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Developments, Issues, and New Remedies – The Duties of National Authorities and Courts Under Article 10 of the EC Treaty

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Abstract

The Court of Justice is using Article 10 of the EC Treaty more frequently, in a wide variety of cases. This Article summarizes and comments briefly on more than forty cases which have been decided and issues which have arisen since the Congress of FIDE, the Fédération Internationale pour le Droit Européen, in Helsinki in 2000, where the case law on Article 10 was discussed at length. The Court is continuing to draw a variety of practical conclusions from the general words of the Article, elaborating and applying existing case-law, and ruling on both positive and negative duties resulting from Article 10.

DEVELOPMENTS, ISSUES, AND NEW REMEDIES — THE DUTIES OF NATIONAL AUTHORITIES AND COURTS UNDER ARTICLE 10 OF THE EC TREATY

*John Temple Lang**

INTRODUCTION

Article 10 of the Treaty Establishing the European Community ("EC Treaty") reads:

Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.¹

The Court of Justice has ruled that this Article imposes a wide variety of duties, involving procedural and substantive law, on both national courts and non-judicial authorities. These duties are essentially constitutional in nature, since they concern the overall relationship between the European Community and its Member States.

The Court of Justice is using Article 10 of the EC Treaty more frequently, in a wide variety of cases. This Article summarizes and comments briefly on more than forty cases which have been decided and issues which have arisen since the Congress of FIDE, the *Fédération Internationale pour le Droit Européen*, in Helsinki in 2000, where the case law on Article 10 was discussed at

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1. Consolidated version of the Treaty establishing the European Community, art. 10, at 42, O.J. C 325/33 (2002), 37 I.L.M. 79, at 81 (ex Article 5) [hereinafter Consolidated EC Treaty], incorporating changes made by Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Feb. 26, 2001, O.J. C 80/1 (2001) [hereinafter Treaty of Nice] (amending Treaty on European Union ("TEU"), Treaty establishing the European Community ("EC Treaty"), Treaty establishing the European Coal and Steel Community ("ECSC Treaty"), and Treaty establishing the European Atomic Energy Community ("Euratom Treaty") and renumbering articles of TEU and EC Treaty).

length.² The Court is continuing to draw a variety of practical conclusions from the general words of the Article, elaborating and applying existing case-law, and ruling on both positive and negative duties resulting from Article 10.

One common difficulty with Article 10 case law is that the Court does not always mention Article 10 expressly, even when applying a principle which is clearly derived from Article 10, or which has previously been held to derive from Article 10. Another difficulty is finding the best method to classify or synthesize the great variety of cases. It would be easy, but not very meaningful, to group them all under the heading of "effectiveness" or complete application of Community law, where the Court often merely uses the phrase "the duty to cooperate in good faith"³

The Article discussed here used to be Article 5 of the EC Treaty. It has been renumbered as Article 10, thus, it is convenient to refer to it here by its current number. The recent cases are discussed here only insofar as they raise issues under that Article.

The Actual and Potential Importance of Article 10

Article 10 continues to be important for several reasons. First, the Community (now the European Union, or "EU") relies almost entirely on national authorities to carry out agreed poli-

