

Colophon

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1. From the president's desk

I am pleased to present the first issue of the newsletter of the Association of the Councils of State and Supreme Administrative Jurisdictions.

The aim of the newsletter is to improve the exchange of information between the members of the Association, and between the executive and the members, in order to strengthen our ties.

The content of the newsletter will include news from the individual institutions that may be of interest to other members and information about their own work in the field of Community law which may be relevant for the activities of other members.

The newsletter is scheduled to appear in principle every two months.

This issue opens with news about the executive's plans for the coming years. The executive hopes to organise a meeting in The Hague on 22 November. Preparations for this meeting are already underway.

The newsletter will also provide extensive coverage of the colloquia. The general rapporteur of the colloquium that was held in Helsinki in May, Heiki Kanninen of the Supreme Administrative Court van Finland, was kind enough to summarise the main findings of this colloquium for this issue. As was agreed in Helsinki we will discuss the results of the colloquium with the European institutions in the near future.

Preparations have started for the colloquium in 2004 on the subject of "The quality of Community Law and its implementation and application in the national legal order". I recently wrote a letter about it to the presidents. A copy of that letter is printed in this issue. As you will see, the intention is to organise the preparations for the colloquium differently, with a more interactive approach than for previous colloquia. The general rapporteur for the colloquium in 2004 is Ernst Hirsch Ballin, a member of the Netherlands' Council of State. With your help we can once again make the colloquium an extremely interesting event.

The column "Information from the members of the Association" provides a forum for members to keep other members of the Association in touch with interesting events going on in their own institution. The first item concerns the Bundesverfassungsgericht's move from Berlin to Leipzig in August of this year.

A special section in the newsletter is devoted to opinions published by Councils of State. This first newsletter reports on an opinion of the Dutch Council of State concerning a problem of Community law relating to the relaxation of the nationality requirement for the job of captain of a marine vessel and the Dutch government's response to it.

Another regular feature of the newsletter is an exchange of information about jurisprudence on Community law. This issue includes summaries of judgments of the German Bundesverfassungsgericht, the Austrian Verwaltungsgerichtshof and the Dutch Tariefcommissie (Customs and Excise Duties Court). A special word of praise to the Austrian Verwaltungsgerichtshof for its strong contribution to this first newsletter!

Because of the potential importance of the judgments and opinions of the members for the work of other members of the Association I appeal to all of you to follow this excellent example and to submit summaries in English or French of the most important judgments and opinions of your organisation through the contact person in your institution, together with the name and telephone number or e-mail address of the person who can provide further information about them for any readers that are interested.

The newsletter concludes with some recent requests for preliminary rulings submitted to the European Court in Luxembourg by the Austrian Verwaltungsgerichtshof and the Administrative Law Division of the Dutch Council of State.

This column could also prove very useful for the work of each one of us. I would therefore ask you all to send the editors of the newsletter all questions that you submit to the Court, either in their entirety or in summary form, in English or French. The executive of the Association will meanwhile review the possibilities of securing this information through other channels.

This newsletter is in many respects just a sample issue. Understandably, up to now only a few members have submitted judgments and opinions about the application of Community law for inclusion. However, this issue will give you an impression of what we are trying to do. I hope you will agree with me that this is a useful tool for communication between the members of our association. However, it is only with your cooperation that the newsletter will be able to fully achieve what it has set out to do.

We would like the newsletter to be distributed widely in your institutions so that it is read by as many people as possible. The simplest way to arrange this is to send the editor the e-mail addresses of all those in your organisation who would like to receive a copy directly.

With the holidays upon us, I would like to wish you all a very pleasant and refreshing break.

Tjeenk Willink



2. Information from the Association

2.a Excerpts of the speech of the president of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, mr H. D. Tjeenk Willink, held at the General Assembly of the Association in Helsinki, May 22 2002.

Program for the Association in the near future

The main object of the Association is to promote exchanges of views and experience between members on matters concerning case law, organisational structures, and the performance of judicial and advisory functions, with particular reference to Community law. We recognise that such exchanges can enhance the quality of our work.

Our work as advisors on legislation and as our countries' highest administrative courts is influenced today more than ever by Community law, which increasingly determines the content of national legislation, whether directly or indirectly. Not only is European law widening its scope and acquiring a denser system of rules, but it is also becoming the initiator in a growing number of areas. With each successive amendment of the European treaties this influence becomes stronger.

In this osmotic legal order, with unifying Community elements and divergent national elements complementing one another, it is important for advisory bodies on legislation to help ensure that the rules of law at national level - whether or not derived from Community law - are of the highest possible quality, and for administrative courts to ensure the correct application of Community law throughout the European Union.

This work can benefit immensely from exchanges of experience, views and case law. Besides making our work easier, such exchanges can foster legal uniformity within the Community.

Our Association was founded on the belief that a permanent organisation would provide the necessary structure to promote this endeavour. It was clear to us that the previous loosely - knit group no longer sufficed, in the face of the ongoing integration of Europe and the growing importance of Community law.

It seems to me that the Association faces four great challenges over the next few years.

First challenge

The first challenge is to sustain the Association's momentum and to develop it further.

This means continuing our current activities and undertaking new ones.

The Board has decided to promote networking among the membership by publishing a newsletter on a regular basis, by organising thematic symposiums and seminars on European law for the Association's members and their staff in collaboration with the European Academy of Law in Trier, and by the development of a central coordination and information point in Brussels.

The purpose of the newsletter is to promote communication between the members of the Association and between the Board and the members. Members can use the newsletter to inform each other of relevant events, activities and developments between within their organisations. These might include important appointments, organisational changes as well as noteworthy advisory reports or decisions. It will also give the Board a channel to keep the members informed of activities and developments between the meetings of the General Assembly.

