concerning certain protection measures relating to bovine spongiform encephalopathy and repealing Decisions 89/469 and 90/200", <http://ec.europa.eu/food/food/biosafety/tse_bse/docs/d94-474.pdf> (Accessed February 7, 2011).
[265] European Commission, "Commission Decision of 14 May 1992 concerning certain protection measures relating to bovine embryos in respect of bovine spongiform encephalopathy (BSE) in the United Kingdom", < http://ec.europa.eu/food/food/biosafety/tse_bse/docs/d92-290.pdf> (Accessed February 7, 2011).
[266] "BSE cat dies", *The Guardian* (London), 28 July 1990.

1995/1996, where, first, the death of a farmer Stephen Churchill, in May 1995, was revealed to have resulted from a new variant of Creutzfeld-Jakob Disease.[267] Second, in March 1996, the UK government announced publicly its findings on a potential link between BSE and this newly discovered variant of Creutzfeld-Jakob Disease.[268]

The policy implications of this announcement were urgent and decisive. Within a week, the European Commission adopted Decision 96/239/EC imposing an emergency ban on UK bovine exports.[269] At the Florence European Council of June 1996 it was agreed that the ban would be lifted subject to implementation measures.[270] However, those conditions were only finalized two years later with Commission Decision 98/692, which authorized UK exports for bovine animals born after 1 August 1996 and traced under a newly devised Date-Based Export Scheme.[271]

However, in that same period, regulatory matters were further complicated following the intervention of the European Parliament (EP) and the European Court of Auditors (ECA). In particular, in 1996, the EP empowered a temporary Committee of Inquiry on BSE (the Committee), which tabled its report in February 1997.[272] The Committee's findings were critical of both the UK government's[273] and the EU's handling of scientific research and containment measures.[274] The most damning finding was that the UK had pressured the Commission into not including "anything related to BSE in its general inspections of slaughterhouses."[275] Further, that the UK had failed to implement legislative measures and necessary checks against BSE. This was followed by the Committee's assertion that the EU had downplayed the BSE problem in favour of the market, and that the Commission's important Scientific Advisory Committee (SAC) had

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[267] Vincent, "'Made Cows' and Eurocrats", 503.
[268] Deborah Hargreaves, "Mad Cow Disease-Farmers fear that consumers will panic after government admits probable BSE link", *Financial Times*, 21 March 1996.
[269] European Commission, "Commission Decision of 27 March 1996 on emergency measures to protect against bovine spongiform encephalopathy", <http://ec.europa.eu/food/food/biosafety/tse_bse/docs/d96-239.pdf> (Accessed February 7, 2011).
[270] Robert Peston and Neil Buckley, "EU may lift exports embargo by November: Cow cull to cost Pounds 2bn", *Financial Times*, 25 June 1996; Lionel Barber and George Parker, "EU spells stark terms for lifting of beef ban", *Financial Times*, 18 June 1996.
[271] European Commission, "Commission Decision of 25 November 1998 amending Decision 98/256 as regards certain emergency measures to protect against bovine spongiform encephalopathy", <http://ec.europa.eu/food/food/biosafety/tse_bse/docs/d98-692.pdf> (Accessed February 7, 2011).
[272] Report on alleged contraventions or maladministration in the implementation of Community law in relation to BSE, without prejudice to the jurisdiction of the Community and national courts, Temporary committee of inquiry into BSE, Rapporteur, *Mr Manuel Medina Ortega*, 18 July 1996 <http://www.europarl.europa.eu/conferences/19981130/bse/a4002097_en.htm?textMode=on> (Accessed February 8, 2011).
[273] Neil Buckley, "Inquiry into BSE wants UK taken to court", *Financial Times*, 7 February 1997.
[274] Neil Buckley, "MEPs put Commission under notice: Brussels told to shake up its food and health policies or face the sack", *Financial Times*, 20 February 1997.
[275] Vincent, "'Made Cows' and Eurocrats", 506.

suffered from potential bias. These criticisms were bolstered further by an ECA report in 1998, which emphasized "...a systematic failure in the control of the schemes undertaken by Member States to deal with BSE...."[276]

Uncertain Science and French Reluctance

Such revelations did not contribute to an assured atmosphere[277] when British beef exports were scheduled to resume on 1 August 1999. Confidence with EU institutions and between member states was likely shaken,[278] and one could appreciate how this fed doubts[279] over EU rules permitting British beef imports under Decision 98/692. The French government proved to be the most resistant to re-open British bovine exports, and this became apparent in the fall of 1999.[280] The French government held that re-opening of the country's market for British beef exports required French draft legislation to be first assessed by the French Food Safety Agency (*Agence francaise de securite sanitaire des aliments*) (AFSSA).[281] In September 1999, the AFSSA expressed its opinion and consequent doubt over whether the conditions of Data-Base Export Scheme (DBES) would totally overcome the risk of infected beef exports from the UK.[282] The French government sent the AFSSA opinion to the Commission,[283] requesting that the newly constituted Scientific Steering Committee (SSC) examine it.[284] In its assessment, the SSC found that the DBES system controlled the risk of infected UK exports to a level "at least comparable to that in the other Member States", and thus no grounds existed for a revision of the DBES export rules.[285] Yet, the findings of the SSC proved unconvincing to France, and the ban on British Beef was retained. This prompted a series of conciliation meetings between French, UK and Commission officials in early November 1999, which were ultimately unsuccessful.[286]

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276 Ibid., 509.
277 Steve Connor, "Europe's hidden mad cow scandal", *The Sunday Times*, 30 June 1996; Michela Wrong, "Warning on toll of BSE crisis", *Financial Times*, 18 December 1999.
278 Caroline Southey, "EU nations attacked over BSE controls: Brussels condemns poor safeguards on infected beef", *Financial Times*, 8 March 1997.
279 "Germany joins France in refusing to lift ban on beef", *Financial Times*, 9 October 1999.
280 Michael Smith and Michela Wrong, "Brussels delays action over French beef ban", *Financial Times*, 15 October 1999.
281 Karolina Szawlowska, "Risk Assessment in the European Food Safety Regulation: Who is to Decide Whose Science is Better? Commission v. France and Beyond..." *German Law Journal*, 5, no. 10 (2004), 1265.
282 Ibid., 1266.
283 Judgment of the Court of 13 December 2001 in European Court of Justice Case C-1/00 *Commission v France* [2001] ECR I-09989, para. 20.
284 Michael Smith, "Scientific Advisers Vital meeting to be hold today and tomorrow", *Financial Times,* 28 October 1999.
285 Szawlowska, "Risk Assessment in the European Food Safety Regulation", 1266.
286 Judgment of the Court of 13 December 2001 in European Court of Justice Case C-1/00 *Commission v France* [2001] ECR I-09989, para. 23 and 25.

Consequently, on 17 November 1999, the Commission sent the French government a letter of formal notice under Article 226, and requested a response within 15 days.[287] This gave stimulus to a protocol of understanding, on November 24, between France, the UK and the Commission where, in exchange for clarifications on UK tracing and control measures, the French government proclaimed its satisfaction.[288] However, the French government insisted that the protocol required AFSSA approval;[289] and this was subsequently denied several days later by that French safety organ.[290] This precipitated a press release from the French Prime Minister's office on December 8 declaring France's inability to lift the ban on British beef in the absence of expanded tests and compulsory labelling of UK bovine products.[291]

The Commission delivered reasoned opinions in mid-December. The French government replied, on December 29, that domestic law required the satisfaction of the AFSSA in order for the British beef ban to be lifted.[292] Further, the French government criticized the lack of weight given to dissenting scientific opinions and that, by implication, the precautionary principle had been infringed. French officials also noted that guarantees under the earlier protocol of understanding were ineffective due to deficiencies noted in the tracing of the UK bovine products.[293]

Thus, it came as no surprise that the Commission brought infringement procedures against France in January 2000. The ECJ ruled in December 2001, finding the French government in breach of its obligations to allow the marketing of UK bovine products. The Court emphasized settled case law that a member state could not justify an infringement based upon provisions, practices or circumstances of its internal legal system.[294] Moreover, the Court found the French government to have been fully informed of tracing issues and potential remedies in adequate time, precluding France from contesting the validity and legality of Community law regarding bovine exports.

However, the order of the ECJ did not prompt a lifting of the UK beef ban. Rather, the Commission's post-decision request on French implementing measures was met with a French reply that measures of consultation were in course both within the country and with British

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[287] Ibid., para. 26.
[288] Ibid., para. 27.
[289] Ibid., para. 30.
[290] David Owen, "Food safety body fails to direct French to decision on beef ban", *Financial Times*, 7 December 1999.
[291] Judgment of the Court of 13 December 2001 in European Court of Justice Case C-1/00 *Commission v France* [2001] ECR I-09989, para. 30.
[292] Ibid., para. 37.
[293] Ibid., para. 38-41.
[294] Ibid., para. 130.

health officials.[295] In March 2002, the Commission delivered its letter of formal notice advising that despite assurances of internal and external consultations, the French government had not advised of any concrete measures to implement the order and lift the ban.[296] The letter of notice was followed in June 2002 with a reasoned opinion, which cautioned the French government that the failure to comply with the ECJ's order would result in penalty proceedings.[297] Ultimately, the Commission did register penalty proceedings with the ECJ in July 2002, requesting that France pay 158 250 Euros for each day of non-compliance.[298]

The timing of this second referral came at nearly the same time a Conservative government came to power in France, in June 2002, led by Prime Minister Jean-Pierre Raffarin. This change in government became significant owing to the previous Socialist government's concern that the lifting of the ban would aggravate consumer mistrust in beef and thus damage an already injured French beef industry.[299] In September 2002, in any case, AFSSA advised the French government that the ban could be lifted since the incidence of BSE in the UK had diminished sharply and there was a "very weak residual risk (of contamination)."[300] Ten days later, the French government announced the lifting of the ban subject to additional measures that would ensure the origin of all beef is identified not merely at butchers and supermarkets but also in school canteens, restaurants and public eateries.[301] Further, France's Agriculture Minister, Herve Gaymard, announced efforts would be taken to pressure the European Commission to order that BSE tests be conducted across the EU on all beef cattle aged 24 months.[302] Notwithstanding, with France's removal of the ban on British beef, on 5 November 2002 the Commission acted to withdraw its action for penalty proceedings from the ECJ's register.[303]

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[295] Letter of Roy Norton, First Secretary of the United Kingdom Permanent Representation to the European Union, to Robert Coleman, European Commission, 15 April 2002.
[296] Letter of David Byrne, European Commission, to His Excellency Hubert Vedrine, Foreign Minister of the French Republic, 20 March 2002.
[297] Michael Mann, "France facing daily fines over British beef ban", *Financial Times*, 27 June 2002.
[298] Action brought on 25 July 2002 in European Court of Justice Case C-274/02 *Commission v France* [2002] OJ C233/16.
[299] Paul Webster and Andrew Osborn, "France accepts UK beef is safe: Farmers' hopes are raised that ban will be lifted", *The Guardian* 21 September 2002, 13.
[300] Hugh Schofield, "France Lifts British beef ban as mad cow fears ease", *Agence France Presse* 2 October 2002.
[301] Ibid.
[302] Ibid.
[303] Removal from the register of Case C-274/02 by Order of 5 December 2002 *Commission v France*.