2. See JOHN TEMPLE LANG, GENERAL REPORT: THE DUTIES OF COOPERATION OF NATIONAL AUTHORITIES AND COURTS AND THE COMMUNITY INSTITUTIONS UNDER ARTICLE 10 EC TREATY, THE REPORT FOR THE XIX FIDE CONGRESS, HELSINKI 373-426 (vol. I), 65-72 (vol. IV) (Sundström ed., 2000) [hereinafter HELSINKI GENERAL REPORT]; JEAN-ERIC DE COCKBORNE ET AL., COMMENTAIRE MÉGRET: LE DROIT DE LA CEE 25-43 (2d ed. 1992) [hereinafter COMMENTAIRE MEGRET]; John Temple Lang, *Article 5 of the EEC Treaty: The Emergence of Constitutional Principles in the Case Law of the Court of Justice*, 10 FORDHAM INT'L L.J. 503, 503-37 (1987); HENRY G. SCHERMERS & DENIS F. WAELBROECK, JUDICIAL PROTECTION IN THE EUROPEAN UNION 112-15, 330 (6th ed. 2001); MARC BLANQUET, L'ARTICLE 5 DU TRAITÉ CEE: RECHERCHE SUR LES OBLIGATIONS DE FIDÉLITÉ DES ÉTATS MEMBRES DE LA COMMUNAUTÉ (Paris 1994); Laurence W. Gormley, *The Development of General Principles of Law Within Article 10 (ex Article 5) EC*, in GENERAL PRINCIPLES OF EUROPEAN COMMUNITY LAW 113 (Ulf Bernitz & Joakim Nergelius eds., 2000); John Temple Lang, *The Duties of National Courts under Community Constitutional Law*, 22 EUR. L. REV. 3 (1997); John Temple Lang, *The Duties of National Authorities Under Community Constitutional Law*, 23 EUR. L. REV. 109 (1998); John Temple Lang, *The Duties of Cooperation on National Authorities and Courts Under Article 10 EC: Two More Reflections*, 26 EUR. L. REV. 84 (2001) [hereinafter Temple Lang, *The Duties of Cooperation*].

3. *Roquette Freres SA v. Directeur General de la Concurrence*, Case C-94/00, [2002] E.C.R. I-9011, ¶ 30.

cies: it has not got the resources to carry them out itself. Second, Member States' powers and resources are much greater than those of the EU, so that they have extensive opportunities for obstructing, intentionally or otherwise, its policies. Third, it is Article 10 which, in the absence of specific provisions or supplements, governs the whole relationship between EU law and national legal systems — the relationship which in a federation would be between federal and State law. Fourth, Article 10 creates justiciable issues, unlike, for example, subsidiarity, which creates primarily policy, political, and barely-justiciable issues. Fifth, in the international sphere the EU and the Member States have an astonishing and unique variety of relationships: exclusive competences, concurrent powers, "mixed" agreements, Member State membership of international organizations on which the Community or EU has legislated, and so on. These relationships give rise to many situations in which the Member States and the EU need to cooperate, and Article 10 requires and regulates that cooperation. Sixth, the Article has had so many practical consequences under the EC Treaty that it is certain to have many more, in due course, in justice and home affairs, and perhaps in the area of foreign and security policy.

The importance of Article 10 is greatly underestimated. There are several reasons for this. Perhaps the most important is that when the Court gives a judgment which is in fact based on Article 10, it usually refers to its previous judgments but not to Article 10 itself. In particular, the Court repeatedly refers to the equivalence and effectiveness principles, discussed below, without mentioning Article 10. Another reason is that Article 10 has so many consequences in so many different and apparently unconnected spheres that not many lawyers see the Article 10 case law as a whole.

Article 10 gives powers to national authorities and courts, and creates duties for them. For example, Article 10 obliges all courts to disregard national legislation which is contrary to Community law, even if they would not otherwise have power to treat national legislation as invalid or unconstitutional. Article 10 gives national courts powers, when necessary, to develop new procedures or remedies for carrying out their duties to safeguard Community law rights. This is important because the Court interprets Article 10 as imposing essentially the same duties on judicial and non-judicial authorities. It has therefore

ruled that a competition authority which is not a court has the same duty as a court to disregard national legislation which is contrary to Community law.⁴

*The Articles in the Draft Treaty Establishing a Constitution
for Europe*

The Draft Treaty Establishing a Constitution for Europe ("Draft Constitution")⁵ contains two articles which replace and extend Article 10. First, Article 5, paragraph 2, addressing the relations between the Union and the Member States, provides that

[f]ollowing the principle of loyal cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Constitution. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the objectives set out in the Constitution.⁶

Second, Article 10 of the Draft Constitution, dealing with Union Law, states:

1. The Constitution, and law adopted by the Union's Institutions in exercising competences conferred on it, shall have primacy over the law of the Member States.
2. Member States shall take all appropriate measures, general or particular, to ensure fulfilment of the obligations flowing from the Constitution or resulting from the Union Institutions' acts.⁷

These provisions usefully confirm and make explicit the reciprocal nature of the duties imposed on the Member States and the EU institutions. More important, they extend the legal duties of cooperation into the areas of common foreign and security policy and justice and home affairs. They show that those present at the Convention which drew up the Constitutional Treaty saw no reason to reduce the effects of Article 10, and nobody else has seriously suggested this at any time; although the *Francovich*

4. *Consorzio Industrie Fiammiferi (CIF) v. Autorita Garante Della Concorrenza Del Mercato*, Case C-198/01, [2003] ECR I- __, ¶¶ 45-51, [2003] 5 C.M.L.R. 16.

5. Draft Treaty establishing a Constitution for Europe, July 18, 2003, O.J. C 169/1 (2003) (not yet ratified) [hereinafter Draft Constitution].

6. *Id.* art. 5, O.J. C 169/1, at 9 (2003).

7. *Id.* art. 10, O.J. C 169/1, at 10 (2003).

judgment,⁸ based on Article 10, caused governments serious concern that there would be many claims for compensation for breaches of Community law.

I. THE DUTIES OF JUDICIAL AUTHORITIES

A. *Procedural Duties: the Equivalence and Effectiveness Principles*

In *Dounias v. Ikonomikon*,⁹ the Court repeated the formula on equivalence and effectiveness which it had previously often used:

... in the absence of Community rules governing a matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law. However, such rules must not be less favourable than those governing similar domestic actions; nor may they make it impossible or excessively difficult in practice to exercise rights conferred by Community law.¹⁰

The last sentence states the equivalence and effectiveness principles.

The duties of national courts to protect rights given by Community law in accordance with these two principles derive from Article 10. The effectiveness principle requires the Community Courts to define precisely what Community law rights require — sometimes, a precise definition of a right is needed before a remedy for violation can be devised — and can go so far as to oblige national courts to devise new penalties and new kinds of remedies which are not given by national law. This is one very important potential growth area under Article 10. The effectiveness principle has far more potential than the equivalence principle.

In *Dounias*, the issue concerned a procedural rule which empowered customs authorities to keep imported goods unless import duty was paid, even when it was disputed. The Court said that the principles applied to difference in procedures, and in particular to the rules of evidence in claims against a State for

8. *Francovich v. The Republic (Italy)*, Joined Cases C-6/90 & C-9/90, [1991] E.C.R. I-5357, [1993] C.M.L.R. 66.

9. Case C-228/98, [2000] E.C.R. I-577; Case C-255/00, [2002] E.C.R. I-8003, ¶ 33, [2003] 1 C.M.L.R. 36.

10. *Dounias*, [2000] E.C.R., at ¶ 58.

breach of Community law, and left it to the national court to apply the principles to the facts. If there is no comparable procedure for domestic cases, the test is whether the procedure makes it virtually impossible or excessively difficult to import. The Advocate General had said:

If the effect of the national rule at issue is — as appears to be the case — that in practice national courts restrict the calling of witnesses in proceedings in which such evidence is critical to the claimant's case, the rule does not satisfy [the effectiveness] . . . requirement and is accordingly contrary to Community law.¹¹

In *Preston v. Wolverhampton Healthcare*¹² the national court had asked about the compatibility with Community law of procedural rules on claims for benefits in a pension scheme. The Court held that the effectiveness principle did not preclude rules requiring claims to be made within six months of the employment ending, and limiting service within two years of making the claim. On the equivalence principle, to see whether a right of action under domestic law is similar to proceedings under Article 119 (now Article 141) the national court must look at the purpose, cause of action, and essential characteristics of the two kinds of claim. To decide whether the procedural rules are equivalent, the national court must determine objectively whether the rules are similar, taking into account the role of those rules in the procedure as a whole, as well as the operation of the procedure and any special features of the rules.

