

18 This duty of sincere cooperation imposed on Community institutions is of particular importance vis-à-vis the judicial authorities of the Member States, who are responsible for ensuring that Community law is applied and respected in the national legal system.

19 When analysed in the light of those principles, the privileges and immunities which the Protocol grants to the European Communities have a purely functional character, inasmuch as they are intended to avoid any interference with the functioning and independence of the Communities ( see the order of the Court in Case

C-1/88 SA Générale de Banque v Commission [1989] ECR 857, paragraph 9 ).

20 The functional, and therefore relative, character of the privileges and immunities of the Communities is, moreover, expressly embodied in the provisions of the Protocol; Article 1 provides that the Court may authorize administrative or legal measures of constraint with regard to the property and assets of the Communities, and Article 18 provides that the privileges, immunities and facilities are accorded to officials and other servants of the Communities solely in the interests of the Communities.

21 The Protocol therefore does not permit the Community institutions to neglect the duty of sincere cooperation with the national authorities, and in particular the judicial authorities, a duty which is, moreover, referred to in Article 19 of the Protocol itself.

[...]

Operative part

On those grounds,

THE COURT

hereby orders as follows :

( 1 ) The request by the Rechter-commissaris, Groningen, is declared admissible.

[...]

### ***Subsidiarity***

**N.B.:** Subsidiarity lays down conditions for the exercise of Community competences, and non-compliance with subsidiarity may lead to the annulment of a Community act. It is, however, addressed above in the context of the competences of the Community (see page 62).

### ***Proportionality***

#### ➤ **Case C-331/88 Fedesa**

The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others

Reference for a preliminary ruling: High Court of Justice, Queen's Bench division – United Kingdom.

[1990] ECR I-4023.

#### **Facts:**

As part of the proceedings it was claimed that a directive concerned with the use of hormones in agriculture was invalid for non-compliance with the principles of proportionality.

#### **Extracts from the judgment:**

[...]

12. It was argued that the directive at issue infringes the principle of proportionality in three respects. In the first place, the outright prohibition on the administration of the five hormones in question is inappropriate in order to attain the declared objectives, since it is impossible to apply in practice and leads to the creation of a dangerous black market. In the second place, outright prohibition is not necessary because consumer anxieties can be allayed simply by the dissemination of information and advice. Finally, the prohibition in question entails excessive disadvantages, in particular considerable financial losses on the part of the traders concerned, in relation to the alleged benefits accruing to the general interest.

13. The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.

14. However, with regard to judicial review of compliance with those conditions it must be stated that in matters concerning the common agricultural policy the Community legislature has a discretionary power which corresponds to the political responsibilities given to it by Articles 40 and 43 of the Treaty. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue (see in particular the judgment in Case 265/87 *Schraeder* [1989] ECR 2237, paragraphs 21 and 22).

[...]

### ***Non-discrimination and equality***

#### ➤ ***Non-discrimination***

➤ **Case 61/77 Commission v Ireland (Sea fisheries)**  
[1978] ECR 417.

**Facts:**

The Irish government had adopted unilateral conservation measures designed to maintain fish stocks. Fishing boats were prohibited from entering and fishing in a certain area. Fishing boats not exceeding 33 metres in length or having an engine power not exceeding 1,100 bhp were exempted from the prohibition. The Commission considered the Irish measures discriminatory and brought infringement proceedings.

**Extracts from the judgment:**

[...]

**Discriminatory character of the Irish measures**

69 The Commission contends that, although the Irish measures are based on apparently objective factors, such as size and power of boats, they are in fact discriminatory on two grounds.

70 It would appear that there are scarcely any boats in the Irish fishing fleet which exceed the limits specified in the contested orders, apart from two boats one of which has certainly never fished in the prohibited area, whereas the measure seriously handicaps the fleets of certain other Member states, in particular of France and of the Netherlands.