Case Notes

- **Problem**: French officials and food safety scientists disagreed with their UK and EU counterparts on the adequacy of measures to guard against the export of infected UK bovine products.
- **Causes of Infringement:** This is a case of motivated non-compliance which produced a protectionist effect until the BSE crisis was essentially over. The French government held that the lifting of the ban on UK bovine products required a positive opinion from the French food safety agency, the AFSSA. This placed French law in conflict with the relevant Commission Decision. The human and animal threat constituted by the BSE, combined with considerable unknowns on its possible spread, created considerable economic and political risk for French officials in decisions over whether to allow the import of UK bovine products.
- **Outcome**: Following penalty proceedings, the French government took steps, with relative vigour, to remove its ban of British beef. Thus, on 5 November 2002, the Commission had the action withdrawn from the ECJ's register.

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)

Litigation Basics

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.[304] 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 maintaining viability of fishing communities.[305] 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,[306] 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.[307] Further, France has long been unhindered in exercising protectionism in favour of its fisheries as illustrated by how fish protection measures became suspended in

[304] 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.
[305] Simon Mardle, Sean Pascoe, Jean Boncoeur, Bertrand Le Gallic, Juan J. Garcia-Hoyo, Ines Herroro, 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.
[306] EEC Treaty, Artide 43.
[307] Paul Treuthardt, "French Navy Gunboats Fire on Spanish Fisherman, Wounding Nine", *Associated Press*, 8 March 1984.

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.[308]

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.[309]

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.[310] 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 strict French standards; and a failure of French officials to impose sanctions despite widespread non-compliance.[311] 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;[312] the preferential treatment of French fishermen over other member states;[313] a "silent agreement between industry and authorities to accept landings of hake measuring 24cm instead of the legal size of 27cm;"[314] and "verbal instructions" permitting the auction of fish below the minimum legal size.[315]

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[308] 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.
[309] 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.
[310] 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.
[311] 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.
[312] 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.
[313] 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.
[314] 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.
[315] "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

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.[316]

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.[317] This was followed by a number of inspections of French ports by Commission officials in ensuing years which noted an improvement, but still found that controls were inadequate in several areas.[318] 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.[319]

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.[320] The response of French officials in August 2000 asserted that since the last inspections French fisheries control had "undergone significant change."[321] This, however, was not confirmed by Commission inspections conducted in 2001 and in 2003. The Commission opened penalty proceedings.

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appliquée, il s' agit des mesures nationales relatives aux tailles des poissons, qui sont moins strictes que la réglementation communautaire, œ qui n' est pas conforme à l' artide 1er du règlement n 2057/82". (Ibid.)

316 Ibid.

317 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.

318 Ibid., para 13.

319 Ibid., para. 14.

320 Ibid, para. 17.

321 Ibid., para 19.

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.[322] 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,[323] as intervenors, gave submissions on whether the ECJ had the discretion to order: (1) the 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.[324]

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 Spain[325] 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.[326] 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

[322] 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.
[323] 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.
[324] 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.
[325] See Case C-387/97 *Commission v. Greece* [2000] ECR I-5047 and Case C-287/01 *Commission v. Spain* [2003] ECR I-14141.
[326] Ian Kilbey, "The Interpretation of Artide 260 TFEU (ex 228 EC)", *European Law Review* 35, no. 3 (2010), 382.

breach of the judgment…French fishermen had really changed the habits of a lifetime…."[327] It should be also noted that France initiated a counter-action[328] before the Court of First Instance in 2006 (which it lost[329]), questioning whether the Commission possessed the full and proper competence to determine whether or when an infringement had ceased.

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.

[327] Ibid, 384.
[328] Ibid., 382.
[329] PRESS RELEASE No 113/11, http://www.eulaws.eu/?p=1021, accessed 27. 10. 2013.

Overtime: Italy's tribulations in transposing the Working Time Directive

(Case 15 reviewed by Gerda Falkner and Nikolas Rajkovic)

Litigation Basics	
EU Law at Issue	
● Directive 93/104 (Working Time)	
Transposition Deadline:	23.11.1996
First Proceedings (C-386/98)	
● Letter of Formal Notice:	30.05.1997
● Entrance into Registry:	26.10.1998
● First Judgment:	09.03.2000
Second Proceedings (C-57/03)	
● Letter of Formal Notice:	09.02.2001
● Entrance in Court Registry:	12.02.2003
● Withdrawal:	14.07.2003

The regulation of working hours can be a delicate issue involving a number of dimensions: economic, social and political. Further, the way in which work is scheduled has a profound impact on the everyday living arrangements of individuals and families. Thus, the EU's attempt at harmonizing working time standards in 1993 was done with the awareness that change of this order could require diverse approaches between member states.[330] In particular, Directive 93/104/EC gave member states the option of either adopting laws or giving industrial groups the task of implementing needed measures. In the case of Italy, owing to the culture of industrial relations in the country, the government attempted the latter option. However, the length of time and tribulations experienced with this approach pushed the Italian government far beyond the deadline required by the Directive. Thus, faced with penalty proceedings, the government resorted to decree in order to ultimately deliver compliance.

[330] Catherine Barnard, Simon Deakin and Richard Hobbs, "Opting Out of the 48-hour Week: Employer Necessity or Individual Choice? An Empirical Study of the Operation of Artide 18(1)(b) of the Working Time Directive in the UK", *Industrial Law Journal 32*, no. 4 (December 2003), 223.

The Working Time Directive and the Question of Working Limits

In November 1993, Council Directive 93/104/EC was enacted with the purpose of establishing minimum rules on working time across the EU ("Working Time Directive").[331] The Directive required member states to ensure basic standards regarding a number of work conditions such as working time, rest periods, and leaves, as well as provide distinct rules for specialized labour in areas like doctor traineeships, offshore work and urban passenger transport.[332] Under the Directive, member states had until November 1996 to implement the directive by way of either legal acts or industrial agreements.[333]

The invocation of the Working Time Directive provoked considerable debate within Italy over how to implement EU provisions.[334] A key issue was the maximum level of normal working time. The weekly limit in Italy was already set at 40 hours per week. However, contention existed over whether a maximum daily level was required, because both Italian law and the Directive did not impose an explicit upper limit.[335] The subsequent debate over daily and weekly limits slowed transposition of the Working Time Directive, and permitted only a partial enactment of Italian laws to fulfil the Directive.[336]

Italy's Laboured Path toward Implementation

In 1997, a breakthrough seemed imminent following an industrial agreement reached between Italy's federations of labour unions and employers associations on the transposition of the Directive.[337] However, the agreement became undone in 1998 following the introduction of a parliamentary bill by the then centre-left and minority government of Romano Prodi, which attempted to lower the legal working week to 35 hours. The bill came as a surprise to both labour and employer representatives and in fact was the product of a deal with the Communist Party

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331 See Gerda Falkner, Oliver Treib, Miriam Hartlapp and Simone Lieber, "The Working Time Directive: European standards taken hostage by domestic politics", in Gerda Falkner, Oliver Treib, Miriam Hartlapp and Simone Lieber *Complying with Europe: EU Harmonisation and Soft Law in the Member States* (Cambridge: Cambridge University Press, 2005), 99-103.

332 *European Commission*, "Working Time Directive", http://ec.europa.eu/social/main.jsp?catId=706&langId=en&intPageId=205 (Accessed March 29, 2011).

333 *Council of the European Communities*, Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time, O.J. L 307, 13/12/1993, 18 – 0024 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0104:EN:HTML> (Accessed March 29, 2011).

334 "Government transposes EU working time Directive," *Eiroline: European Industrial Relations Observatory On-Line*, http://www.eurofound.europa.eu/eiro/2003/05/feature/it0305305f.htm, (Accessed March 29, 2011).

335 Ibid.

336 Opinion of Advocate General Jacobs delivered on 16 November 1999 in European Court of Justice Case C-386/98 *Commission v Italy* [2000] ECR I-01277, para 3.

337 "Government transposes EU working time Directive," *Eiroline: European Industrial Relations Observatory On-Line*, http://www.eurofound.europa.eu/eiro/2003/05/feature/it0305305f.htm, (Accessed March 29, 2011).

(*Rifondazione Communista*) to ensure the survival of Prodi's government.[338] However, the draft law only prompted heated dispute between social partners and political parties over whether employment could be increased through a reduction in legal working time.[339] The consequence was a crisis that led to the failure of the government's bill, a further postponement in the transposition of the Directive and the collapse soon thereafter of Prodi's centre-left coalition in October 1998.[340]

This failure to transpose the Directive did not go unnoticed by the Commission, which already in May 1997 delivered a formal letter of notice to the Italian government.[341] Further, following the government's continued silence on implementing measures, a reasoned opinion was delivered in June 1998.[342] The entry into pre-litigation prompted a number of meetings between Commission and Italian officials regarding progress on full transposition. However, the government's failure to supply any notice of pending legislation or regulation to implement the Directive led the Commission to pursue an infringement application before the ECJ.

Before the Court, the proceedings became noteworthy owing to the position taken by the Italian government. Italy did not deny its failure to transpose the Directive on time, but assured the Court that complete transposition was currently underway.[343] This admission made it easy for the ECJ to rule, in March 2000, that Italy was in non-compliance and had been in breach of the Directive. However, the adverse ruling had a limited effect on prompting Italian social partners and political parties into a consensus over working time and consequently an implementation of the Directive. The continued stagnation led the Commission to pursue penalty proceedings against Italy in February 2003, requesting a daily penalty payment of 238 950 Euro.[344] It appears that these prospects of a penalty gave Italy's new centre-right government the public justification to forego further consultation with social partners and pursue instead top-down transposition by decree. The result was the passing by Italy's cabinet in April 2003 of legislative decree 66/2003 which completed transposition of the Working Time Directive in Italy to the satisfaction of the Commission.[345]

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338 Gerda Falkner *et al.*, ""The Working Time Directive: European standards taken hostage by domestic politics", 108-109.
339 Ibid.
340 The failure of the Prodi government led to a reshuffling of the centre-left coalition. The new centre-left government appointed Massimo D'Alema as prime minister and exduded the Communist Party. See Gerda Falkner *et al.*, ""The Working Time Directive: European standards taken hostage by domestic politics", 109.
341 Judgment of the Court of 9 March 2000 in European Court of Justice Case C-386/98 *Commission v Italy* [2000] ECR I-01277, para. 4.
342 Ibid., para. 6.
343 Ibid., para. 11.
344 Action brought on 12 February 2003 in European Court of Justice Case C-57/03 *Commission v Italy* [2003] OJ C83/11.
345 Withdrawal in ECJ Case C-57/03 from 14 July 2003, JUR(2003)60345.

Case Notes

- **Problem**: The Working Time Directive gave member states the option of transposing either via social partners or via standard legislative procedures. The Italian government chose the former route and attempted to transpose via collective agreement. However, controversies over weekly and daily working limits made transposition contested and delayed.
- **Causes of Infringement**: During second proceedings, this was a case of *de facto* structural blockage since the centre-left government wanted to, in effect, gold-plate transposition of the Directive with the introduction of a parliamentary bill which mandated a 35-hour work week. This insistence to go beyond the Directive's minimum standard of 40 hours provoked deadlock in parliament, and between social partners in their efforts to arrive at transposition via collective agreement.
- **Outcome**: The arrival of the centre-right government in Italy and possibly the impending penalty led to a change in approach and transposition of the Directive via decree. Despite the lateness of transposition, the Commission demonstrated leniency for Italy's internal circumstances and withdrew the case; which has not been a consistent practice by the Commission in cases of late transposition.

A Question of Priorities?
Ireland's Delayed Compliance with the Berne Convention

(Case 16 reviewed by Gerda Falkner and Nikolas Rajkovic)

Litigation Basics

EU Law at Issue

- EC Treaty, Article 300(7) in conjunction with Article 5 of Protocol 28 of the European Economic Area Agreement (Binding nature of International Agreements)
- Berne Convention (Paris Act of 24 July 1971) for the Protection of Literary and Artistic Works.