The effectiveness principle requires not only legislation providing the same penalties as those for breach of corresponding national laws, but also enforcement action and the actual imposition of by equivalent courts.¹³ The Commission has not yet brought a case based on statistical evidence showing inadequate resources or a pattern of relative under-enforcement of Community law, whether by too few prosecutions or by inadequate penalties, but may well have to do this in fisheries, for example,

11. *Id.* at 50.

12. Case C-78/98, [2000] E.C.R. I-3201.

13. Commission v. France, Case C-333/99, [2001] E.C.R. I-1025 (concerning failure to adopt detailed rules for utilization of fishing quotas, failure to monitor adequately, not prohibiting fishing when quotas were exhausted, and failure to enforce after prohibitions had been imposed).

where enforcement is entirely in the hands of national authorities.

In *Courage v. Crehan*,¹⁴ the Court said that Community law gives a party to a restrictive agreement a right to sue the other party for loss caused by the agreement. "The full effectiveness of Article 85 (now Article 81 EC) . . . would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition," even if the claimant was a party to the contract.¹⁵ However, provided that the principles of equivalence and effectiveness are respected, national law could deny the right to obtain compensation to a party bearing "significant responsibility" for the effect on competition. A litigant should not profit from his own unlawful conduct. In fact, the Court could have gone further by stating that Article 10 must require national courts to make sure that a party is not encouraged to make a restrictive agreement by knowing that, if profit resulted, it would be able to keep the profit and, if loss resulted, it would be able to sue the other party for the loss.¹⁶

The Court elaborated the effectiveness principle in *Santex SpA v. Unita Socio Sanitaria Locale No. 42*.¹⁷ The Court ruled that the Community directives on public contracts must be interpreted as imposing a duty on national courts to disapply national limitation rules, where a public authority has made it impossible or excessively difficult for a private party to exercise its rights under Community law by challenging a decision of the authority within the normal limitation period. National authorities must not be allowed to obstruct the exercise of rights given by Community law.

14. Case C-453/99, [2001] E.C.R. I-6297.

15. *Id.* at ¶ 2.

16. In 2003, the Finance Court of Rhineland Pfalz ruled that a Commission fine was not deductible for tax purposes under German law, except insofar as it represented the refund of profits which themselves had suffered tax. See Finanzgericht Rheinland-Pfalz 2 Senat., Urteil vom 15 Juli 2003, Az. 2K 2377/01. It would be contrary to Article 10 for a Member State to reduce the effect of a Commission fine by allowing it to be deducted for tax purposes, or otherwise to reduce the cost of infringement of Community law.

17. Case C-327/00, [2003] E.C.R. I-1877. See *Salafero v. Genova*, Case C-13/01, [2003] E.C.R. I-__.

B. *The Duty to Avoid Conflicts with Judgments of the Court of Justice*

*Weber's Wine World Handels-GmbH v. Abgabenberufungskommission*¹⁸ concerned Austrian legislation purporting to allow claims for repayment of a tax on alcoholic beverages, if the tax had not been passed on to third parties. This tax had been previously declared by the Court to be incompatible with Community law. The Court said that the legislation was contrary to Article 10 if it was intended specifically to deal with the unlawful tax because it would frustrate the earlier judgment. Also, refusal of refunds on the sole ground that a tax was passed on, without considering the degree of unjust enrichment which the refund would involve, is contrary to Community law. It is for the national court to decide if refunds claimed under Community law are subject to less favorable procedural rules than claims based on national law. The principle of effectiveness prevents national rules making the exercise of Community law rights impossible in practice or excessively difficult by establishing a presumption of unjust enrichment on the sole ground that the duty was passed on.