71 Furthermore the measures create differences of treatment between the various Member States in that the Netherlands fishing fleet, which is mainly made up of large boats is wholly cut off from the waters in question and the same applies, but to a lesser extent, to the French fishing fleet whereas, because of its composition, the British fishing fleet has escaped entirely.

72 Thus, by these measures, Ireland has breached the general non-discrimination rule in Article 7 of the EEC Treaty and the provisions of Article 2 (1) of Regulation (EEC) No 101/76, to which reference was made in Annex vi to the Hague Resolution.

73 These strictures were supported by the French and Netherlands governments, which consider that an attack has in this way been made on one of the indispensable foundations of the common fishing policy.

74 The defendants in the main action in Case 88/77 advance the same arguments and emphasize that, in choosing a condition based on the size and power of boats, the Irish measures discriminate against large boats in thus abolishing the advantages associated with the economies of scale arising out of the modernization of the Netherlands fishing fleet.

75 On the other hand the Irish government points out that the contested measures are based on technical considerations which have nothing whatever to do with the nationality of the boats.

76 The variable effect of these measures is an inevitable result of the composition of the various national fleets concerned and not of the criteria adopted which cannot therefore be described as discriminatory.

77 The Irish government considers that the advantages which Irish fishermen may obtain from the measures adopted are justified by the fact that the Community itself has repeatedly and right up to the Hague Resolution, recognized the need to encourage the growth of the fishing industry in Ireland.

78 As the court has had occasion to declare in other contexts, in particular in its Judgment of 12 February 1974 in Case 152/73, *Sotgiu v Deutsche Bundespost* (1974) ECR 153 the rules regarding equality of treatment enshrined in Community law forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.

79 This certainly applies in the Case of the criteria employed in the contested measures the effect of which is to keep out of Irish waters a substantial proportion of the fishing fleets of other Member States which have traditionally fished in those areas whereas under the same measures no comparable obligation is imposed on Ireland's own nationals.

80 These measures are, accordingly, contrary both to Article 7 of the EEC Treaty, which prohibits any discrimination on grounds of nationality, and to Article 2 (1) of Regulation (EEC) No 101/76 under which rules applied by each Member State in respect of fishing in the maritime waters coming under its sovereignty or within its jurisdiction shall not lead to differences in treatment of other Member States.

[...]

**> Case 186/87 Cowan**Ian William Cowan v Tresor public

Reference for a preliminary ruling: Tribunal de grande instance de Paris - France.

[1989] ECR 195.

**Facts:**

The Commission d'indemnisation des victimes d'infraction attached to the tribunal de grande instance, Paris, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of the prohibition of discrimination laid down in Article 7 of the Treaty, in order to be able to assess whether a provision of the French code de procedure penale (Code of Criminal Procedure) was compatible with Community law. That question arose in a dispute between the French Tresor public (Treasury) and a British citizen, Ian William Cowan, concerning compensation for injury resulting from a violent assault suffered by him at the exit of a metro station during a brief stay in Paris. Since his assailants could not be identified Mr Cowan applied to the Commission d'indemnisation des victimes d'infraction attached to the tribunal de grande instance, Paris, for compensation under Article 706-3 of the code de procedure penale. That provision allows compensation to be obtained from the State inter alia when the victim of an assault which has caused physical injury with consequences of a certain severity is unable to obtain effective and adequate compensation for the harm from any other source. Before the Commission d'indemnisation the Law Officer of the Treasury submitted that Mr Cowan did not satisfy the conditions for obtaining the abovementioned compensation provided for in Article 706-15 of the code de procedure

penale. That article provides that only the following persons may receive the compensation in question: 'Persons who are of French nationality or foreign nationals who prove: (i) that they are nationals of a State which has concluded a reciprocal agreement with France for the application of the said provisions and that they satisfy the conditions laid down in the agreement; or (ii) that they are holders of a residence permit'. Mr Cowan then relied on the prohibition of discrimination laid down, in particular, in Article 7 of the EEC Treaty. He argued that the conditions set out above were discriminatory and that such conditions prevented tourists from going freely to another Member State to receive services there. The representative of the Treasury and the *ministere public* replied that the rules in question treated resident foreigners in the same way as French nationals and that to distinguish their situation from that of tourists was compatible with Community law, which itself makes periods spent by nationals of one Member State in another Member State subject to different conditions according to the length of the stay.