The Board plans to hold a meeting at the European Academy of Law in Trier in the autumn for the heads of the research units attached to our various organisations to acquaint them with each other's work and to explore the scope for collaboration and synergy. It is our intention to hold another meeting at the Academy in Trier for the national reporters in preparation of the next Colloquium.

We hope to develop a lasting relationship between the Academy and the Association in the future.

The Board also intends to set up a central coordination and information point for members at the Secretariat-General in Brussels, with information and documentation on the application of European law.

We hope to present more information on this project at the meeting of the next General Assembly.

Second Challenge

The second challenge is to develop relations between the Association and the various institutions of the European Union.

The Board seeks to establish relations with the institutions of the European Union: the Council of the European Union, the European Parliament, and the

European Commission. Such ties could prove mutually beneficial. They may make it easier for us to convey the problems we encounter in our work with European legislation, and possibly to suggest solutions with a view to improving the quality of Community legislation and promoting good governance within the European Union.

We shall begin by informing the institutions of the European Union of the conclusions of our symposium and by inviting them to exchange views on the matters discussed. We also want to involve experts of the Commission in the preparation of the work for our next Colloquium.

Third Challenge

The third challenge is to adjust to the increase in the Association's membership following EU enlargement. This increase will affect the Association in terms of its organisational structure and its work.

An increase in membership of over 50% within a few years poses immense organisational challenges. Besides affecting the composition of the Board it will automatically mean larger colloquiums, with all the financial and organisational consequences such expansion entails. The Board must study these problems over the next few years and propose solutions to the General Assembly.

As for the Association's work, we must realise that our future colleagues look to us to help resolve some of the problems they face. The Board feels that we can and should make a meaningful contribution to their integration into the Community, in particular by allowing them to benefit from our expertise. We should seek to establish bilateral and multilateral channels for this purpose. The Board will take stock of the observers' aspirations, and see what the Association can do to resolve their problems, for instance by devising some kind of twinning system. With regard to this the Board will investigate possibilities for specific Community funds to support members who are willing to develop relations in this respect.

Fourth Challenge

The fourth challenge is on a more personal note: it has to do with members' input, with what members can do to make the Association effective as such.

I am not of course referring here to financial contributions, but to active participation in the Association's activities. Just now I mentioned the database that the Court of Justice has made available to us, which you will

soon be able to consult. It is being provided on a quid pro quo basis: in return for this service, our institutions must provide the Court (through the Association's Secretariat-General) with relevant national decisions and advisory reports on Community law for inclusion in the database. Only if our own institutions take an active part in the exchange, this database will retain its full effectiveness and topicality.

Active participation is also needed on other fronts: for the planned review of key decisions, for the newsletter, and indeed for most of the other activities we shall be undertaking. So I would urge you to take steps within your own institutions to ensure that you can effectively participate in these activities.

Colloquium 2004

Pursuant to our statutes, it is the President's responsibility to organise the next colloquium. I therefore have the honour of inviting you to The Hague, the seat of the Dutch Council of State, in 2004. The subject for this colloquium as proposed will be "The quality of Community law and its implementation and application in the national legal order".

General rapporteur will be my colleague, Councillor of State Ernst Hirsch Ballin.

The purpose is to examine the problems we encounter as judges, or as advisors on legislation, with the direct and indirect application of Community law, to investigate the causes of these problems and to propose solutions.

It is our intention to prepare the next colloquium in a more interactive way between general rapporteur and national rapporteurs, than we are used to do.

The general rapporteur intends to send you a letter within a few weeks containing an analysis of the subject and the way he intends to deal with it.

On the basis of this we would like to have a meeting of the national rapporteurs and Mr Hirsch Ballin at the Academy in Trier at the end of the year to discuss and to develop the subject.

On the basis of this discussion a questionnaire will be sent to the national rapporteurs for further reflection.

Mr Hirsch Ballin plans that the draft general report with specific proposals will be presented to the participants of the colloquium in The Hague in time, before the beginning of the Colloquium, so that they will be able to prepare themselves thoroughly.

During the process the development of the Convention on Europe, intended to be presented in 2004, will be

taken into account. To ensure an effective follow up of proposals, a relation will be maintained during the process also with the Commission of the European Union.

2.b Colloquium 2002

Summary of the main conclusions by Heikki Kanninen, Justice in the Supreme Administrative Court of Finland and General Rapporteur of the 18th Colloquium in Helsinki

The topic of the 18th colloquium in Helsinki was 'Preliminary Reference to the Court of Justice of the European Communities'. For the purpose of the Colloquium, national reports had been provided on all of the Member States explaining their practical experiences in applying Community law, and particularly of the preliminary reference procedure. On the basis of these national reports, a general report had been drawn up by the Rapporteur General. The European Court of Justice had also prepared a report of its own. Just as the preliminary reference procedure institutes a dialogue between the national judges and the European Court of Justice, the general Colloquium report and the report of the European Court of Justice formed a foundation for discussion in the meeting. The materials collected for the Colloquium refer explicitly to many practical issues on which there has previously been little information. The reports will soon be available on the Internet site of the Association.

Community law is far from establishing any kind of preponderance in the national courts, even though the importance of Community law has increased in recent years and continues to do so. The proportion of Community law matters heard before the national courts represented in the Colloquium varies between a few per cent to nearly one-third. It is no surprise that the topics in which Community law has established a firm foothold are indirect taxation, customs, social security, agriculture, public procurement and environmental affairs. Correspondingly the number of references for preliminary rulings varies considerably between national supreme courts. These differences can certainly largely be explained in terms of differences between the jurisdictions of these courts.