In *Echirolles Distribution SA v. Association du Dauphine*,¹⁹ the defendants had sold books at less than the price fixed by the publisher, contrary to French legislation. They argued that the legislation was contrary to Community rules. The Court had previously ruled that, in the absence of a Community competition policy in the book sector, the duties of national authorities under Article 5 were not sufficiently defined to prevent the adoption of national laws obliging publishers to fix the retail price of books.²⁰ A national authority cannot have an obligation under Article 10 unless the Community rule in question is clear and precise. The essential issue was whether there was any reason for the Court to reconsider its previous judgment. Although the Commission has recently dealt with some book pricing cases,

18. Case C-147/01, [2003] E.C.R. I-___, ¶¶ 86, 92, [2004] 1 C.M.L.R. 7. See *Marks & Spencer Plc v. Commissioners of Customs and Excise*, Case C-62/00, [2002] ECR I-6325, ¶ 36, [2002] C.M.L.R. 9; *State Finance Administration v. San Giorgio SpA*, Case 199/82, [1983] E.C.R. 3595, ¶ 14, 2 C.M.L.R. 658; *Christian Deville v. Administration des Impôts*, Case 240/87, [1988] E.C.R. 3513, ¶ 13, [1989] 3 C.M.L.R. 611; *Aprile Srl v. Amministrazione delle Finanze dello Stato*, Case C-228/96, [1998] E.C.R. I-7141, ¶ 16; *Dilexport Srl v. Amministrazione delle Finanze dello Stato*, Case C-343/96, [1999] E.C.R. I-579, ¶ 39, [2000] 3 C.M.L.R. 791.

19. Case C-9/99, [2000] E.C.R. I-8207.

20. See *Leclerc v. "Au Ble Vert"*, Case 229/83 [1985] E.C.R. 1, [1985] 2 C.M.L.R. 286.

the Court said that there was no reason to reconsider, and that a national court cannot call into question a judgment of the Court.

C. *The Duty of National Courts to Avoid Conflict with Decisions of the Commission*

In *Masterfoods v. HB Ice Cream*,²¹ the Commission had adopted a decision that certain agreements for exclusive use of ice-cream freezer cabinets were contrary to Article 85 of the EC Treaty (now Article 81). The Irish courts considered that the agreements were lawful. The Irish Supreme Court asked the Court if the duty of national courts to cooperate with the Community institutions required them to adjourn cases to await the judgment of the Court of First Instance concerning the validity of the Commission's decision. The Court ruled that though the Commission is not bound by a decision of a national court, Commission decisions are binding on the parties to whom they are addressed unless and until they are annulled. Under Article 10, to avoid a conflict between its judgment and the decision of the Commission, a national court should either adjourn and wait for the judgment of the Community Courts, or itself refer to the Court of Justice the question of the validity of the Commission's decision.²²

D. *The Duty of National Courts to Raise Questions of Community Law on their Own Initiative*

In *Oceano Grupo Editorial SA v. Murciano Quintero*,²³ the Court held that a national court should raise, on its own initiative, the question of whether a clause in a consumer contract was unfair and contrary to the Community directive on unfair terms. The objective of the directive would not be achieved if a consumer, who might not be represented by a lawyer because the

21. Case C-344/98, [2000] E.C.R. I-11369. See also Opinion of Advocate General Tizzano, *IMS Health v. NDC Health*, Case C-418/01, [2003] E.C.R. __, ¶ 88 (Oct. 2, 2003).

22. In *IMS Health*, the national court did not directly question the validity of the Commission's decision, but instead asked several questions raising similar issues, a less satisfactory procedure.

23. Case C-240/98, [2000] E.C.R. I-4941; *Eco Swiss China Time Ltd. v. Benetton International NV*, Case C-126/97, [1999] E.C.R. I-3055; *R. v. Criminal Proceedings against Carra and Others*, Case C-258/98, [2000] E.C.R. I-4231, ¶ 16; *Cofidis SA v. Jean-Louis Fredout*, Case C-473/00, [2002] E.C.R. I-10875.

amount of money involved might be small, had to raise such a question, and the national court had a duty to interpret the national legislation as far as possible so as to achieve the aim of the directive.