Accession or Ratification Deadline: 01.01.1995

First Proceedings (C-13/00)

- Letter of Formal Notice: 15.04.1998
- Entrance into Registry: 14.01.2000
- First Judgment: 19.03.2002

Second Proceedings (C-165/04)

- Letter of Formal Notice: 16.10.2002
- Entrance in Court Registry: 01.04.2004
- Withdrawal: 20.12.2004

When does an agreement in international law become a matter of concern for EU law? Further, how should member states treat their obligations under international agreements? How does EU membership affect international obligations? These questions came to the fore with respect to Ireland's delayed adherence to the Berne Convention (Paris Act of 24 July 1971) for the Protection of Literary and Artistic Works (Berne Convention).[346] Pursuant to the Agreement on the European Economic Area, signed in 1992 between EU member states and the states of the European Free Trade Association, all member states became obligated to ascend to the Berne

[346] *Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886,* completed at PARIS on May 4, 1896, revised at BERLIN on November 13, 1908, completed at BERNE on March 20, 1914, revised at ROME on June 2, 1928, at BRUSSELS on June 26, 1948, at STOCKHOLM on July 14, 1967, and at PARIS on July 24, 1971, and amended on September 28, 1979 <http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html> (Accessed April 8, 2011).

Convention by 1 January 1995.[347] Ireland's failure to do so in time led to infringement proceedings by the Commission for a resultant breach of EU law. The ensuing proceedings before the ECJ raised *inter alia* the question of how seriously and swiftly member states should act to implement obligations under international law.

Copyright, the Berne Convention and its Significance for EU Law

In Ireland, copyright and intellectual property protection is alleged to have suffered from a history of legislative neglect and some miscomprehension.[348] A notable example is how the 1963 Copyright Act only became superseded in 2001 by the newer Copyright and Related Rights Act. The 1963 legislation extended a rudimentary framework that permitted "someone to breach copyright" and deal with the consequence of having "to pay for it."[349] Further, Ireland became considerably delayed with the ratification of a number of international treaties on copyright, such as: "the Berne Convention, the World Trade Organisation 1994 Agreement on TRIPS – Trade Related Intellectual Property Settlement; a GATT Treaty; two World Intellectual Property Organisations treaties, and three outstanding EU directives on legislating for an information society."[350]

The subject matter of the Berne Convention is broadly stated to be the protection of literary and artistic works. Yet, this understates the commercial ambit of the Convention which deals with such aspects as "the legal protection of computer programs, rental and lending rights within the area of intellectual property, the protection of copyright applicable to satellite broadcasting and cable retransmission, [and] the legal protection of databases."[351] Notably, these areas fall under commercial and intellectual property rules within EU law. Thus, Ireland's failure to accede and comply with the Berne Convention not only breached international law but also EU law. This latter prospect became confirmed when the Commission expressed its concern over Ireland's

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[347] *Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation*, OJ L1 of 03/01/1994, p. 3.
<http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=1> (Accessed April 8, 2011).
[348] Mic Moroney, "Who owns your brainchild", *The Irish Times*, 21 March 2000, 10.
[349] Ibid.
[350] Ibid.
[351] Judgment of the Court of 19 March 2002 in European Court of Justice Case C-13/00 *Commission v Ireland* [2002] ECR I-02943, para 17.

non-compliance with the Berne Convention, underlined with the Commission's delivery of a letter of formal notice in April 1998[352] and then a reasoned opinion in December 1998.[353]

At Court, the ECJ received submissions from the Commission, Ireland and also the UK. Specifically, the UK sought intervenor status to argue that Ireland's breach of the Berne Convention was a matter of international and not EU law, and thus beyond the jurisdiction of the Court.[354] However, this plea of inadmissibility was not shared by Ireland's lawyers, who had asked in the alternative for a suspension of the proceedings until the requisite legislation could be amended; conceding that Ireland had in fact failed to comply with international and EU law: "Ireland accepts that it has failed to fulfill an obligation and confines itself to requesting the Court to suspend the case until its legislation has been amended accordingly."[355]

Citing earlier case law, the Court ruled that so-called "mixed agreements" involving the Community, its member states and non-member countries, held the same status in EU law as purely "Community Agreements."[356] Consequently, the Court held, in March 2002, that Ireland's failure to adhere to the Berne Convention in time was a breach of the EC Treaty.[357]

The Lack of Priority and the slippery slope to Penalty Proceedings

Following the judgment, Ireland's response appeared to suffer from avoidable delays. For instance, by January 2001, the Copyright and Related Rights Act 2000, No. 28 of 2000 (the Act) entered into force.[358] As noted earlier, this Act significantly enhanced the prior 1963 law; and brought Irish law into substantive compliance with the Berne Convention[359] as well as a number of other intellectual property treaties like the 1994 Trade Related Intellectual Property Settlement (TRIPS).[360] Already by the time of the first judgment, what remained was Ireland's formal adherence to the Berne Convention, and here it seems a combination of policy indolence and

[352] Judgment of the Court of 19 March 2002 in European Court of Justice Case C-13/00 *Commission v Ireland* [2002] ECR I-02943, para 15.
[353] Judgment of the Court of 19 March 2002 in European Court of Justice Case C-13/00 *Commission v Ireland* [2002] ECR I-02943, para 10.
[354] Judgment of the Court of 19 March 2002 in European Court of Justice Case C-13/00 *Commission v Ireland* [2002] ECR I-02943, para 4.
[355] Ibid.
[356] Ibid., para. 14.
[357] Ibid., para. 23.
[358] Opinion of Advocate General Mischo delivered on 27 November 2001 in European Court of Justice Case C-13/00 *Commission v Ireland* [2001] ECR I-02943, para 5.
[359] Submissions by Deputy Michael Ahern, Minister of State at the Department of Enterprise, Trade and Employment before the Select Committee on Enterprise and Small Business Debate, *Houses of the Oireachtas (Irish Parliament)*, 30 November 2004 < http://debates.oireachtas.ie/BUS/2004/11/30/00004.asp >(Accessed April 8, 2011).
[360] Moroney, "Who owns your brainchild", 10.

technical complication forestalled case closure. Foremost, the substantive achievements of the Act appeared to falsely satisfy the Irish government, as Irish Minister Michael Ahern explains:

> "In 2000, the European Commission initiated a case against Ireland in the European Court of Justice, alleging that Ireland was in breach of its obligations under the economic area agreement, as a result of its failure to adhere to the Paris Act of the Berne Convention. Following the commencement of the copyright and related Acts, there was full substantive compliance with the Paris Act. Completing the formality of ratification or accession was not seen as a priority. That is why the Government did not move at the time. We are now in full adherence with the Act."[361]

Second, technical difficulties emerged regarding the tracking of records which established Ireland's formal relationship to the Paris Act; a matter that determined whether Ireland had to ratify or accede to the Convention.

The net result was the Commission's dissatisfaction with Irish measures to fulfill the ECJ's initial judgment. The Commission required formal accession to the Berne Convention and would not be contented that Irish law was in substantive compliance. Thus, in October 2002, the Irish government received its second letter of formal notice,[362] followed by a reasoned opinion in July 2003.[363] In April 2004, the Commission filed a second referral against Ireland with the ECJ, requesting a daily penalty payment of 3 600 Euro. As attested to by Minister Ahern, it seems the "threat" of fines from the second referral action pushed the Irish government into full compliance: "The Commission's actions in this matter have placed Ireland under threat of the imposition of penalties should we fail to rectify this. [...] I am glad to say that these difficulties have now been resolved and the Government is anxious to see the State accede to the Paris Act as soon as possible.[364]

In March 2005, the Commission withdrew its application for penalty proceedings after receipt of confirmation that Ireland had completed its accession under the Berne Convention: "By fax dated 2 December 2004, the Irish authorities communicated to the Commission a copy of a letter from the World Intellectual Property Organization attesting to the receipt by it, on 2 December, of Ireland's instrument of accession to the Convention."[365]

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361 Ibid.
362 Letter of formal notice, Infringement No 1997/2047 from Sylvain Bisarre, European Commission, to Brian Cowen TD, Minister of Foreign Affairs of Ireland, 16 October 2002.
363 Reasoned Opinion, Infringement No 1997/2047 from Frits Bolkesteain, European Commission, to the Permanent Representation of Ireland to the European Union, 11 July 2003.
364 Ibid.
365 Withdrawal by the Commission in ECJ Case C-165/04, JURM(2004)183 from 20 December 2004, para. 2

Case Notes

- **Problem**: Pursuant to the Agreement on the European Economic Area, Ireland became obligated to ascend to the Berne Convention by 1 January 1995. Its failure to do so in time led to infringement proceedings by the Commission for a resultant breach of EU law.
- **Causes of Infringement**: The Irish government did not see that adherence to and with the Berne Convention was a timely priority. It held that the substantive compliance of Irish laws with the Berne Convention was satisfactory for compliance, and was in no hurry to formally accede to the Convention. Further delay was caused by an archives problem to determine Ireland's diplomatic history with Convention.
- **Outcome**: Upon Ireland's accession to the Berne Convention, the Commission withdrew its application for penalty proceedings.

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)

Litigation Basics

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.[366] However, what constitutes proper enactment of non-discrimination continues to stoke

[366] Richard Plender, "Equality and Non-Discrimination in the Law of European Union", *Pace International Law Review* 7, no. 1 (1995), 57.

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.

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.[367] 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.[368] 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.[369]

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.[370] 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.[371] This prompted the intervention of

[367] Ian Kilbey, "Case Comment: *Commission v Italy*—Case C-119/04", *Liverpool Law Review* 29, no. 3 (2008), 336.
[368] Ibid.
[369] 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.
[370] 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.
[371] 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.

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.[372]

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.[373] Second, it was argued, the 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.[374] 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.[375] 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

[372] 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.
[373] 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.
[374] 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.
[375] 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.

ruling.[376] These measures did not satisfy the Commission, and in April 2003 a reasoned opinion was submitted to the Italian government.[377] 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."[378]

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."[379]

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[376] 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.
[377] 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.
[378] 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.
[379] 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.

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.[380] 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."[381] 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.[382] Thus, the ECJ held that Italy was only in breach in so far as its adopted Decree-Law came after the deadline set by the reasoned opinion, and no infringement was evident in the Decree-law itself.[383]

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.

[380] 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.
[381] 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.
[382] 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.
[383] 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.

A "Common" Standard? EU Harmonization meets French Product Liability

(Case 18 reviewed by Gerda Falkner and Nikolas Rajkovic)

Litigation Basics	
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,"[384] 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

[384] 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.

between member states, and the need for European regulation to harmonize this area. The response was Directive 85/374/ECC which established a common scheme of strict product liability across member states.[385] 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.[386] 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.[387] 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.[388] 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.[389]

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

[385] Alberto Cavaliere, "Product Liability in the European Union: Compensation and Deterrence Issues", *European Journal of Law and Economics* 18, no. 3 (2004), 299.
[386] Norbert Reich,"Product Safety and Product Liability", *Journal of Consumer Policy* 9, no. 1 (1986), 137.
[387] 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.
[388] Otto Baron van Wassenaer van Catwijck, "Products Liability in Europe", *American Journal of Comparative Law* 34, no. 4 (1986), 789.
[389] Ibid., 791.

passage of the Directive was based on the unanimity requirement of Article 100 EC, it seems that France had generally approved of the Directive.