The preliminary reference procedure continues to be a progressive and exceptional mechanism in international organisations. The results of the Colloquium show that this procedure has worked and continues to work in practice. It has achieved a mature and accepted position in the judiciary systems. This positive picture is however overshadowed by the permanent concern for the delay

the preliminary reference procedure causes for the final settlement of the case. Moreover, the needs for future changes are still very unclear.

The formal criteria referred to in the CILFIT judgment and, on the other hand, a certain "functional flexibility" in the practical application of paragraph 3 of Article 234 of the EC Treaty gave rise to lively discussion. Other especially interesting items in the discussion were the internal arrangements in national courts for the preparation and handling of cases related to Community law, the respective roles of the parties (their counsels) and the national court in taking up a matter of Community law and taking the initiative to seek a preliminary ruling. Variations between national procedural systems are on certain points surprisingly great. There was also a useful exchange of views on the role of the national court during the proceedings before the Court of Justice. Finally, it may be observed that the Colloquium showed the need to improve the means to seek up to date information on the case law and pending cases related to Community law.

2.c Colloquium 2004

Letter dated July 5 2002, sent by the president of the Association, mr Tjeenk Willink, to the presidents of the member organisations regarding the Colloquium to be held at the The Hague in 2004

During the General Assembly of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union on 21 May 2002 in Helsinki, we briefly discussed the Colloquium planned for 2004 in The Hague. This letter goes into the subject matter and format of that Colloquium in greater detail.

The topic will be "The quality of Community law and its implementation and application in the national legal order". This covers a broad area and will of course need to be narrowed down. Our aim is to identify concrete problems that members encounter in their work as advisers on legislation and as administrative tribunals when they transpose, interpret or apply Community legislation. We hope to find the sources of these problems and compile a record of both existing solutions and new ones.

We do not intend to address general aspects of the quality of legislation. Community legislation has unique characteristics which pose unique problems in practice. The goal of the 2004 Colloquium will be to catalogue quandaries in European lawmaking that are directly related to Community law, as well as the methods

developed to deal with them.

These fall into two categories:

- problems relating directly to Community legislation and the process of its creation
- problems relating to the implementation and application of Community law in national legal orders.

The first category, problems relating directly to Community legislation, includes the following issues. First of all, Community rules come into being in a very different way from national legislation. Important steps take place behind closed doors. As a result, it is not always easy to tell what the authors had in mind. This is especially true of amendments made by the Council of the European Union to proposals brought forward by the European Commission. The recitals may not provide enough clarification in these cases and it sometimes becomes more difficult to interpret the legislation as a result. In addition, as was mentioned in Helsinki, the European Union's language policy creates practical difficulties. All language versions are equally authentic. Differences between versions therefore regularly lead to practical problems of interpretation. The upcoming enlargement of the European Union will only exacerbate this problem.

The second category of issues has to do with the implementation and application of Community legislation in national legal orders. At issue are national legislation implementing Community legislation (this is particularly relevant to our role as advisers on legislative matters) and issues of national judicial application and review. More specifically, what is at stake is how the various actors in national legislative procedures deal with obligations arising from Community rules and the attendant organisational issues.

This second category also covers the various methods of implementation and in particular the way that national systems deal with the architecture and terminology of Community law. The main question is what principles should guide national legislators. Two related issues are the interpretation of Community legislation and the question of how to handle provisions of Community legislation that give member states more - or less - freedom of choice.

Judicial and legislative authorities regularly encounter difficulties with the timely implementation of directives and the consequences of failure to implement in a timely fashion. These issues arise both in our capacity as advisers on legislative matters and when we function as administrative tribunals, though different aspects come

to the fore. For instance, problems of interpretation probably play a frequent and prominent role in our judicial activities than in our advisory work.

With regard to our role as advisers on legislation, we will focus on the mechanisms developed in the various member states to improve the quality of European legislation. How do the member states figure into Community legislative procedures? What is the role of Councils of State? We will also look at techniques that have been devised to smooth the process of accommodating and applying Community legislation in the national context. Special attention will be given to ways of approaching differences between the architecture and terminology of national legislation (and national systems) and that of the Community legislation that must be accommodated in national systems. Another important issue is how to deal with questions about the interpretation of Community rules that arise during their implementation.

The questions that arise in our work as legislative advisers return in a different guise in our judicial activities. There, we must find ways of handling situations in which implementation has not taken place (and the potential ramifications of 'uncontrolled' direct effect can be unacceptably severe). And there again, the issue arises of discrepancies in the architecture and terminology of Community and national legislation and how to deal with them in practice. Also, building on the insights gleaned in Helsinki, we can delve deeper into the techniques for resolving uncertainties about interpretation or direct effect ourselves rather than by seeking preliminary rulings. The discussion of these matters will to a large extent take the General Report of the Helsinki Colloquium as its point of departure.

The 2004 Colloquium will cover a broad terrain. If appropriate, the conclusions could feed into policy on the Convention and the Intergovernmental Conference in 2004. This is the reason for the chosen format, with more preparation time and more preparatory work than usual.

This autumn, a discussion paper written in collaboration with a university institute will be sent to the members. A meeting of national reporters will follow, which will explore the subject matter more deeply and concretely. Representatives of the Court of Justice of the European Communities and of the European Commission will also be invited to attend. The conclusions of that meeting will be used to draw up questions for national reporters, which can guide their efforts as they continue preparing for the 2004 Colloquium.

I hope that this letter has given you enough information about the subject matter and format of the 2004 Colloquium. In view of the large amount of preparation that will be required, I would ask you to let me know by the end of July whom your organisation has designated as national reporter. I look forward to working with you in the months and years ahead.