This judgment follows previous judgments in which the Court had said that national courts should raise questions of Community law on their own initiative,²⁴ should interpret national legislation, if possible, in accordance with Community directives,²⁵ and should interpret Community measures so as to give such effective protection as the measure was intended to provide.²⁶ It is significant because it shows that national courts may have a special duty to protect the interests of consumers and claimants where only a small amount of money is claimed by each individual, and therefore to develop effective remedies to deal with such situations. Protection of consumers is mentioned in both Articles 81 and 82 of the EC Treaty.²⁷

E. *The Duty to Provide Judicial Review to Protect EC Law Rights*

In *Union de Pequeños Agricultores v. Council*,²⁸ the Court of Justice confirmed the traditional interpretation of Article 230 on the need for an applicant to be directly and individually concerned by a Community act, but added that national courts have a duty under Article 10 to enable private parties to challenge the legality of any national measure applying a Community act of general application, on the grounds that the Community act is invalid, even if they could not challenge the Community act di-

24. *Peterbroeck Van Camphenhout & Cie SCS v. Belgium*, Case C-312/93, [1995] ECR I-4599; *Kraijveld BV and Others v. Gedeputeerde Staten van Zuid-Holland*, Case C-72/95, [1996] E.C.R. I-5403.

25. *Marleasing SA v. La Comercial Internacional de Alimentacion SA*, Case C-106/89, [1990] E.C.R. I-4135. This duty applies between private parties, while the direct effect of directives in other respects applies only against State bodies.

26. *Coote v. Granada*, Case C-185/97, [1998] E.C.R. I-5199; John Temple Lang, *The Principle of Effective Protection of Community Law Rights*, in 1 JUDICIAL REVIEW IN EUROPEAN UNION LAW 235-74 (David O'Keeffe & Antonio Bavasso eds., 2000).

27. John Temple Lang, *European Community Competition Policy — How Far Does it Benefit Consumers?*, 18 BOLETIN LATINO AMERICANO DE COMPETENCIA 128, 128-33 (2004).

28. Case C-50/00 P, [2002] ECR I-6677, [2002] 3 C.M.L.R. 1. John Temple Lang, *Actions for Declarations that Community Regulations are Invalid: The Duties of National Courts Under Article 10 EC*, 28 EUR. L. REV. 102 (2003); John Temple Lang, *Declarations, Regional Authorities, Subsidiarity, Regional Policy Measures and the Constitutional Treaty*, 29 EUR. L. REV. 94 (2004). The view has been authoritatively expressed that Article 230 should be amended. See European Union Committee, *The Future Role of the European Court of Justice*, 6th Report of Session 2004-04, at ¶¶ 128-42 (H.L. Paper 47, 2004).

rectly under Article 230. Once again, Article 10 obliges national courts to develop or invent procedures, if necessary, to protect rights given by Community law.

In *Kofisa Italia Srl v. Ministero delle Finanze*,²⁹ the Court held illegal a provision in the Italian customs code that only the customs authorities could suspend a customs decision. This would effectively exclude the jurisdiction of the Italian courts to decide questions of the interpretation of the Community customs Regulations. No provision can restrict the right to effective judicial protection. The requirement of judicial control of any decision of a national authority reflects a general principle of Community law. National courts, in accordance with Article 10, must ensure the legal protection which private persons derive from the direct effect of rules of Community law. A court dealing with a dispute governed by Community law must be able to grant interim relief to ensure the full effectiveness of the judgment to be given on the EC Treaty law rights. This followed from the judgments in *Zuckerfabriek Suderdithmarschen AG v. Hauptzollamt Itzehoe*³⁰ and in *Factortame Ltd.*³¹ on the need to make interim or interlocutory remedies available, when necessary, to protect rights given under Community law, even if national law does not confer these powers.

In *Empresas Navieras v. Administracion General del Estado*,³² the Court was asked whether a requirement for prior administrative authorization for a cabotage service, in order to impose public service obligations, was compatible with freedom to provide transport services. The Court said that, if it would derogate from a fundamental freedom, any prior administrative authorization scheme must be based on objective, non-discriminatory criteria known in advance, so as to limit the exercise of the authorities' discretion, and prevent it from being used arbitrarily. This, of course, not only provides legal certainty, but also makes judicial control easier and more effective. All persons affected by measures based on such a derogation must have a legal remedy available to them.