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.[390] 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 Parliament[391], France did not meet the deadline and was condemned in 1993 by the ECJ for non-transposition.[392] Yet, France was not alone, as only three states had passed requisite laws by the deadline.[393] 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.[394] In fact, the exchange began even before French law had taken force, with a letter of formal notice being issued in November 1998.[395] 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-

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390 Michael G. Faure "Product Liability and Product Safety in Europe: Harmonization or Differentiation?" *Kyklos* 53, no. 4 (2000), 470.
391 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.
392 Judgment of the Court of 13 January 1993 in European Court of Justice Case C-293/91 *Commission v France* [1993] ECR I-00001.
393 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.
394 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.
395 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.[396]

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.[397]

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."[398]

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

[396] Judgment of the Court of 14 March 2006 in European Court of Justice Case C-177/04 *Commission v France* [2006] ECR I-02461.
[397] 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.
[398] 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.[399]

In the ensuing penalty proceedings (Case C-177/04), the Commission, responding to French legislative amendments,[400] 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.[401] 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."[402] 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.[403] As a result of the adverse judgment, three weeks later the French Parliament amended the relevant provision of the *Code Civile*.[404]

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.

[399] 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.
[400] 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.
[401] 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.
[402] Ibid, para. 48.
[403] Ibid, para. 78.
[404] *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).

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

(Case 19 reviewed by Gerda Falkner and Nikolas Rajkovic)

Litigation Basics

EU Law at Issue

- Directive 92/50 EC (Public Procurement)

Transposition Deadline: 01.12.1991

First Proceedings ***Braunschweig*** **(C-28/01)**

- Letter of Formal Notice: 30.04.1999
- Entrance into Registry: 16.01.2001
- First Judgment: 10.04.2003

First Proceedings ***Bockhorn*** **(C-20/01)**

- Letter of Formal Notice: 20.07.1998
- Entrance into Registry: 21.01.2001
- First Judgment: 10.04.2003

Second Proceedings ***Braunschweig/Bockhorn*** **(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 Commission[405] 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 infringements would suffice. Ultimately, the case assumed proportions beyond the specific waste

[405] Winfried Didzoleit, "Bruesseler Prinzipien", *Der Spiegel*, 27 November 2000, 124.

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).[406] The Paper identified that preferential public purchasing by member states constituted a significant non-tariff barrier that obstructed the functioning of the common market.[407] Further, the Commission assessed the value of public procurement at some 15% of the Community's GDP,[408] and noted that preferential procurement imposed excess costs on the public purse.[409] Flowing from this were new EU Directives, pursuant to the Single Market agenda,[410] 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).[411]

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

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[406] 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.

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

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

[409] 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.

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

[411] 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.

accordance with Procurement Directive 92/50.[412] 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.[413] 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.[414] Pursuant to the EC Treaty, the Commission began infringement proceedings by delivering formal letters of notice in July 1998[415] (Braunschweig) and April 1999[416] (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.[417]

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.[418] In its defence, the German government initiated a two-pronged (domestic versus external) strategy that, first, encouraged a mutual dissolution of the questioned contracts[419] and amended German law to permit contract rescission.[420] Second, the government advanced a number of legal arguments to the Commission which denied that the breach remained actionable in law.

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412 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.

413 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.

414 Ibid.

415 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.

416 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.

417 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.

418 Rhodri Williams, "Remedying a breach of Community Law", 110.

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

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

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.[421] 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.[422] Third and finally, the German government emphasized that termination of the contracts would require a high level of compensation to be paid;[423] an onerous financial burden which the government argued was disproportionate to the principled aim sought by the Commission.[424]

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.[425] 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.[426] 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.[427] 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.

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

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[421] 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.
[422] 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.
[423] Peter Kalbe, "Public-private partnerships under the constraints of EC procurement rules", *Public Procurement Law Review* 14, no. 6 (2005), 178.
[424] 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.
[425] 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.
[426] Rhodri Williams, "Remedying a breach of Community Law", 112.
[427] Ibid; Reply of the German government to the Reasoned Opinion (Second Referral) of the European Commission, 1 June 2004, 9.

hand, the Commission sharpened its demands of Germany and insisted that remedy of the breach required termination of the disputed waste contracts.[428] 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.[429] 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.[430]

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.[431] 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.[432] 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.[433] 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 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

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[428] 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.
[429] 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.
[430] Ibid., para. 8-10.
[431] 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.
[432] 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.
[433] 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.

rescission and allow only an award of damages.[434] 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...."[435]

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."[436] 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."[437] Finally, regarding the claim under Article 295 EC,[438] 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."[439]

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.[440] In a broader perspective, the ruling should also be understood as parcel of the Commission's larger effort to reform the Remedies Directive as demonstrated with amending Directive 2007/66.[441] In

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[434] 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.
[435] Ibid.
[436] 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.
[437] 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.
[438] "This Treaty shall in no way prejudice the rules in Member Sates governing the system of property ownership."
[439] 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.
[440] 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.
[441] 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.

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."[442]

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 sunct servanda* was entrenched in a domestic legal system.

No Answer? Luxembourg's response to Patent Law infringement

(Case 20 reviewed by Gerda Falkner and Nikolas Rajkovic)

Litigation Basics

EU Law at Issue

- EC Treaty, Article 49
  (Freedom to provide Services)

First Proceedings C-478/01

- Letter of Formal Notice: 15.04.1998
- Entrance into Registry: 11.12.2001
- First Judgment: 06.03.2003

Second Proceedings C-136/05

- Letter of Formal Notice: 19.12.2003
- Entrance in Court Registry 22.03.2005
- Withdrawal: 13.12.2005

[442] Directive 2007/66 of the European Parliament and of the Council of 11 December 2007amending 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).

The origins of this case do not involve the transposition of Council Directives, but rather pertain to the incompatibility of Luxembourg law with the EC Treaty. Further, the case became aggravated by the failure of Luxembourg officials to make timely responses to Commission requests for information on compliance. Specifically, the Commission found several articles of Luxembourg's law on patents to be in contravention of Article 49 of the EC Treaty; requiring that anyone exercising rights under a registered patent in Luxembourg would require actual or agent domicile in the country. This requirement infringed upon the freedom of services provided for under the EC Treaty. However, that penalty proceedings were initiated was a direct outcome of communication lapses between Luxembourg officials and the Commission. Ultimately, Luxembourg authorities did make amendments to national law in time to prevent a judgment on penalties by the Court.

No fixed address: The EC Treaty, Luxembourg Patent Law and the Domicile Rule

Compliance with EU law is often understood to involve transposition of specific Directives. However, another key area of compliance is that national law should conform to the general imperative of a 'common market', and specifically the essential freedoms of the EC Treaty: the free movement of goods, the free movement of labour, the freedom to provide services, and the free movement of capital.[443] National laws which do not comply with these essential freedoms are treated as obstructions to competition and made a target for approximation.

At specific issue in this case were patent rules under Luxembourg law set out in the Law of 30 June 1880 and initially amended by the law in 1978 (Patent Law). These patent rules required that agents supplying patent services were to be domiciled in Luxembourg or employ the services of an approved agent. A further amendment to the Patent Law was made in January 1998, which effaced most provisions imposing this domicile requirement; however Article 83(4) of the Patent Law still remained in force and attracted scrutiny in Brussels:

> "No one may exercise rights under a patent application or a patent unless he has his actual or elective domicile in the Grand Duchy of Luxembourg. The choice of domicile in Luxembourg, if necessary, which determines the court having jurisdiction, may be made only through an agent approved in Luxembourg. If the latter does not have his actual

[443] Victor Vandebeek, "Realizing the European Community Common Market by Unifying Intellectual Property Law: Deadline 1992", *Brigham Young University Law Review* 1, no. 4 (1990), 1606.

domicile in Luxembourg, he must opt for domicile with an approved agent who has actual domicile there."[444]

Aggravation by Silence: Lapses in communication between Luxembourg and Brussels

The Commission, in a letter of formal notice dated 15 April 1998, sought the Luxembourg government to repeal the remaining provisions, owing to how it restricted the freedom to provide services pursuant to Article 49 of the EC Treaty. By letter dated 8 July 1998, the Luxembourg government replied expressing its intent to abolish the domicile requirement in the Patent Law, and that the Luxembourg intellectual property service would then be able to accept patents applications made by persons not enrolled in the Luxembourg registry of patent agents.[445] The Commission followed up with additional concerns regarding how the domicile requirement was further sustained by Article 85(2) of the Patent Law and Articles 19 and 20 of the Law governing access to professions. These issues led to a supplementary letter of formal notice sent to the Luxembourg government.[446]

However, following the supplementary letter of formal notice, the Luxembourg government failed to reply to correspondence and requests for information from the Commission, including the reasoned opinion dated 26 January 2000.[447] This led the Commission to file an action with the Court registry on 11 December 2001, and in addition complain of Luxembourg's breach of the duty to cooperate in good faith pursuant to Article 10 of the EC Treaty.[448] The extent of Luxembourg's lapse in communication was noted by the Advocate General:

"...Luxembourg did not reply either to the supplementary letter of the Commission prior to the reasoned opinion, nor to the reasoned opinion itself; nor has it provided any explanation of the legislation in the course of the present proceedings."[449]

The Court proceedings themselves were marked by Luxembourg's non-contest of both key allegations made by the Commission: infringement of the freedom to provide services[450] and

[444] Judgment of the Court of 6 March 2003 in European Court of Justice Case C-478/01 *Commission v Luxembourg* [2003] ECR I-02351, para 5.
[445][445] Judgment of the Court of 6 March 2003 in European Court of Justice Case C-478/01 *Commission v Luxembourg* [2003] ECR I-02351, para 11.
[446] Judgment of the Court of 6 March 2003 in European Court of Justice Case C-478/01 *Commission v Luxembourg* [2003] ECR I-02351, para 12.
[447] Judgment of the Court of 6 March 2003 in European Court of Justice Case C-478/01 *Commission v Luxembourg* [2003] ECR I-02351, para 13.
[448] Judgment of the Court of 6 March 2003 in European Court of Justice Case C-478/01 *Commission v Luxembourg* [2003] ECR I-02351, para 22.
[449] Opinion of Advocate General Jacobs delivered on 14 November 2002 in European Court of Justice Case C-478/01 *Commission v Luxembourg* [2003] ECR I-02351, para 8.
[450] Opinion of Advocate General Jacobs delivered on 14 November 2002 in European Court of Justice Case C-478/01 *Commission v Luxembourg* [2003] ECR I-02351, para 5.

breach of the duty to cooperate in good faith. Regarding the former claim, the Court held that Luxembourg's law on patents still contained ambiguities on the domicile requirement, and this contravened the principle of legal certainty where

> "Member States' legal rules should be worded unequivocally so as to give the persons concerned a clear and precise understanding of their rights and obligations and enable national courts to ensure that those rights and obligations are observed."[451]

Thus, Luxembourg was under an obligation to ensure that its laws did not impede agents representing a client in patents proceedings that were lawfully established in another member state.[452] Regarding the subsequent complaint of non-cooperation, the Court found Luxembourg to be in breach as well:

> "According to the Commission, the Luxembourg Government's conduct prevented it from reaching a conclusion as to whether those provisions of national law are compatible with Article 49 EC. The Grand Duchy of Luxembourg has not raised any defence to that claim."[453]

Yet, despite the reprimand in the infringement judgement, the Luxembourg government continued in its pattern of non-response with the Commission. The Luxembourgian authorities did not communicate any measures to meet the requirements of the Court's order, nor did they react to the letter of formal notice, or to the reasoned opinion.[454] This led to the opening of penalty proceedings and the Commission seeking the imposition of a daily penalty payment of 9 100 Euro. However, near to the time the action was registered in March 2005 the Luxembourg government informed the Commission that a law would be adopted in April 2004 amending the relevant provisions.[455] In its presentation of these legislative amendments, the Luxembourgian government acknowledged that, by mistake, one discriminatory provision had been left unchanged but would be addressed urgently.[456] Nonetheless, the Commission decided to close