3. Information from the members

The Federal Administrative Court (Bundesverwaltungsgericht) of Germany will move from Berlin to Leipzig in August 2002.

The German Federal Administrative Court, established in 1953, resides in Berlin in the premises built for the Prussian Superior Administrative Court in 1907. That Court, established in 1875, was in function until 1941 when it was merged with other special administrative courts into a new "Reichsverwaltungsgericht" which, however, never gained any importance.

After the reunification of Germany in 1990, a special commission formed of members of parliament of the federal Bundestag and of the Länder made proposals how to distribute federal institutions throughout Germany, following the tradition not to concentrate such institutions in the capital but to spread them widely through all the German Länder. Since the Federal Government, the Bundestag and the Bundesrat would move from Bonn to Berlin, it was decided that federal institutions already residing in Berlin should be assigned new places of residence in the so called "New Länder". Thus the Federal Administrative Court was designated to move to Saxony. The commission's proposals were adopted in 1992.

Although the city of Leipzig was not mentioned in the commission's proposals the Federal Administrative Court took it for granted that its new place of residence would be Leipzig, and in particular the old building of the former Reichsgericht.

The Reichsgericht was established in 1879 as the supreme court of the newly founded German Reich. The huge and impressive building erected in the years 1888 - 1895 was designed by the young and until then completely unknown architects Ludwig Hoffmann and Peter Dybwad, winners of a national competition. It was by far the most important judicial building in Germany, comparable in size to the Reichstag erected in Berlin by Paul Wallot. It was meant to symbolise the newly gained unity of law as well as the importance of jurisdiction.

The Reichsgericht's activities ended in 1945. The building was severely damaged by numerous bombs; 336 of 358 rooms were injured or destroyed; just 24 rooms (in summer) and 12 (in winter) were usable. The presidential wing suffered additional losses in a fire that broke out in 1951. In 1952 the building was renamed into "Georgi Dimitroff-Museum", thus celebrating the communist Bulgarian Prime Minister who was acquitted by the Reichsgericht in a trial for high treason in 1933. Some provisional repairs were carried out. The building now served as a museum exhibiting the Fine Art Collection of the city of Leipzig. Other rooms served as archives and even as a cinema atelier.

After the decision that the building of the Reichsgericht should become the residence of the Federal Administrative Court, the Leipzig Fine Art Collection was transferred into another building and a complete restoration of the building was set into work. Within less than five years of intense labour all damages resulting from the war time and post war neglects were carefully repaired, the staircases and the fine decoration of the historic session halls were restored, the outer side of the building, darkened with smoke and age, was brightened up. Furthermore, the interior technical installations were completely renewed in order to meet the requirements of a court acting in the 21st century. The building now houses a library of about 230 000 books dating from the 14th century to our days and including the most valuable historic collection of the former Reichsgericht. About 65 judges will take up their work in Leipzig by the end of August, 2002.

4. Advisory opinions regarding community law

Advisory opinion of the Council of State of the Netherlands

Relaxation of the nationality requirement for captains of Dutch seagoing vessels; rights of nationals of countries with which the European Union has concluded Association Agreements; the rights of EU/EEA nationals' family members.

The current Dutch Maritime Crews Act provides that the captain of a Dutch ship must possess Dutch nationality. At present there is very little room for exemptions.

The Bill would widen the nationality requirement to include nationals of any country of the European Union (EU) and the European Economic Area (EEA), as well as nationals of a country with which the Netherlands has concluded a specific Memorandum of Understanding (MoU). The reason for relaxing the rules was the lack of eligible candidates to captain Dutch ships.

In its advisory opinion, the Council of State drew attention to the captain's responsibility in respect of public order, in light of the provisions on freedom of movement. Captains of Dutch seagoing vessels have diverse responsibilities and powers under public law, in particular regarding the maintenance of public order and safety on board ship, such as the competence to investigate criminal offences and to draw up official reports under oath of office.

In its advisory opinion, the Council drew attention in this regard to the significance of the EU's Association Agreements with inter alia States in Central and Eastern Europe, which give certain groups rights comparable to the rights of freedom of movement. The Council wondered whether the proposed construction making eligibility for a captaincy contingent on an agreement in the form of an MoU would actually be lawful in light of these treaties, since such eligibility already exists under the terms of the relevant Association Agreements.

In its response, the Government pointed out that under the present state of the law and having regard to the relevant case law of the Court of Justice of the European Communities (ECJ), it is entirely permissible for Member States to make eligibility for a regulated profession contingent on certain requirements. It added the following explanation.

Eligibility to serve on board a Dutch vessel is governed primarily by Directive 2001/25/EC on the minimum level of training of seafarers, which is implemented by the Maritime Crews Act and the regulations based on it. The Bill makes a direct link in the statutory requirements for non-EU candidates, in respect of the Minister's discretionary power to grant exemption from the nationality requirement, between the candidate's nationality and the quality of the maritime education and other nautical training courses in the State of his/her nationality. States with which the Netherlands has concluded an MoU are deemed to meet the required standards of nautical training relevant to service on board a Dutch vessel within the meaning of the Directive.

The objective standard of foreign (i.e. non-EU) training courses that have been completed successfully by seafarers on board ships registered in the Netherlands and that fly the Dutch national flag is assessed materially at various times and by various bodies and can be deemed satisfactory subject to this assessment. The appointments at issue are jobs on board a seagoing vessel that are governed by the training and experience requirements prescribed by the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW Convention).¹

Pursuant to the STCW Convention, every Party must ensure that its maritime training fulfils the training and experience criteria that are defined in the Annex or the mandatory part of the Code attached to this Convention. Parties to the Convention are required to provide detailed information to the UN's International Maritime Organisation (IMO) concerning administrative measures taken to ensure compliance, submitting all the relevant documentary evidence such as legislation and training curricula. The IMO then examines these measures and documents to determine whether the State in question has discharged its obligations under the STCW Convention. If it passes this test, the State (or territory) concerned is placed on its "White List". Only seafarers from White List countries are qualified to serve on vessels navigating international waters.