#### Extracts from the judgment:

[...]

#### Judgment:

[...]

6 In those circumstances the Commission d'indemnisation considered that an interpretation of the Community rules in the light of the essential requirements and aims of Community law was necessary in order for it to be able to assess whether the disputed provisions were compatible with the Treaty; it therefore stayed the proceedings and submitted the following question to the Court of Justice for a preliminary ruling:

'Are the provisions of Article 706-15 of the code de procedure penale, which governs cases where a foreign national who is the victim of an offence in France may obtain compensation from the French State, compatible with the prohibition of discrimination contained inter alia in Article 7 of the EEC Treaty?'

7 Reference is made to the Report for the Hearing for the facts of the main proceedings, the course of the procedure and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

8 The preliminary question asks in essence whether the prohibition of discrimination laid down in particular in Article 7 of the EEC Treaty precludes a Member State, in respect of persons in a situation covered by Community law, from making the award of State compensation for harm caused in that State to the victim of an assault resulting in physical injury subject to the condition that he hold a residence permit or be a national of a country which has entered into a reciprocal arrangement with that Member State.

9 As a preliminary point it should be recalled that the first paragraph of Article 7 of the Treaty provides that 'within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be

prohibited'. These terms lay down both the content and the scope of the prohibition of discrimination.

#### The content of the prohibition of discrimination

10 By prohibiting 'any discrimination on grounds of nationality' Article 7 of the Treaty requires that persons in a situation governed by Community law be placed on a completely equal footing with nationals of the Member State. In so far as this principle is applicable it therefore precludes a Member State from making the grant of a right to such a person subject to the condition that he reside on the territory of that State - that condition is not imposed on the State's own nationals.

11 It should also be emphasized that the right to equal treatment is conferred directly by Community law and may not therefore be made subject to the issue of a certificate to that effect by the authorities of the relevant Member State (in that respect see the judgment of 3 July 1980 in Case 157/79 *Regina v Pieck* [1980] ECR 2171).

12 Finally, it should be recalled, as the Court first stated in its judgment of 22 June 1972 in Case 1/72 *Frilli v Belgium* [1972] ECR 457, that the right to equal treatment laid down in Community law may not be made dependent on the existence of a reciprocal agreement between the relevant Member State and the country of which the person concerned is a national.

13 It follows that in so far as the prohibition of discrimination is applicable it precludes a Member State from making the award of a right to a person in a situation governed by Community law subject to the condition that he hold a residence permit or be a national of a country which has entered into a reciprocal agreement with that Member State.

#### The scope of the prohibition of discrimination

14 Under Article 7 of the Treaty the prohibition of discrimination applies 'within the scope of application of this Treaty' and 'without prejudice to any special provisions contained therein'. This latter expression refers particularly to other provisions of the Treaty in which the application of the general principle set out in that article is given concrete form in respect of specific situations. Examples of that are the provisions concerning free movement of workers, the right of establishment and the freedom to provide services.

15 On that last point, in its judgment of 31 January 1984 in Joined Cases 286/82 and 26/83 *Luisi and Carbone v Ministero del Tesoro* [1984] ECR 377, the Court held that the freedom to provide services includes the freedom for the recipients of services to go to another Member State in order to receive a service there, without being obstructed by restrictions, and that tourists, among others, must be regarded as recipients of services.

16 At the hearing the French Government submitted that as Community law now stands a recipient of services may not rely on the prohibition of discrimination to the extent that the national law at issue does not create any barrier to freedom of movement. A provision such as that at issue in the main proceedings, it says, imposes no restrictions in that respect. Furthermore, it concerns a right which is a manifestation of the principle of national solidarity.