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[451] Judgment of the Court of 6 March 2003 in European Court of Justice Case C-478/01 *Commission v Luxembourg* [2003] ECR I-02351, para 20.
[452] Judgment of the Court of 6 March 2003 in European Court of Justice Case C-478/01 *Commission v Luxembourg* [2003] ECR I-02351, para 21.
[453] Judgment of the Court of 6 March 2003 in European Court of Justice Case C-478/01 *Commission v Luxembourg* [2003] ECR I-02351, para 22-23.
[454] Action brought on 22 March 2005 in European Court of Justice Case C-136/05 *Commission v Luxembourg* [2005] OJ C115/16.
[455] Letter from the Luxembourgian Minister of Economics to the European Commission from 1 March 2005, SG(2005)A/2945.
[456] "Malheureusement une erreur de transcription matérielle s'est produite lors de l'intégration d'un amendement proposé par le Conseil d'Etat, de sorte que l'exigence d'un domicile réel au Luxembourg - condition contraire au droit communautaire - a été maintenue à l'article 85, deuxième paragraphe de la loi. La modification proposée vise à redresser cette erreur. Elle présente une certaine urgence, étant donné que, par arrêt du 6 mars 2003, le Luxembourg a été condamné par la Cour de Justice des Communautés Européennes pour manquement aux articles 49 et 10 du Traité CE." Chambre des Députés, Session ordinaire 2002-2003, *Projet de loi (5128/00) modifiant 1) la loi du 18 avril 2001 sur les droits d'auteur, les droits voisins et les bases de données, et 2) la loi modifiée du 20 juillet 1992 portant modification du*

the case, upon receipt of this letter from the Luxembourg government, and following examination.

Case Notes

- **Problem**: Luxembourg law required that patent agents had to have domicile in the country, and this had a discriminating effect against foreign service providers.
- **Causes of Infringement:** Persistent lapses in communication with the Commission suggest that the case had not been assigned sufficient priority by the Luxembourg bureaucracy to command adequate administrative attention and care. Neglect seems to have been chronic at several stages, even occurring when the final amending law appeared to overlook the constraints of EU law.
- **Outcome**: The action was withdrawn when the Commission was informed, after nearly a year of delay, that the applicable patent laws had been adequately amended and had entered into force.

No Ordinary Ordinance? Explosives Regulation as Legal *Deja Vu* in Luxembourg

(Case 21 reviewed by Gerda Falkner and Nikolas Rajkovic)

Litigation Basics

EU Law at Issue

- Directive 93/15 (Explosives for Civil Use)

Transposition Deadline:	30.09.1993
First Proceedings C-89/03	
Letter of Formal Notice:	05.11.2001
Entrance in Court Registry:	27.02.2003
First Judgment:	02.10.2003
Second Proceedings C-416/05	
Letter of Formal Notice:	09.07.2004
Entrance in Court Registry:	24.11.2005
Withdrawal:	30.05.2006

régime des brevets d'invention, 14 May 2003 , <http://www.chd.lu/wps/portal/public/!ut/p/c1/jY7JDoIwFEW_xS94r4-pXTJZAdWUpgTYmMYQQsLgwmj8e1my09zlyTm50MG2xb7GwT7HdbETNND5t4SSuspcQhkoFylP88Do0uHc33i74zwWhJlU5yJmHkrt_GMT57qS4SUVwkSYYcx0qqKtQz_s8rTOPbTQBbsHIj8ilUwbrq5OwTxop36w9w88ZtO81_DwBX3BiEM!/dl2/d1/L0lJSklna21BIL0lKakFBRXlBQkVSQ0pBISEvWUZOQTFOSTUwLTVGd0EhIS83X0QyRFZSSTQyMDg5SkYwMk4xU1U4UU8zSzE1L2pzeVdJMTA5NDAwOTQ!/?PC_7_D2DVRI42089JF02N1SU8QO3K15_selectedDocNum=2&PC_7_D2DVRI42089JF02N1SU8QO3K15_secondList=&PC_7_D2DVRI42089JF02N1SU8QO3K15_action=document#7_D2DVRI42089JF02N1SU8QO3K15> (Accessed December 1, 2010), 21.

The subject of this case and its relevant Directive involve the regulation of explosives for civil use in the EU. The more exotic nature of this topic could suggest that safety concerns had been at the forefront of compliance controversy. Yet, litigation between the Commission and Luxembourg was actually centred upon obstacles within Luxembourg's domestic law and administration. Specifically, the Luxembourg government claimed it could not deliver timely implementation on Directive 93/15/EEC because of a domestic reorganization of institutional competences respecting explosives for civil use, and the ensuing contention this brought between national legislative bodies over preferred legal instrument and hence procedure. In this way, infringement proceedings had been propelled by Luxembourg's use of a defence which the ECJ had long discounted as a valid justification for delayed compliance, which becomes curious in light of the 13 year delay in implementation.

Background: Directive 93/15/EEC and the creation of a single EU explosives market

In April 1993, Council Directive 93/15/EEC was issued regulating the market and supervision of explosives for civil use as defined by the United Nations recommendations on the transport of dangerous goods, [457] which may include chemical substances (like trinitrotoluene or TNT, nitroglycerin, dynamite, gunpowder) or manufactured articles (like ammunition, fireworks). The purpose behind the Directive was to create a single market for civil explosives by harmonizing laws across member states. In sum, divergent national rules had to be standardized so as to enable free movement, but without compromising on safety, security and environment concerns. The essential feature of the new Directive was that explosives which conformed to prescribed safety requirements would receive a special marking that entitled them to market access anywhere in the EU.

Luxembourg's delayed implementation of the Directive

Directive 93/15/EC required that all member states complete transposition into national law by 30 September 1993. Luxembourg failed to advise the Commission of implementation measures, and the Commission launched infringement proceedings in June 2002, almost 9 years after the end of the transposition deadline. In short order, the Court found Luxembourg to be in breach of its obligation to implement the Directive. The noteworthy feature of these legal proceedings

457 *Council Directive 93/15/EEC of 5 April 1993 on the harmonization of the provisions relating to the placing on the market and supervision of explosives for civil uses* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0015:EN:HTML> (Accessed November 3, 2010).

was how Luxembourg provided scant resistance to Commission's infringement claim, such that no opinion from the Advocate General was asked for. Further, following the initial judgment[458], the Commission asked Luxembourg to advise on its implementation measures; with Luxembourg answering that the Government Council had already approved a package of regulations which were awaiting subsequent approval from the State Council:

> "(...) le projet de règlement grand-ducal portant transposition de la directive 93/15/CEE (...) a été approuvé par le Conseil de Gouvernment le 19 décembre 2003 et immédiatement soumis à l'avis du Conseil d'Etat et des chambers professionnelles, le Ministère du travail et de l'emploi ayant invoqué l'urgence auprès du Conseil d'Etat."[459]

Yet, initial optimism dissipated when it became clear that Luxembourg would not meet the December 2004 deadline which it had proposed to implement the Directive. Consequently, the Commission produced a Reasoned Opinion where it referred to a letter from the Luxembourg authorities, in September 2004, which stated how the date of implementation was undetermined:

> "Les chambers professionnelles ont émis leur avis et celui du Conseil d'Etat devrait intervener en Novembre 2004. Le Grand Duché de Luxembourg ne precise pas à quelle date l'adoption du règlement devrait intervener."[460]

As a result, the Commission brought the matter to the Court for a second time, arguing for a daily penalty payment of 9 000 Euro. This penalty proceeding seemed to nudge implementation forward, as at the end of 2005 Luxembourg finally communicated to the Court and the Commission that it had completed implementation of the Directive:

> "Le gouvernement luxembourgeois a communiqué à la Commission par fax du 6 décembre 2005 copie du règlement grand-ducal du 24 novembre 2005 relatif à la mise sur le marché et le contrôle des explosives à usage civil (...). Les services de la Commission ont constaté que ce règlement mettait fin au manquement constaté par votre Cour dans l'arrêt du 2 octobre 2003 dans l'affaire C-89/03."[461]

The Conflict over form of Transposition

This case was distinguished by how its controversy was not related to a dispute over European law. In fact, the case was treated by all parties as a *prima facie* instance of failure to implement; resulting from divergent opinions within Luxembourg's legislative process on the desired manner

[458] Judgment of the Court of 2 October 2003 in European Court of Justice case C-89/03, Commission of the European Communities vs Grand Duchy of Luxembourg, [2003] ECJ I-11659.

[459] Letter of Formal Notice, issued on 9 July 2004, SG-Greffe (2004) D/202889, 1.
[460] Reasoned Opinion, issued on 22 December 2004, SG-Greffe (2004) D/206134, para 4.
[461] Désistement dans l'affaire C-416/05, 14 July 2006, JURM (2006)8106.

of compliance. In particular, implementation was delayed owing to a disagreement over the correct legal instrument and decision-making procedure which had to be applied in order to produce needed changes in national law.[462] Luxembourg's legislative bodies, i.e. the Government Council and the Council of State, contested whether transition could be achieved through decree (*règlement*) or legislation—with the latter route entailing more procedures, time and resultant difficulties. In fact, the technical means of implementation involved interpretation of Luxembourg's constitutional and legal order; something which the Council of State referred to when it insisted that implementation had to be done via law and not regulation:

> "Selon le Conseil d'Etat, la matière traitée par le projet sous examen, à savoir les conditions de la mise sur le marché et le contrôle des explosifs à usage civil, constitue une matière réservée à la loi, et ce en vertu de l'article 11(6) de la Constitution, qui dispose que les restrictions à la liberté du commerce et de l'industrie ainsi qu'à l'exercice de la profession libérale et au travail agricole sont à établir par le pouvoir législatif. Certaines dispositions du texte sous examen doivent de ce fait être reprises dans une loi formelle. En conséquence, la loi modifiée du 9 août 1971 ne saurait servir de fondement légal au texte sous examen puisque son article 1er exclut précisément de son champ d'application les matières réservées à la loi par la Constitution. Le premier visa est dès lors à supprimer."[463]

Case Notes

- **Problem**: None of the materials of this case showed any concern with the content of EU rules at stake. Much of the difficulties of transposition flowed from a cumbersome and slow process of legislative implementation in Luxembourg. The insistence by the Luxembourg State Council that transposition had to be by law, and not decree, instigated a process of law-making that extended transposition four years beyond the initial infringement proceeding.
- **Causes of Infringement**: Luxembourg's administration showed signs of neglect when faced with a duty to transpose a Directive on civil explosives. Later, added work and resources became necessary following the Council of State's rejection of implementation by decree.
- **Outcome:** In the end, Luxembourg's institutions managed to adopt a law that was compliant with EU law in November 2005, and the case was withdrawn.

[462] J-2005-O-0135, 5272/09 *Projet de règlement grand-ducal relatif à l'harmonisation des dispositions concernant la mise sur le marché et le contrôle des explosifs à usage civil Avis de la Chambre de Travail* (9.12.2005).

[463] Chambre des Deputes Session ordinaire 2005-2006, Avis de la Conférence des Présidents, *Projet de règlement grand-ducal relatif à l'harmonisation des dispositions concernant la mise sur le marché et le contrôle des explosifs à usage civil,* ,9 November 2005), J-2005-O-0135, 5272/08, <http://www.chd.lu/wps/PA_1_084AIVIMRA06I4327I10000000/FTSByteServingServletImpl/?path=/export/exped/sexpdata/Mag/060/481/045890.pdf> (Accessed July 12, 2011), 1.