To implement the provisions in regulation I/10 of the Annex of the STCW Convention, the Netherlands must conclude a written undertaking with a State before qualified seafarers from that State may be permitted to serve on board Dutch ships.

¹ Treaty Series 1981, 144.

However, before signing such an undertaking (generally in the form of a policy agreement - an MoU), the Netherlands conducts a thorough investigation of the training in the State concerned to ascertain whether it is STCW-compliant and whether it has a quality assurance system that provides an enduring guarantee of the quality of training, and hence of those who have completed this training.

The Netherlands then submits the said undertaking for inspection and approval to the European Commission, together with the documents on which it based its decision. The Commission presents the documents to the other EU Member States, asking them to notify the Commission if they have any objection to recognition. The Commission itself examines the Netherlands' proposed recognition independently of the assessments carried out by EU Member States. Only if all quality requirements have been fulfilled and there are no objections remaining within the EU will the Commission approve the appointment of seafarers from the State concerned.

In view of the above, the Minister was of the opinion that restricting the recognition by EU Member States of seafarers' certificates of competency issued by non-EU States to those issued by States with which a Member State - after receiving the European Commission's approval - has concluded a MoU does not constitute an unwarranted restriction of the rights conferred on nationals of countries with Association Agreements with the EU by the said Agreements.

Another of the Council of State's comments concerned the situation of non-EU/EEA nationals who nonetheless have the same status as EU nationals and enjoy rights under Community law on the basis of their family relationship with an EU national.

In response, the Government replied that these individuals are indeed eligible for the new, more inclusive regime, provided they are in possession of a recognised certificate (that is, a certificate from an EU/EEA Member State or a country with which an MoU has been concluded). The explanatory memorandum accompanying the Bill was amended to this effect.



5. Jurisprudence

5.a Austria

Decision of the Verwaltungsgerichtshof of 28 February, no. 99/15/0269, and decisions of 31 January 2002, no. 2002/15/0003, 0004 and 0005

- 1. Fiscal provisions - Harmonisation of legislation - Turnover tax - Common system of value added tax - Deduction of tax paid upstream - Exclusions from the right to deduction - Possibility for the Member States to maintain the existing exclusions upon the entry into force of the Sixth Directive - Exclusion, subsequent to that date, of the right to deduct expenses relating to certain automobiles after the opening up of this right according to an administrative practice - Inadmissibility (Council Directive 77/388, art. 17. #6, para. 2)*
- 2. Fiscal provisions - Harmonisation of legislation - Turnover tax - Common system of value added tax - Deduction of tax paid upstream - Exclusions from the right to deduction - Possibility for the Member States to make provision for certain exclusions depending on circumstances - Conditions for exercise (Council Directive 77/388, Article 17. #7, first sentence)*

By Order of 22 September 1999 the Verwaltungsgerichtshof put, by virtue of EC Article 234, two preliminary questions to the Court of Justice of the European Community on the interpretation of Article 17, paragraphs 6 and 7, of the Sixth Council Directive 77/388 of 17 May 1977, on the subject of harmonisation of the legislation of Member States on turnover tax - Common system of value added tax: uniform tax base. These questions were raised in the context of two disputes between, on the one part, Metropol Treuhand WirtschaftstreuhandgmbH and the Finanzlandesdirektion für Steiermark and, on the other part, M. Stadler at the Finanzlandesdirektion für Vorarlberg, on the subject of the right to deduction of value added tax (hereinafter « VAT ») paid upstream for the use, respectively, of a Pontiac Transport vehicle and a Fiat Ulysse vehicle, to which the Court replied in its decision of 8 January 2002, C-409/99.

In this case the Verwaltungsgerichtshof decided that the deduction of VAT relating to the vehicles of the claimant parties could not be refused on the sole ground that those vehicles could not be classified in terms of the new definition of the decree of the Federal Finance Minister as « minibus » vehicles.

The Verwaltungsgerichtshof subsequently overturned the administrative decision by which the deduction of

VAT had been refused to the claimant parties.

Decision of the Verwaltungsgerichtshof of 28 February 2002, no. 99/17/0008

EEC Commission Regulation no. 2220/85 of 22 July 1985 fixing the common modalities for application of the regime of guarantees for agricultural products
EEC Commission Regulation no. 3719/88 of 16 November 1988 containing common modalities for the application of the regime of certificates of import, export and prefixation for agricultural products
Force majeure - notion

The claimant party obtained a certificate of import on 28 April 1997 with a period of validity until 30 June 1997 for 24,990 kg of pig meat; Hungary was stated as the country of shipment and of origin.

By administrative decision of 9 July 1998 the guarantee of the claimant party was declared due for the above-mentioned certificate for the amount of ATS 108,350.00, and that party was required to pay the said amount to the Federal Republic of Austria.

In its administrative appeal the claimant party put forward the argument that during the period of validity of the certificate only 5% of the products scheduled had been imported, because at the moment of shipment swine fever had broken out on the Czech Republic. It was therefore a case of force majeure and the guarantee should never have been declared due. The Minister of Agriculture rejected the claimant party's appeal, taking the view that the conditions for force majeure had not been fulfilled in this case, since the country of origin stated in the certificate was Hungary where the epidemic relied upon by the claimant party had not broken out and where there had not therefore been any import restrictions.