Such a right presupposes a closer bond with the State than that of a recipient of services, and for that reason it may be restricted to persons who are either nationals of that State or foreign nationals resident on the territory of that State.

17 That reasoning cannot be accepted. When Community law guarantees a natural person the freedom to go to another Member State the protection of that person from harm in the Member State in question, on the same basis as that of nationals and persons residing there, is a corollary of that freedom of movement. It follows that the prohibition of discrimination is applicable to recipients of services within the meaning of the Treaty as regards protection against the risk of assault and the right to obtain financial compensation provided for by national law when that risk materializes. The fact that the compensation at issue is financed by the Public Treasury cannot alter the rules regarding the protection of the rights guaranteed by the Treaty.

18 The French Government also submitted that compensation such as that at issue in the main proceedings is not subject to the prohibition of discrimination because it falls within the law of criminal procedure, which is not included within the scope of the Treaty.

19 Although in principle criminal legislation and the rules of criminal procedure, among which the national provision in issue is to be found, are matters for which the Member States are responsible, the Court has consistently held (see inter alia the judgment of 11 November 1981 in Case 203/80 *Casati* [1981] ECR 2595) that Community law sets certain limits to their power. Such legislative provisions may not discriminate against persons to whom Community law gives the right to equal treatment or restrict the fundamental freedoms guaranteed by Community law.

20 In the light of all the foregoing the answer to the question submitted must be that the prohibition of discrimination laid down in particular in Article 7 of the EEC Treaty must be interpreted as meaning that in respect of persons whose freedom to travel to a Member State, in particular as recipients of services, is guaranteed by Community law that State may not make the award of State compensation for harm caused in that State to the victim of an assault resulting in physical injury subject to the condition that he hold a residence permit or be a national of a country which has entered into a reciprocal agreement with that Member State.

#### Costs

[Not reproduced]

On those grounds,

#### The Court,

in answer to the question referred to it by the Commission d'indemnisation des victimes d'infraction attached to the tribunal de grande instance, Paris, by order of 5 June 1987, hereby rules:

The prohibition of discrimination laid down in particular in Article 7 of the EEC Treaty must be interpreted as meaning that in respect of persons whose freedom to travel to a Member State, in particular as recipients of services, is guaranteed by Community law that State may

not make the award of State compensation for harm caused in that State to the victim of an assault resulting in physical injury subject to the condition that he hold a residence permit or be a national of a country which has entered into a reciprocal agreement with that Member State.

#### ➤ Case C-237/94 *O'Flynn*

John O'Flynn v Adjudication Officer

Reference for a preliminary ruling: Social Security Commissioner - United Kingdom  
[1996] ECR I-2617.

#### Facts:

Mr O'Flynn had Irish nationality but had worked in the UK. When he died, in the UK, his son wished to bury him in the Irish republic. Workers in the UK were entitled to a funeral benefit, to assist with the costs of their funeral, but only if they were buried in the UK. Mr O'Flynn (junior) claimed this was discrimination on the grounds of nationality.

#### Extracts from the judgment:

[...]

9. Mr O' Flynn submitted that the condition at issue, being a territorial condition, was by its nature indirectly discriminatory against migrant workers. He submitted, in the alternative, that the discriminatory character of the provision should in any event be taken to be established if it was shown that migrant workers were normally less likely to fulfil the condition at issue.

10. The respondent authorities submitted for their part that the condition was to be regarded as discriminatory only if it was shown that it was substantially more difficult for migrant workers than for national workers to satisfy it, having regard inter alia to their customs. For that it was necessary to show that the condition at issue was satisfied only by a substantially lower proportion of workers from all the other Member States than of national workers. In any event, a migrant worker could not rely on the discriminatory character of the condition at issue if the condition was not satisfied for reasons unconnected with that worker's nationality.