Seeds of Discontent:
The Commission, France and Social Controversy over Genetic Modification

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

Litigation Basics

EU Law at Issue

- Directives 90/219 and 2001/18 (The contained use of genetically modified micro-organisms and the deliberate release of genetically modified organisms).

Directive 90/219

Transposition Deadline:	23.10.1991

First Proceedings (C-429/01)

● Letter of Formal Notice:	18.03.1998
● Entrance into Registry:	05.11.2001
● First Judgment:	27.11.2003

Second Proceedings (C-79/06)

● Letter of Formal Notice:	22.12.2004
● Entrance in Court Registry:	10.02.2006
● Withdrawal:	19.12.2006

Directive 2001/18

Transposition Deadline:	17.10.2002

First Proceedings (C-419/03)

● Letter of Formal Notice:	21.11.2002
● Entrance into Registry:	03.10.2003
● First Judgment:	15.07.2004

Second Proceedings (C-121/07)

● Letter of Formal Notice:	13.07.2005
● Entrance in Court Registry:	28.02.2007
● Second Judgment	09.12.2008

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.[464] A lightning rod for discussion has been the GM of crops, where public protest and hostility[465] has risen in response to the commercialization of GM crops in the late 1990s[466] and their expanded use in North America.[467] 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.[468]

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.[469] The first Directive dealt with the contained use of GMMs (90/219 and 90/220) in research, laboratories and industry.[470] The latter Directive (2001/18) was a more advanced regulatory regime dealing

[464] 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.
[465] "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.
[466] Paula Rey Garcia, "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.
[467] Francescon, "The New Directive 2001/18/EC", 309.
[468] Garcia, "Directive 2001/18/EC on the Deliberate Release", 4.
[469] Ruth MacKenzie, "Genetically Modified Organisms: Colloquium Artide the Regulations of Genetically Modified Foods in the European Union: An Overview", *New York University Environmental Law Journal* 8, no. 3 (2000), 532.
[470] 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.[471]

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;[472] 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."[473] 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.[474] 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.[475] In 1998, the socialist Jospin government further approved the production of two new GM maize varieties, TER25 and MON810.[476]

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."[477] 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

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471 Garcia, "Directive 2001/18/EC on the Deliberate Release", 4.
472 Tamara K. Hervey, "Regulation of Genetically Modified Products in a Multi-level System of Governance or Citizens", *RECIEL* 10, no. 3 (2001), 321.
473 Ibid., 325.
474 Graeme Hayes, "Collection Action and Civil Disobedience: The Anti-GMO Campaign of the *Faucheurs Volontaire", French Politics* 5, no. 3 (2007), 295.
475 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.
476 Ibid., 1027.
477 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."[478] 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.[479] 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.[480] 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,

[478] 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.
[479] Ingmar von Homeyer, "The Revision of the Direction 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.
[480] 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.[481] 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.[482] 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...."[483]

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

[481] Ibid.
[482] For a list see the Reasoned Opinion from 19 May 2005, C (2000) 826 final.
[483] 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 modifies et notamment leur dissemination volontaire dans l'environment sont devenus, en France, un sujet majeur de débat et de conflits parfois violents comme l'ont illustré de trop nombreuses operations de destruction de cultures en plein champ notament en 2003 et en 2004."[484]

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.[485]

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."[486]

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.[487] A few months later, the version of the decrees adopted notably included those aspects previously argued as remediable only by law.[488] It turned out that full transposition, in accord with the infringement judgment, could be

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[484] Letter from France to the European Commission from 25 February 2005, SG(2005)A/2002.
[485] 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.
[486] Letter from France to the European Commission from 30 September 2004, SG (2004) A/10395.
[487] Letter from France to the European Commission from 25 January 2006, Ref Nr 231/LB/ip.
[488] 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 block [489] the Directive formally. [490] In 1999, Austria, Denmark, Greece, France, Italy and Luxembourg [491] prompted the EU to suspend new authorizations for the growing and marketing of GMOs over concerns of inadequate risk assessments, tracing and labelling. [492] 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. [493] 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."[494]

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. [495] 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

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[489] Donald G. McNeil Jr., "Europe Approves Strict Food Rules", *New York Times*, 15 February 2011, A 1.
[490] 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).
[491] Statements made in connection to the adoption of Directive 2001/18 in the Council, 6068/01 ADD 1 REV 2, 3.
[492] Alasdair Murray, "US warns Europe of trade war over GM food", *The Times (London)* 12 August 1999.
[493] Garcia, "Directive 2001/18/EC on the Deliberate Release", 6.
[494] Ibid.
[495] 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.[496] 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)."[497]

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.[498] 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."[499] 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."[500]

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[496] 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).
[497] 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.
[498] Letter from the French Government to the European Commission from 28 February 2007, SG/CDC/2007/A/1906, 1.
[499] 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.
[500] 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.[501] 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,[502] and a further reference to the French constitutional court;[503] 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.[504] 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"[505]. 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.[506]

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.

[501] Letter of the French Government to the European Commission 28 February 2007, SG/CDC/2007/A/1906, 1.
[502] National Assembly of the Republic of France, *Compte rendu analytique official Séance du mardi 20 mai 2008,* http://www.assemblee-nationale.fr/13/cra/2007-2008/160.asp (Accessed June 22, 2011).
[503] 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).
[504] 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.
[505] Ibid., para. 69.
[506] Ibid., para. 60.

In Remedy of the Remedy Procedure: Contradictory Portuguese Law and the Commission's Procurement Reform

(Case 23 reviewed by Gerda Falkner and Nikolas Rajkovic)

Litigation Basics

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

- *Portuguese Republic v. European Commission*, 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*[507] (White Paper) identified public authorities as significant market players in the consumption of goods and services.[508] 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.[509] This concern spurred a number of EU public procurement directives which strengthened internal market rules for the conduct of public procurement.[510] Central to enforcement became the so-called Remedies Directive (89/665[511]) 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.[512] 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.[513]

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.[514]

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[507] 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.

[508] 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).

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

[510] 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.

[511] 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.

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

[513] Ibid.

[514] 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.[515] 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";[516] and, according to the Commission, this constituted an infringement under Article 1 of the Remedies Directive.[517]

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.[518] 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.[519] The defence raised by the Portuguese government alleged that the Commission had wrongly interpreted national law and the actual application of the Decree Law.[520] 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.[521] Further, the government noted it was drafting a law on extra-contractual liability which would resolve any concern over the Decree Law.[522]

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

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[515] 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.
[516] 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.
[517] Ibid.
[518] 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.
[519] 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.
[520] Judgment of the Court of 14 October 2004 in European Court of Justice Case C-275/03 *Commission v Portugal* [2004], para. 24.
[521] Judgment of the Court of 14 October 2004 in European Court of Justice Case C-275/03 *Commission v Portugal* [2004], para. 25.
[522] 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.[523] 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,"[524] which thus enables them to exercise their full rights before national courts.[525] 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.[526]

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.[527] 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 …"[528]

[523] Judgment of the Court of 14 October 2004 in European Court of Justice Case C-275/03 *Commission v Portugal* [2004], para. 31.
[524] Dischendorfer, "The conditions Member States may impose", 20.
[525] Judgment of the Court of 14 October 2004 in European Court of Justice Case C-275/03 *Commission v Portugal* [2004], para. 33.
[526] Judgment of the Court of 14 October 2004 in European Court of Justice Case C-275/03 *Commission v Portugal* [2004], para. 34.
[527] Reasoned Opinion of 13 July 2005, SG-Greffe (2005)D/203393, 4.
[528] 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; [529] notwithstanding that in its infringement ruling the Court had as well referred to obligations embedded in the Directive to provide for effective review procedures. [530]

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.[531] 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,[532] 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.[533]

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.

[529] 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.
[530] 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.
[531] 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.
[532] Action brought on 26 January 2009 in General Court Case T-33/09 *Portugal v Commission* [2006] OJ C82/30.
[533] 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.

Slow Train to EU Rail Liberalization: Luxembourg as Case and Symptom

(Case 24 reviewed by Gerda Falkner and Nikolas Rajkovic)

Litigation Basics

EU Law at Issue

- Directives 2001/12 and 2001/13 (Railway Liberalization)

Transposition Deadline:	15.03.2003
First Proceedings (C-481/03)	
● Letter of Formal Notice:	03.04.2003
● Entrance in Court Registry:	19.11.2003
● First Judgment:	30.09.2004
Second Proceedings (C-219/06)	
● Letter of Formal Notice:	21.03.2005
● Entrance in Court Registry:	12.05.2006
● Withdrawal:	06.11.2006

This compliance case becomes noteworthy for the difficulties the Commission encountered not only with Luxembourg's implementation of the so-called "First Railway Package" of 2001 but also across member states as a whole. Working against a background where national railway markets operated as statutory monopolies for decades, the Commission had to confront an embedded institutional legacy when it introduced legislative reforms intended to open EU rail markets to non-national providers.[534] Thus, the case of the Commission's enforcement against Luxembourg, while leading to the only second referral, was nevertheless emblematic of the overall lag the Commission encountered with its planned transition to a more competitive and "European" railways regime.[535]

[534] European Parliament, *European Parliament resolution on the Implementation of the first railways package Directives* (Nos 2001/12/EC, 2001/13/EC and 2001/14/EC), B7-0344/2010, 11 June 2010 <http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B7-2010-0344&language=EN> (Accessed July 8, 2011).

[535] European Parliament, "Commission must enforce rail liberalisation, say MEPs", 11 June 2010, Press Release, http://www.europarl.europa.eu/sides/getDoc.do?language=en&type=IM-PRESS&reference=20100616IPR76235, (Accessed July 8, 2011).

From National Monopolies to an Open EU Market: Legislating Railway Transformation?

Important context in this case is an appreciation of how monopoly has been synonymous with the general operation of European national railways, and how competition was largely a foreign principle to the historical function of this industry. To speak of a European railway in accurate and historical terms, meant cross-border cooperation between national carriers which had been given statutory license by their governments over national rail infrastructure, scheduling, operations and service provision.[536] By the 1990s, however, a sustained decline in State railways came to be reflected both in the steady loss of market share to road transport services and subsequent problems in traffic congestion and pollution.

This was a legacy the EU attempted to change by designating European railway reform a key strategic aim in EU transport policy pursuant to the Lisbon agenda. The Commission pursued liberalization and integration through three successive legislative packages (2001, 2004, 2005). The First Package required the economic separation of rail infrastructure and transport services. The Second Package established a European Railway Agency, and set January 1, 2007 as the final date by which rail freight services would have access to the EU rail network. Finally, the Third Package imposed the liberalization of international passenger services, and access to *cabotage* in all EU member states.

The specific Luxembourg proceedings, with which we are concerned, dealt with the Grand Duchy's failure to implement the First Package for the separation of management over infrastructure and transport services. This was of crucial significance to the Commission owing to how the First Package was a spearhead for the entire three-stage reform process; containing, for instance, Directive 2001/12 which mandated the distinction between "infrastructure" and "railway" entities through separate profit-and-loss accounts and open access for international freight services for the entire Trans-European Freight Network by March 2003.