The Verwaltungsgerichtshof, which had been seized by the claimant party rejected its appeal because in this case the conditions for force majeure laid down in the jurisprudence of the Court of Justice could not be considered as having been fulfilled. The declaration of the country of origin on the certificate was not binding and the claimant party would have been free to import products of other countries. That party had not even argued that it had been impossible to import pig meat of Hungarian origin. Furthermore, even though no such express provision could be found in Community regulations, the terms of Article 22 of EEC Regulation 2220/85

would permit the conclusion that the burden of proof for establishing a case of force majeure fell upon the companies. Nor could the claimant party's appeal be based on the expiry of the time limit prescribed by Article 37 of EEC Regulation no. 3719/88. The reply to the question whether or not there was force majeure was independent of any decision that might be taken under Article 37 of the Regulation.

The point at issue having been resolved by the established jurisprudence of the Court of Justice, no preliminary referral was necessary.

Decision of the Verwaltungsgerichtshof of 28 February 2002, no. 2000/15/0132

Eighth Council Directive 79/1072/EEC, of 6 December 1979, on the harmonisation of the legislation of the Member States relating to turnover tax - Modalities of reimbursement of value added tax to subjects not established inside a country.

The claimant party is an Italian enterprise. It asked the regional tax collecting authority for reimbursement of value added tax for the months of April, May, August, November and December 1997, but this was refused because of the expiry of the time limit fixed by a Ministerial decree.

The enterprise seized the Verwaltungsgerichtshof, arguing, inter alia, that the administrative decision was contrary to the provisions of Article 7 paragraph 4 of EEC Directive 79/1072 because that decision had been notified to it more than six months after the expiry of the time limit set out in the Directive.

The Verwaltungsgerichtshof rejected the appeal of the claimant enterprise on the merits, considering that the non-respect of the time limit for the administrative decision did not mean that, as a consequence, the request for reimbursement made outside the time limit should have been admitted.

Decision of the Verwaltungsgerichtshof of 28 February 2002 no. 2001/16/0054

*EEC Council Regulation no. 2913/92 of 12 October 1992 establishing the Community customs code.
EEC Commission Regulation no. 2454/93 of 2 July 1993 fixing certain provisions for the application of EEC Council Regulation no. 2913/92 establishing the Community customs code.
EEC Commission Regulation no. 993/2001 of 4 May 2001 modifying EEC Regulation no. 2454/93 fixing certain provisions for the application of EEC Council Regulation no. 2913/92 establishing the Community customs code.*

In this case the Verwaltungsgerichtshof was asked to respond to the question whether the fact that the claimant party had omitted to include in its statement of compatibility of materials the mention « special entrepôt » which had been granted to it by the customs authorities, constituted a default which had had real consequences for the proper functioning of the temporary depot or the relevant customs regime.

EEC Regulation no. 2454/93 and the stockage permit obtained by the claimant party provided for the stockage of bulky merchandise in special entrepôts, and set forth the obligation to mention the transfer of the merchandise from the customs entrepôt to the special entrepôt.

The Verwaltungsgerichtshof held that, although Article 859 of EEC Regulation 2454/93 contained a list of defaults without real consequences, it was legitimate to conclude that defaults less serious than those listed in Article 859 (as with the one of which the claimant party was accused) were also without real consequences.

For this reason the Verwaltungsgerichtshof overturned the decision of the administrative authority which had misunderstood the legal position.

Further information on the foregoing cases may be obtained from ms. Annemarie Sellner, Verwaltungsgerichtshof, Vienna: annemarie.sellner@vwgh.gv.at

5. b Germany Decision of the Bundesverwaltungsgericht (First Senate)

Regarding expulsion of a Turkish citizen residing in Germany (Additional Protocol to the 12 September 1963 agreement establishing the Association between the EEC and Turkey.

The plaintiff was a Turkish citizen who had been resident in the Federal Republic of Germany since 1983. In 1996 she was sentenced to three years' imprisonment for trafficking in heroin and for this reason expelled from Germany. The immigration authorities acted pursuant to section 47, paragraph 1, of the Aliens Act 1990, under which foreign nationals subject to prison sentences of this kind are expelled, on a compulsory basis or in principle, and under which no discretion is permitted to the authorities. The Federal Administrative Court quashed the Appeal Court ruling and referred the case back to the Appeal Court.

The Federal Administrative Court first established that the order for the plaintiff's expulsion should have been based not on the compulsory but on the "in principle"

rule, since at the time of the official decision she enjoyed special protection against expulsion. This is because she had entered the Federal Republic as a minor and was in possession of a permanent residence permit at the time in question.

The Federal Administrative Court then considered the question of whether the expulsion was permitted during the transitional stage of association despite article 41, paragraph 1, of the Additional Protocol to the 12 September 1963 agreement establishing the association between the European Economic Community and Turkey. This Protocol, which is directly applicable in all Community member states, states that the contracting parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services. This provision is known as the standstill clause.

The Federal Administrative Court answered the above question in the negative for two reasons. Firstly, it was not clear whether the plaintiff had a right of "establishment" within the meaning of the Protocol provisions, establishment being defined in accordance with article 43 ff. (formerly article 52) of the EC Treaty.

Secondly, even if the plaintiff is given the benefit of the doubt in this question, the standstill clause does not apply. The fact that an alien sentenced to three years' imprisonment for a drug offence would as a rule be expelled does not constitute a deterioration of the legal situation which pertained when the standstill clause came into effect. This question must be examined in the light of case law relating to the legislation then in force, and administrative practice compatible with it. At the time it was already normal practice approved by the courts for aliens convicted of drug offences to be expelled on the basis of the "in principle" rule because of the great danger posed by drug trafficking.