11. In those circumstances the Social Security Commissioner stayed proceedings and referred the following questions to the Court for a preliminary ruling:

'1. Is it compatible with the Community principle of non-discrimination on grounds of nationality for the purposes of Article 7 of Regulation No 1612/68 for the United Kingdom to make the payment of Social Fund funeral expenses subject to a territorial condition, namely that the funeral takes place in the United Kingdom?

2. Does the answer to Question 1 depend upon any of the following considerations:

(a) Is the test to be applied for determining the existence of indirect discrimination on grounds of nationality:

(i) whether nationals of other Member States acting reasonably and in the normal course of events are, by reason of the territorial condition, less likely to receive payments than are United Kingdom nationals (and, if so, must it be shown that, by reason of the condition, a

to ensure (see, to that effect, Case 149/77 *Defrenne v Sabena* [1978] ECR 1365, paragraphs 26 and 27, and Joined Cases 75/82 and 117/82 *Razzouk and Beydoun v Commission* [1984] ECR 1509, paragraph 16).

20. Accordingly, the scope of the directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the directive is also such as to apply to discrimination arising, as in this case, from the gender reassignment of the person concerned.

21. Such discrimination is based, essentially if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment.

22. To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard.

23. Dismissal of such a person must therefore be regarded as contrary to Article 5(1) of the directive, unless the dismissal could be justified under Article 2(2). There is, however, no material before the Court to suggest that this was so here.

24. It follows from the foregoing that the reply to the questions referred by the Industrial Tribunal must be that, in view of the objective pursued by the directive, Article 5(1) of the directive precludes dismissal of a transsexual for a reason related to a gender reassignment.

[...]

### *Legal certainty and legitimate expectations*

#### ➤ Legal certainty

#### ➤ Case 98/78 Racke

A. Racke v Hauptzollamt Mainz  
[1979] ECR 69

#### Facts:

#### Extracts from the judgment:

#### GROUNDS

1 by an order of 21 March 1978 which was received at the court on 26 April 1978 the bundesfinanzhof pursuant to Article 177 of the EEC Treaty referred to the court certain questions relating, on the one hand, to the validity of certain Regulations concerning monetary compensatory amounts in the wine sector and, on the other hand, to the interpretation of Article 191 of the Treaty as well as to the scope of the Regulations at issue with regard to their

entry into force. These questions were raised in the context of proceedings pending between a German undertaking and the competent customs authority for the repayment of monetary compensatory amounts charged when certain quantities of wine imported from Yugoslavia were removed from a private customs warehouse between 9 and 30 March 1973.

#### Question 1

[...]

#### Question 2

14 the second question is in the following terms:

“is a Regulation to be regarded as published within the meaning of Article 191 of the Treaty establishing the European Economic Community:

- (a) on the date borne by the Official Journal in question;
- (b) at the time when the Official Journal in question is in fact available at the office for official publications of the European Communities; or
- (c) at the time when the Official Journal in question is actually available in the territory of the particular Member State?”

15 Article 191 of the Treaty provides that Regulations shall be published in the Official Journal of the Community. They shall enter into force on the date specified in them or, in the absence thereof, on the twentieth day following their publication.

The Official Journal is published by the office for official publications of the European Communities, situated in Luxembourg, which has received formal instructions from the Council intended to ensure that the date of publication borne by each issue of the Official Journal corresponds to the date on which that issue is in fact available to the public in all the languages at the said office.

These provisions give rise to a presumption that the date of publication is in fact the date appearing on each issue of the Official Journal.

However, should evidence be produced that the date on which an issue was in fact available does not correspond to the date which appears on that issue, regard must be had to the date of actual publication.

A fundamental principle in the Community legal order requires that a measure adopted by the public authorities shall not be applicable to those concerned before they have the opportunity to make themselves acquainted with it.