Luxembourg's Non-Defence of *Mea Culpa*

Some two weeks after the March deadline set by the Directives, in April 2003, the Commission opened its first proceedings in this case; as no implementing measures had been notified by the Luxembourg government.[537] The only defense raised by Luxembourg was curiously that domestic

[536] Oliver Stehmann and Ian MacKay, Directorate-General Competition, "Liberalisation and competition policy in railways", *Competition Policy Newsletter*, no. 3 (Autumn 2003), 21-22

[537] Judgment of the Court of 30 September 2004 in European Court of Justice Case C-481/03 *Commission v Luxembourg* [2004] OJ C284/6, para. 3.

complexity of implementing the First Package had been greater than expected. [538] Notwithstanding, the government did not contest its failure to fully implement Directives 2001/12 and 2001/13:

> "Il convient de constater que cet État membre ne conteste pas que, à l'expiration du délai imparti dans l'avis motivé, toutes les mesures nécessaires pour transposer les directives 2001/12 et 2001/13 n'avaient pas encore été prises et, à cet égard, le gouvernement luxembourgeois se borne à faire valoir, dans sa duplique, que des avant-projets de loi et de règlement ayant pour objet de modifier les dispositions nationales en vue de les rendre conformes au droit communautaire sont en cours d'élaboration."[539]

The Luxembourg government made a similar argument when the Commission further pursued infringement proceedings, asking for the imposition of a 4 800 Euro penalty per day of continuing infringement and a 1 000 Euro lump sum for every day of non-compliance with the two directives.[540] However, after considerable months of dialogue on implementation measures between the Commission and the Luxembourg government, in July 2006, it was ascertained that the latter had finally adopted all required measures and the Commission could withdraw its proceedings. [541]

However, the exact reasons for why Luxembourg had been delayed in compliance as it had remains somewhat obscure. To start with, the proceedings, which had begun in unusual haste, were a sizeable challenge for Luxembourg's smaller bureaucracy and sometimes cumbersome legislative procedures. A further factor to consider was the change of government in Luxembourg in 2004, where a coalition of socialists and conservatives came to govern following the conservative and liberal coalition between 1999 and 2004. The newly empowered socialist party wanted to include the social partners, such as the unions, in the legislative process and initiate tripartite negotiations into governance.[542] This change in government and the institution

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[538] Ibid., para. 4, 6 and 10.

[539] Judgment of the Court of 30 September 2004 in European Court of Justice Case C-481/03 *Commission v Luxembourg* [2004] OJ C284/6, para 7.

[540] Action brought on 12 May 2006 - Commission of the European Communities v Grand-Duchy of Luxembourg, (Case C-219/06).

[541] Withdrawal by the Commission of Case C-219/06, JURM(2006)12089, para 2.

[542] Exposé des motifs, *Projet de loi 5529/00 modifiant a) la loi modifiée du 10 mai 1995 relative à la gestion de l'infrastructure ferroviaire b) la loi du 28 mars 1997 1°approuvant le protocole additionnel du 28 janvier 1997 portant modification de la Convention belgo-franco-luxembourgeoise relative à l'exploitation des chemins de fer du Grand-Duché, signée à Luxembourg, le 17 avril 1946; 2° approuvant les statuts modifiés de la Société Nationale des Chemins de Fer Luxembourgeois (CFL); 3° concernant les interventions financières et la surveillance de l'Etat à l'égard des CFL et 4° portant modification de la loi du 10 mai 1995 relative à la gestion de l'infrastructure ferroviaire c) la loi du 11 juin 1999 relative à l'accès à l'infrastructure ferroviaire et à son utilisation d) la loi modifiée du 29 juin 2004 sur les transports publics*, J-2005-O-0279, 12.

of tripartite negotiations became reflected in Luxembourg's more cautious approach[543] towards liberalization of the railways within the timeframe June 2005 and February 2006:

> "Cependant, aux termes du programme de coalition publié en annexe de la déclaration gouvernementale du 4 août 2004 'Le Gouvernement entend relancer le dialogue social proper au modèle dit luxembourgeois par l'organisation d'une 'Tripartite Ferroviaire'. Celle-ci sera appelée à proposer des orientations et des measures qui permettront aux CFL de s'assurer la viabilité et la compétitivité necessaries, notamment dans le domaine du fret, tout en préservant le statut et les remunerations propres aux agents actuels et en définissant la voie à suivre pour les agents futures des CFL.'
>
> Compte tenu de la nécessité d'une preparation approfondie de ladite tripartite et de la présidence de l'Union Européene qui est assure par le Grand-Duché de Luxembourg au cours du 1er semester 2005, le Gouvernment a decide de fixer à l'automne 2005 l'échéance pour convoquer la Tripartite Ferroviaire annoncée dans le programme de coalition."[544]

Quite openly, it appeared the Luxembourgian government was prepared to neglect EU-related duties a bit longer if that enabled the government to uphold the "spirit of social dialogue", as the responsible Minister had informed the Commission without hesitation:

> "Afin de sauvegarder un esprit ouvert de dialogue social, j'ai décidé de ne pas lancer de nouvelles procédures législatives, alors que ces initiatives pourraient être interprétées comme 'faits accomplis' par les differentes parties ayant vocation de prendre part à la Tripartite."[545]

Finally, economic and political costs appear to have been a factor, as the state-owned railway company, the *La Société Nationale des Chemins de Fer Luxembourgeois* (CFL), had to be restructured; as the First Package required that no single entity could operate the various branches of the railway (cargo, transport of persons, infrastructure). There was indication that the delay encountered by Luxembourg related to concern over the ill-prepared cargo branch of CFL, which might suffer from increased competition. This would have affected the some 400 employees of CFL Cargo and their unions; something that likely caught the attention of Luxembourg's then Transport Minister, Lucien Lux, who had first worked for the CFL and was previously a leading member of the OGB-L trade union confederation.[546] Thus, the government

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[543] Letter from the Government of Luxembourg to the European Commission from 5 June 2005, SG(2005)A/5472, 3.
[544] Letter from the Government of Luxembourg to the European Commission from 5 June 2005, SG (2005)A/5472, 3.
[545] Ibid.
[546] Biography of Lucien Lux, released on the occasion of the The Luxembourg Presidency of the Council of the European Union 2005,30 December 2004, <http://www.eu2005.lu/en/presidence/membres/lux/index.html> (Accessed July 12, 2011).

chose to partly privatize CFL Cargo and grant up to 125 000 000 Euro for investments in new infrastructure.[547]

Case Notes

- **Problem**: The Grand Duchy failed to implement EU railway legislation regarding the separation of management between infrastructure versus transport services. This issue of railway liberalization was of crucial significance to the Commission.
- **Causes of Infringement:** Causal factors seem to have been, first, the Commission's extraordinary speed in pursuit of infringement proceedings, second, the Directive's requirement of profound need for restructuring of Luxembourg state-owned railway company, and, thirdly, administrative neglect and limited resources. Lastly, toward the end of the proceedings, the incoming coalition of conservatives and socialists stressed corporatist consultation which added time to compliance.
- **Outcome**: After agreement in tripartite negotiations, a restructuring of CFL was agreed, with high costs for the government, and the EU proceedings were withdrawn.

[547] "'Denksperren aufheben'": Lucien Lux au sujet de l'accord de la tripartite ferroviaire", *Information et actualite de gouvernement Luxembourgeois,* 18 December 2005, <http://www.gouvernement.lu/salle_presse/interviews/2005/12decembre/20051228lux_telecran/index.html> (Accessed July 1, 2011).

An Olympic Odyssey:
The Commission, Greece & the Restructuring of a Flag-Carrier[548]

(Case 26 reviewed by Gerda Falkner and Nikolas Rajkovic)

Litigation Basics

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
- *Olympiaki Aeroporia Ypiresies v. Commission*, T-68/03
- *Hellenic Republic v. Commission*, T-415/05
- *Olympic Airlines S.A. v. Commission,* T-416/05
- *Olympic Airways Services S.A. v. Commission,* 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.[549] 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.

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[548] Thanks to Zoe Lefkofridi for discussing aspects of the Greek cases with Gerda Falkner.

[549] 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. [550]

Olympic Airways was founded in 1957 as a private company by Greek industrialist Aristotle Onassis.[551] In 1975, the company was purchased by the Greek state and became re-categorized as a public utility.[552] 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.[553] 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.[554] State interest in Olympic was further induced by how thousands of current and former Olympic employees resided largely in the "Athens B" district[555] that elected some 15 percent of the Greek parliament.[556]

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.[557] A new law followed in 1994 which granted OSPA two non-executive seats on the Olympic board, and thus inside access to management decisions.[558]

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[550] 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.

[551] Featherstone and Papadimitrou, "Manipulating Rules", 55.

[552] 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://aei.pitt.edu/4822/01/000980_1.pdf> (Accessed on October 12, 2010), 16.

[553] Ibid, 17.

[554] Featherstone and Papadimitrou, "Manipulating Rules", 55.

[555] 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).

[556] Featherstone and Papadimitrou, "Manipulating Rules", 57.

[557] Ibid.

[558] 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,[559] 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.[560] 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).[561] 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.[562] 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.[563]

Thus, Greece's sponsorship of Olympic came to the immediate attention of the Commission in the 1992 State aids report.[564] 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

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[559] *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.
[560] Ibid, 18-19.
[561] 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.
[562] *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.
[563] *Commission of the European Communities*, "Expanding Horizons: A report by the Comite 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.
[564] *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.[565] 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).[566] 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."[567] 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.[568] 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.[569]

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.[570] 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"[571] 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.

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565 Ibid, 18.
566 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.
567 Claus-Dieter Ehlermann, "State Aid Control in the European Union: Success or Failure", *Fordham International Law Journal* 18, no. 4 (1994-1995), 1222-1223.
568 Lars Gorton, "Air Transport and EC Competition Law", 626.
569 Featherstone and Papadimitrou, "Manipulating Rules", 58.
570 Ibid, 59.
571 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.[572] 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.[573] 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.[574] Further, his plan envisioned splitting Olympic in two, "with one half holding the company's huge debt and the other retaining all airline operations,"[575] and the possibility that the government would assume all of Olympics' debt and excess staff.[576]

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572 "EU expected to probe Olympic Failed to follow pledges", *Financial Times*, 19 February 2002, FP13.
573 Featherstone and Papadimitrou, "Manipulating Rules", 60.
574 "Greek government applies to cover national carrier's debt", *Airline Industry Information*, 8 August 2000, http://0-www.lexisnexis.com.biblio.eui.eu/hottopics/lnacademic/?shr=t&sfi=AC00NBGenSrch&csi=293847 (Accessed on October 12, 2010).
575 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/hottopics/lnacademic/?shr=t&sfi=AC00NBGenSrch&csi=293847> (Accessed on October 12, 2010).
576 "Greek government applies to cover national carrier's debt", *Airline Industry Information*, 8 August 2000, http://0-www.lexisnexis.com.biblio.eui.eu/hottopics/lnacademic/?shr=t&sfi=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.[577] 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.[578] 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 reneging 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.[579] Yet, soon after, the Commission released its damning Decision (2003/372/EC)[580] 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.[581] 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."[582]

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[577] 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).

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

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

[580] 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.

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

[582] 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,[583] and an angered Greek transport minister proclaimed that the government would use "all available means" to overturn the Commission's decision in European Courts.[584] 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.[585] Further, Verelis proceeded with his plans to split up and partly privatize Olympic[586] irrespective of the Commission's warnings of infringement proceedings,[587] and informed the Commission as such in March of 2003.[588] 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.[589]

Yet, before the infringement judgment could be handed down, Olympic Airways was restructured, despite significant labour unrest,[590] in December 2003;[591] 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 concern[592] 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."[593]

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583 "Greece's Olympic Airways may face bankruptcy", *The Irish Times*, 9 December 2002, 16.
584 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.
585 Judgment of the Court of First Instance 12 September 2007 T-68/03 *Greece v. Commission* [2007].
586 Paul Meller, "EU draws the line on state aid to carriers", *International Herald Tribune*, 24 April 2003, 14.
587 "European Commission threatens to take Greece to court over illegal state aid", *Airline Industry Information*, 18 February.
588 Opinion of the Advocate General of 5 February 2009 C-369/07 *Commission v Greece* [2009], para. 8.
589 "Brussels to Launch Court Case against Greece", *The Independent (London)*, 23 April 2003, 20.
590 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.
591 "Olympic gets a new name but debts remain", *Flight International*, 23 December 2003, 20.
592 "European Commission seeks details of Greece's plan for Olympic Airways", *Airline Industry Information*, 7 August 2003; "EU Orders Greece to disdose plans on Olympic Airways", Airline Industry Information, 8 September 2003.
593 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.[594] Moreover, in 2006, the Commission brought Greece before the ECJ a further time for failure to fulfill the obligations flowing from the 2005 Decision[595], 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.[596]

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."[597]

In 2009, the ECJ brought a seeming conclusion to this protracted dispute when it delivered its judgment in the penalty proceedings.[598] 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.