International law, in particular article 3, paragraph 3, of the European Convention on Establishment of 13 December 1955 does not confer extensive protection against expulsion. By judgment of 11 June 1996 (BVerwG 1 C 24.94 - BVerwGE 101, 247 (263)), the Federal Administrative Court held that there was no qualitative difference between compelling reasons justifying expulsion under national law on the one hand and the "imperative considerations" specified in article 3, paragraph 2 of the European Convention on Establishment on the other.

The plaintiff could not invoke the standstill clause in article 13 of Decision 1/80 of the EC-Turkey Association Council for the same reasons as set forth in article 41

of the Additional Protocol. The Court of Appeal must, however, clarify whether she had the right of residence under article 6 or 7 of Decision 1/80. If so, consideration must be given to the question of whether her expulsion under article 14 of Decision 1/80 would only have been permissible on the basis of a discretionary decision. A request (no.6 K 4553/00) of 4 December 2001 by Stuttgart Administrative Court for a preliminary ruling on this point is still before the European Court of Justice.

Further information can be obtained from Mr Michael Groepper, Bundesverwaltungsgericht Berlin, email address: groepper@bverwg.bund.de.

5.c The Netherlands

Decision of the Trade and Industry Appeals Tribunal of the Netherlands, 26 April 2002

26 April 2002, AWB00/57 900/579

After examination in the light of article 25 EC, article 34, paragraph 2 (ii) EC and article 90 EC, and case law of the Court of Justice of the European Communities, it was found that there could be no reasonable doubt as to the binding nature of the provision pursuant to which the levy was imposed.
(EC art. 25. 34 para. 2)

The company S.I.O.B. Srl, established under Italian law at P., Italy, appellant v. the Horticulture Marketing Board, Zoetermeer, defendant

Introduction

Pursuant to the Flower Bulbs Trade Levy Regulations 1980 issued by the Ornamental Plant Authority ("the Regulations"), purchasers and sellers of certain saleable flower bulbs are liable for a levy (the "trade" levy) equivalent to a certain percentage of the invoice amount. The appellant considered the charges imposed on it incompatible with the EC Treaty, invoking three judgments of the Court of Justice ("ECJ"), viz. the judgment of 19 June 1973 in case no. 77/72 (Capolongo), the judgment of 16 December 1992 in case no. C-17/91 (Lornoy) and the judgment of 20 May 1987 in case 272/85 (ANTIB). The Van der Hulst case, which the Tribunal cites in its considerations, is the Court of Justice's judgment of 23 January 1975 in case no. 51/74.

Tribunal

(...) In substance, the dispute between the parties concerns the question of whether the trade levy imposed is in violation of articles 25 and 90 EC (previously articles 12 and 95 of the EEC Treaty before amendment). The appellant believes this to be so, and in support of this

argument cites inter alia the ECJ judgments in the Capolongo and Lornoy cases, referred to in para. 2.1 above.

What the Court declared to be the law in the said cases is of no benefit to the appellant in this dispute, since, unlike the levies at issue in those cases, the trade levy pursuant to article 1, paragraph 2 of the Regulations does not apply to imported flower bulbs.

At the hearing, the appellant also cited the ECJ's judgment in the ANTIB case, also referred to above, in support of its argument. The Tribunal holds that in the ANTIB case, which concerned not the application of articles 12 and 95 of the EEC Treaty (now articles 25 and 90 EC) but competition between French boatmen and boatmen from other Member States in accordance with Regulation (EEC) no. 1017/68, the Court of Justice compared the levy and the advantages which French boatmen could derive from it with the levy on transport services offered by foreign boatmen on French inland waterways. For this reason alone, the Court's considerations in the ANTIB case provide no basis for examining the trade levy in the light of the Treaty articles referred to, since the trade levy is specifically not payable on flower bulbs that are cultivated by foreign growers and imported into the Netherlands.

The appellant also stated that it derives less benefit from the improvement and sales promotion of Dutch bulbs. This forced the tribunal to consider whether the trade levy has equivalent effect to a customs duty on exports, because it is intended to make the home market more profitable than exports or to place the bulbs intended for the home market in the Netherlands at an advantage compared with bulbs intended for export, within the meaning of operative part I of the ECJ's judgment in the Van der Hulst case cited above.

The Tribunal's answer to this question is in the negative, and is based on the following considerations.

No facts or circumstances have been submitted or established showing that sales of the Dutch-grown flower bulbs exported by the appellant were promoted less than sales in the Netherlands by the promotional activities funded from the trade levy. The appellant acknowledged that it can benefit from such promotional activities in Italy, but regarded this benefit as minor in proportion to the amount of the trade levy. Whatever the case may be, this ground for appeal cannot achieve the result desired by the appellant, because such a proportion is not in itself a criterion in the light of what the Court declared to be the law in the Van der Hulst judgment.

Nor do the appellant's arguments provide a basis on which the Appeals Tribunal can conclude that the Dutch bulbs sold by the appellant benefit less than Dutch bulbs sold by others from the research and quality assurance policy funded from the trade levy.

The fact that the appellant attaches no - or in any event less - value to a quality guarantee for which the defendant aims to use the money from the trade levy, and the appellant's preference for purchasing foreign-grown bulbs if they are of better quality, do not mean that the Dutch flower bulbs on which the appellant has to pay the levy are excluded from the relative advantage implied by the quality guarantee.

That a very large proportion of the yield of the trade levy is spent in ways that are of sole benefit to Dutch-grown flower bulbs and their sales does not lead to the conclusion drawn by the appellant that only Dutch growers can or do benefit from the levy.