16 as regards the last alternative in the question submitted, it is important that the date on which a Regulation is to be regarded as published should not vary according to the availability of the Official Journal of the communities in the territory of each Member State.

The unity and uniform application of Community law require that, save as otherwise expressly provided, a Regulation should enter into force on the same date in all the Member States, regardless of any delays which may arise in spite of efforts to ensure rapid distribution of the Official Journal throughout the Community.

17 therefore the answer to the question raised should be that Article 191 of the EEC Treaty must be interpreted to mean that, in the absence of evidence to the contrary, a Regulation is to be regarded as published throughout the Community on the date borne by the issue of the Official Journal containing the text of that Regulation.

#### Questions 3 and 4

18 questions 3 and 4 are worded as follows:

“was Regulation (EEC) no 741/73 of the Commission of 5 March 1973 also applicable to wine which was first made subject to monetary compensatory amounts by Regulation (EEC) no 649/73 of the Commission of 1 March 1973 and which was removed from a private customs warehouse before the last-mentioned Regulation was in fact published?”

“if question 3 is answered in the negative: was Regulation (EEC) no 649/73 of the Commission of 1 March 1973 applicable to the said wine?”

19 the first paragraph of Article 3 of Regulation no 649/73 of 1 March 1973 provided that that Regulation was to enter into force on the day of its publication in the Official Journal; however, that Regulation was published in an issue of the Official Journal which, although bearing the date 9 March 1973, was not in fact available at the seat of the office for official publications, according to the statement of the office itself, until 12 March 1973, upon which date it must be deemed to have entered into force.

According to the second and third paragraphs of Article 3 of the aforesaid Regulation, the amounts resulting from its application were however to apply from 26 February 1973, or even - in favour of parties concerned - from 13 February 1973.

Regulation no 741/73 of 5 March 1973 altering the monetary compensatory amounts fixed by Regulation no 649/73 entered into force on the day of its publication in the Official Journal, that is 19 March 1973, but according to Article 2 of the Regulation it applied from 5 March 1973.

Thus the questions submitted first raise the issue whether Regulation no 649/73 could validly attribute retroactive effects to itself as from its entry into force, in particular by extending the monetary compensatory amounts system for the first time to the wine in question.

20 although in general the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected.

As regards monetary compensatory amounts in particular the system introduced by Regulation no 974/71 implies in principle that the measures adopted take effect as from the occurrence of the events which give rise to them, so that in order to make them fully effective it may be necessary to provide for the applicability of newly-fixed monetary compensatory amounts to facts and events which occurred shortly before the publication of the Regulation fixing them in the Official Journal.

It is inherent in the system of monetary compensatory amounts that traders must expect any appreciable change in the monetary situation possibly to entail the extension of the system to new categories of goods and the fixing of new amounts.

In this case, on the date laid down for the applicability of the new amounts, the Commission adopted special measures for them to be brought to the attention of the various sectors of industry concerned.

The applicability of Regulation no 649/73 to events occurring as from 26 February 1973, that is to say during a period of two weeks before its actual publication, was therefore not such as to jeopardize expectations deserving protection.

In the light of this finding in relation to Regulation no 649/73, and having regard to the extraordinary situation prevailing at the time, no overriding consideration pertaining to legal certainty prevents Regulation no 741/73, adopted on 5 March 1973, from altering the monetary compensatory amounts resulting from the aforementioned Regulation from being given effect as from 5 March 1973, notwithstanding the fact that Regulation no 649/73 had not yet been published in the Official Journal.

21 therefore the answer should be that consideration of the questions raised has disclosed no factor of such a kind as to affect the validity of Regulations no 649/73 of 1 March 1973 and no 741/73 of 5 March 1973 in so far as they were made applicable from 26 February 1973 and 5 March 1973 respectively.

## COSTS

Costs

[...]

## RULING

On those grounds,

The court,

In answer to the questions referred to it by the bundesfinanzhof by an order of 21 March 1978, hereby rules:

[...]