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[594] 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.

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

[596] « 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.

[597] 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.

[598] 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.[599] 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).[600] However, the ruling by the Court did ultimately uphold findings of illegal state aids on other counts totalling over 400 000 000 Euro.[601]

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.

[599] 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].
[600] Sophie Mosca, "Court of Justice: Commission Decision on Aid to Olympic Airways partially annulled", *Europolitics*, 14 September 2010.
[601] Ibid.

To Certify a Certificate?
Portugal, Italian Water Pipes and the Free Movement of Goods

(Case 27 reviewed by Gerda Falkner and Nikolas Rajkovic)

Litigation Basics

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.[602] 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."[603] 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.[604] 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.[605] 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 Decision No. 3052/95.[606] In May 2001, the Commission issued a further reasoned opinion, and in October 2003 infringement proceedings were begun before the ECJ.

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[602] Judgment of the Court of 10 November 2005 in European Court of Justice Case C-432/03 *Commission v Portugal* [2005], para 16 .
[603] Judgment of the Court of 10 November 2005 in European Court of Justice Case C-432/03 *Commission v Portugal* [2005], para. 14 & 15.
[604] Judgment of the Court of 10 November 2005 in European Court of Justice Case C-432/03 *Commission v Portugal* [2005], para 17 .
[605] Judgment of the Court of 10 November 2005 in European Court of Justice Case C-432/03 *Commission v Portugal* [2005], para 18 .
[606] Ibid.

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.[607] 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.[608] 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."[609]

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.[610] Notwithstanding these changes, the Commission initiated penalty proceedings against Portugal with the delivery of a letter of formal notice in July 2006.[611] 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 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.[612] Third, Portugal did not communicate any

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[607] Judgment of the Court of 10 November 2005 in European Court of Justice Case C-432/03 *Commission v Portugal* [2005], para 41.
[608] Judgment of the Court of 10 November 2005 in European Court of Justice Case C-432/03 *Commission v Portugal* [2005], para 27.
[609] Judgment of the Court of 10 November 2005 in European Court of Justice Case C-432/03 *Commission v Portugal* [2005], para 46.
[610] Judgment of the Court of 10 September 2009 in European Court of Justice Case C-457/07 *Commission v Portugal* [2009], para 25.
[611] Judgment of the Court of 10 September 2009 in European Court of Justice Case C-457/07 *Commission v Portugal* [2009], para 27.
[612] Letter of Formal Notice, issued on 04 July 2006, SG-Greffe (2006)D/203702, 3.

measures to the Commission intending to remedy the adverse effects resulting from the infringement.[613]

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.[614] 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.[615] 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.[616]

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.[617] While the Commission held that some aspects were "implicitly"[618] 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.[619] Therefore, the ECJ emphasized, the Commission's later concerns fell outside the precise subject-matter of the infringement judgment:

> "...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

[613] Judgment of the Court of 10 September 2009 in European Court of Justice Case C-457/07 *Commission v Portugal* [2009], para 27.
[614] Judgment of the Court of 10 September 2009 in European Court of Justice Case C-457/07 *Commission v Portugal* [2009], para 29-33.
[615] Judgment of the Court of 10 September 2009 in European Court of Justice Case C-457/07 *Commission v Portugal* [2009], para 35.
[616] Judgment of the Court of 10 September 2009 in European Court of Justice Case C-457/07 *Commission v Portugal* [2009], para 36.
[617] Judgment of the Court of 10 September 2009 in European Court of Justice Case C-457/07 *Commission v Portugal* [2009], para 60-61.
[618] Judgment of the Court of 10 September 2009 in European Court of Justice Case C-457/07 *Commission v. Portugal* [2009] para 98.
[619] Judgment of the Court of 10 September 2009 in European Court of Justice Case C-457/07 *Commission v Portugal* [2009], para 75-79.

encountered difficulties in obtaining approval for products or recognition of certificates issued by other Member States...."[620]

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.

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

Out of Sight? Greece's Restrictions on Opticians' Shops[621]

(Case 28 reviewed by Gerda Falkner and Nikolas Rajkovic)

Litigation Basics

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."[622] 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.

621 Thanks to Zoe Lefkofridi for discussing aspects of the Greek cases with Gerda Falkner.
622 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.[623]

The Commission received complaints in the mid to late 1990s from two companies which had been denied authorization to open opticians' shops.[624] 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.[625]

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."[626]

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

[623] Ibid.
[624] Judgment of the Court of 21 April 2005 in European Court of Justice Case C-140/03 *Commission v Greece* [2005] ECR, para. 6.
[625] 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.
[626] 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."[627] 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."[628]

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.[629]

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.[630] 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."[631] 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.[632] 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

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[627] Judgment of the Court of 21 April 2005 in European Court of Justice Case C-140/03 *Commission v Greece* [2005] ECR, para. 13.
[628] Judgment of the Court of 21 April 2005 in European Court of Justice Case C-140/03 *Commission v Greece* [2005] ECR, para. 31.
[629] "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).
[630] Judgment of the Court of 4 June 2009 in European Court of Justice Case C-568/07 *Commission v Greece* [2009], para. 10-12.
[631] Judgment of the Court of 4 June 2009 in European Court of Justice Case C-568/07 *Commission v Greece* [2009], para. 11.
[632] 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."[633] 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."[634]

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.[635] 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,[636] 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."[637]

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.

[633] Ibid.
[634] Ibid.
[635] Judgment of the Court of 4 June 2009 in European Court of Justice Case C-568/07 *Commission v Greece* [2009], para. 16.
[636] Ibid., para. 23 and 50.
[637] Judgment of the Court of 4 June 2009 in European Court of Justice Case C-568/07 *Commission v Greece* [2009], para. 52-53.

Crime and Proportionality:
Social versus Market conflict in Greece's Prohibition of Gaming Machines[638]

(Case 29 reviewed by Gerda Falkner and Nikolas Rajkovic)

Litigation Basics

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.

The Greek "gambling epidemic"[639] 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 year[640] and the Greek state "an estimated $5 million

638 Thanks to Zoe Lefkofridi for discussing aspects of the Greek cases with Gerda Falkner.
639 "Scandals Drive a Crackdown on Illegal Gambling in Greece", *New York Times*, 24 March 2002, 24.

daily in lost revenue, according to government officials."[641] A Finance Ministry spokesman pointed at the "highest incidence of gambling in the 15-nation European Union."[642] Further, some 200 000 unlicensed gambling machines were said to be in operation in Greece by 2002, [643] and this despite an existing prohibition against gambling outside licensed casinos.[644]

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."[645] What is more, snapshots of a senior Minister "seated in the cozy company of a reputed gambling baron" also made newspaper front pages[646]. 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.[647] 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.[648] 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.[649] 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."[650] A government spokesman said that the government would root out, *inter alia*, "financial crimes that have gone unpunished because of lax enforcement of laws."[651] 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?

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[640] "Greek govt deals out blow to gamblers", *Agence France Presse*, 21 February 2002; "Greek parliament outlaws electronic gambling", *Agence France Presse*, 11 July 2002.
[641] "Scandals Drive a Crackdown", 24.
[642] Ibid.
[643] Ibid.
[644] Ibid. See also "Government condemns report linking president to illegal gambling scandal", *Associated Press Worldstream*, 31 January 2002.
[645] "Government condemns report".
[646] "Scandals Drive a Crackdown", 24.
[647] "Government condemns report".
[648] "Scandals Drive a Crackdown", 24.
[649] "Premier dedares war on corruption in wake of illegal gambling scandal", *Associated Press Worldstream*, 6 February 2002.
[650] Ibid.
[651] Ibid.

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."[652] 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.[653]

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.[654]

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.[655] Specifically, the government argued that a blanket ban on electronic gaming in public places, with the exception of casinos,[656] became necessary because it was practically impossible to monitor the legality of each gaming machine.[657] This aggressive approach seemed to have broad partisan support because, reportedly, each of the bill's articles were passed unanimously in Parliament,[658] 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."[659] 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

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[652] 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.
[653] 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.
[654] Decision 1107414/1491/T. & E. F., published in the Government Gazette issue 1827, on December 8, 2003.
[655] 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.
[656] Greek parliament outlaws electronic gambling", *Agence France Presse*, 11 July 2002.
[657] Ibid.
[658] 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 induding questions with encydopaedic content. See "Greek parliament outlaws electronic gambling", *Agence France Presse*, 11 July 2002.
[659] "Greek govt deals out blow to gamblers", *Agence France Presse*, 21 February 2002.

nervously shooting from the hip...." [660] 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."[661] 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.[662]

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.[663] 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.[664] 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:

> "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."[665]

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[660] Ibid.
[661] "Scandals Drive a Crackdown", 24.
[662] 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.
[663] Judgment of the Court of 4 June 2009 in European Court of Justice Case C-109/08 *Commission v Greece* [2009], para 34.
[664] Judgment of the Court of 26 October 2006 in European Court of Justice Case C-65/05 *Commission v Greece* [2006], para 13.
[665] Judgment of the Court of 26 October 2006 in European Court of Justice Case C-65/05 *Commission v Greece* [2006] , para 17.

In reply, the Greek government did not contest the fact that its 2002 Law did create barriers to intra-Community trade.[666] 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."[667] 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. [668]

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 …."[669] Further, subsequent delivery of a letter of formal notice and a reasoned opinion similarly did not garner a reply from the Hellenic Republic.[670] Later, the Commission did not receive any reply regarding its observations on a draft amendment to the 2002 Law.[671]

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.[672] Following this action, the Greek government provided the Commission with a draft amending law in May 2008. Further, representations were given during submissions which asserted that amendments would be approved shortly by the Greek government.[673] 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:

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[666] Judgment of the Court of 26 October 2006 in European Court of Justice Case C-65/05 *Commission v Greece* [2006] , para 18.
[667] Judgment of the Court of 26 October 2006 in European Court of Justice Case C-65/05 *Commission v Greece* [2006] , para 21.
[668] Judgment of the Court of 26 October 2006 in European Court of Justice Case C-65/05 *Commission v Greece* [2006] , ruling.
[669] Judgment of the Court of 4 June 2009 in European Court of Justice Case C-109/08 *Commission v Greece* [2009] ECR, para 7.
[670] 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.
[671] Judgment of the Court of 4 June 2009 in European Court of Justice Case C-109/08 *Commission v Greece* [2009] ECR, para 12.
[672] Judgment of the Court of 4 June 2009 in European Court of Justice Case C-109/08 *Commission v Greece* [2009] ECR, para 1.
[673] 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.

"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."[674]

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).[675] 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.[676]

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.

[674] 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.
[675] Judgment of the Court of 4 June 2009 in European Court of Justice Case C-109/08 *Commission v Greece* [2009] ECR, para 56.
[676] Judgment of the Court of 4 June 2009 in European Court of Justice Case C-109/08 *Commission v Greece* [2009] ECR, para 35.