The conclusion is that, in the light of article 25, article 34, paragraph 2 (ii) and article 90 of the EC Treaty and the European Court of Justice case law cited above, there can be no reasonable doubt of the binding nature of the contested trade levy.

The appeal is consequently declared to be ill-founded.

Further information on this case can be obtained from Molle Eisma, Raad van State, The Hague, email address: aweggeman@raadvanstate.nl.

6. Preliminary References

6.a Austria

Preliminary referrals by the Verwaltungsgerichtshof

Order of 28 February 2002, no. 2000/16/0853

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

The Verwaltungsgerichtshof asked the Court of Justice for a ruling on whether the levying of contributions pursuant to #108 paragraph 1 of the national law giving effect to the Community customs code (Österreichisches Zollrechts – Durchführungsgesetz) due upon the coming into existence of a customs debt according to Articles 202 to 205 or 205 or 211 or for the recovery of contributions according to Article 220 of EEC Regulation no. 2913/92 and which corresponds to the amount of the delay penalty which would result for the period between the coming into existence of the customs debt and its entry into the books, in the case of an inventory taken pursuant to Article 220 of EEC Regulation no. 2913/92 for the period between the due date of the customs debt as initially entered and the entry on the books of the customs debt to be recovered, was contrary to the Community customs regime.

Order of 23 May 2002, no. 2001/07/0132

Decision of the Commission of 11 June 1992 determining the criteria for approval or recognition of organisations and associations holding or creating genealogical records for registered members of the horse family

The Verwaltungsgerichtshof submitted the following questions to the Court:

- 1 Does Article 2 paragraph 2 (a) of the decision of the Commission of 11 June 1992 determining the criteria for approval or recognition of organisations and associations holding or creating genealogical records for registered members of the horse family confer the right on an officially approved or recognised organisation or association to require the State authorities to refuse approval or recognition of another organisation or association, if the approval or recognition of that new organisation or association endangers the preservation of the breed or compromises the functioning of an existing organisation or association or its programme for improvement or selection?
2. Does Article 2 paragraph 2 (a) of the above-mentioned decision of the Commission contradict a national provision which confers on an organisation or association holding or creating genealogical records for registered members of the horse family only the right to be heard before the authority in an approval or recognition procedure, but not the right to require the State authorities to refuse approval or recognition of another organisation or association, if the approval or recognition of that new organisation or association endangers the preservation of the breed or compromises the functioning of an existing organisation or association or its programme for improvement or selection, and b) does not confer on the existing organisation or association the right of appeal to the Verwaltungsgerichtshof, even if the approval or recognition had been granted by the State authority after having declared itself against it?

6.b The Netherlands

Preliminary referral by the Administrative Jurisdiction Division of the Council of State of 27 March 2002

Directive no. 92/43/EEC of 21 May 1992 of the Council of the European Communities concerning the conservation of natural habitats and of wild flora and fauna (Habitat Directive)

- 1a. Should the phrase “plan or project” in Article 6 (3) of the Habitat Directive be construed to include an activity that has already been in progress for many years but for which in principle a fixed-term licence must be issued each year, following an assessment of whether the activity may be carried out and, if so, in what parts of the site?
- 1b. If the answer to question 1a is negative, should the activity concerned be classified as a “plan or project” if this activity has gained in intensity over the years, or, alternatively, if an increase in intensity has been made possible by the disputed decisions?
- 2a. If it follows from the answers to question 1 that a “plan or project” within the meaning of Article 6 (3) of the Habitat Directive is at issue, should Article 6 (3) of the Habitat Directive be seen as a more detailed specification of the rules in para. 2, or as a provision with a distinct, independent content, for instance in the sense that:

- (i) para. 2 relates to existing use and para. 3 to new plans or projects; or
 - (ii) para. 2 relates to measures relating to control and the third to other decisions; or
 - (iii) para. 3 relates to plans or projects and para. 2 to other activities?
- 2b. f Article 6 (3) of the Habitat Directive should be construed as a more detailed specification of the rules in para. 2, could para. 2 and para. 3 have cumulative application?
- 3a. Should Article 6 (3) of the Habitat Directive be construed such that a “plan or project” exists as soon as a certain activity could have an effect on the site concerned (and hence that thereafter an “appropriate assessment” must be made to determine whether this effect is “significant”), or does this provision mean that an “appropriate assessment” does not need to be made until a plan or project is (sufficiently) likely to have a significant effect?
- 3b. On the basis of what criteria should it be determined whether a plan or project within the meaning of Article 6 (3) of the Habitat Directive that is not directly connected with or essential to the management of the site could have a significant effect on the site, either individually or in combination with other plans or projects?
- 4a. On the basis of what criteria should it be determined, in the context of the application of Article 6 (3) of the Habitat Directive, whether “appropriate steps” have been taken within the meaning of para. 2 of this Article, and whether an “appropriate assessment” has been made in connection with the certainty required to secure consent to a plan or project within the meaning of para. 3?
- 4b. Do the terms “appropriate steps” and “appropriate assessment” have independent meaning, or should Article 174 (2) of the EC Treaty, in particular the precautionary principle mentioned in that paragraph, be taken into account when assessing them?
- 4c. If the precautionary principle mentioned in Article 174 (2) of the EC Treaty must be taken into account, does this mean that a specific activity, such as the cockle fishery that is at issue here, can be permitted if the absence of any potential significant effect is not subject to any clear doubt, or can it be permitted only if the absence of such an effect is not subject to any doubt at all, or only if it can be established with certainty that there will be no such effect?
5. Does Article 6 (2) or (3) of the Habitat Directive have direct application, in the sense that private individuals may invoke it before the national courts and that these courts must provide the legal protection that follows from this direct applicability for the litigants, as ruled *inter alia* in the Peterbroeck case?