Similarly, in *Dounias* (discussed above) the Court repeated

29. Case C-1/99, [2001] E.C.R. I-207.

30. Joined Cases C-143/88 and C-92/88, [1991] E.C.R. I-415.

31. Case C-213/89, [1990] E.C.R. I-2433.

32. Case C-205/99, [2001] E.C.R. I-1271.

that under Article 10, the national courts must ensure the legal protection of individuals and ensure that the rules of evidence comply with the equivalence and effectiveness principles. The Court added that "the existence of a judicial remedy against any decision of a national authority refusing the benefit of a fundamental right conferred by the Treaty is essential in order to secure for the individual effective protection for his right."³³

The case *max.mobil Telekommunikation Service GmbH v. Commission*³⁴ was concerned with judicial review by the Community Courts. The Court of First Instance deliberated upon a complaint against Austria for infringement of Article 86 (ex Article 90). In an important judgment, the Court said that diligent and impartial treatment of a complaint is part of the right to sound administration, which is one of the general principles observed in a State governed by the rule of law, common to the constitutional traditions of Member States, and stated in the Charter of Fundamental Rights of the EU. The Court further observed that "in so far as the Commission is required to undertake such an examination, the fulfillment of that obligation must be amenable to judicial review."³⁵ Judicial review is also one of the general principles observed in a State governed by the rule of law, common to the constitutional tradition of Member States, and stated in the Charter on Fundamental Rights.

Although the scope and depth of the judicial review by the Court is limited in certain respects, an action against the Commission for the partial rejection of a complaint under Article 86 is admissible. This judgment, if it is upheld by the Court of Justice, has clear implications for the duties of national administrative courts in judicial review cases involving Community law, and may well create duties for national competition authorities whose rejections of complaints are not now subject to effective judicial review. The right to judicial review is, of course, a prerequisite to the right to obtain effective remedies for the enforcement and protection of Community law rights.

33. *Id.* at ¶ 64 (citation omitted).

34. Case T-54/99, [2002] E.C.R. II-313, ¶ 56, [2002] 4 C.M.L.R. 32 (this case is being appealed). See *Schlüssolverlag and others v. Commission*, Case C-170/02, [2003] E.C.R. I-__.

35. *max.mobil Telekommunikation*, [2002] E.C.R., at ¶ 56.

F. *The Duty to Set Aside National Law Rules, If Necessary to Protect EC Law Rights*

In *Rijksdienst voor Pensioenen v. Engelbrecht*,³⁶ the Court was asked how the Community rules on pensions for migrant workers applied to a national rule reducing a worker's pension because his wife had a pension from another Member State. The aim of the Treaty would not be met if, through exercising their right to freedom of movement, migrant workers were to lose social security advantages guaranteed to them by the law of any Member State. Under Article 10, a national court must, as far as possible, interpret national law in a way which complies with EC law. The Court referred to *van Munster v. Rijksdienst voor Pensioenen*³⁷ and *Marleasing SA v. La Comercial Internacional*.³⁸ The Court said that if national law could not be applied in accordance with Community law, the national court must fully apply Community law and protect the rights conferred by it on individuals, if necessary disapplying any national law rule which would lead to a result contrary to Community law. Apart from the cases referred to by the Court, this is also based on the same principle as *Factortame*. In *Factortame*, the effect was that the national court was obliged not merely to set aside a rule of national law, but to give a new remedy which had not previously existed (the provisional suspension of an Act of the U.K. Parliament).

Similarly, a national court has a duty to disregard a collective agreement which is inconsistent with Community law. The national court must use all the means at its disposal to end discrimination, in particular by benefiting the disadvantaged, and should not wait until the illegal provisions have been set aside by legislation or by a new collective agreement.³⁹

36. Case C-262/97, [2000] E.C.R. I-7321. See *Duchon v. Pensionsversicherungsanstalt*, Case C-290/00, E.C.R. I-___, [2002] 2 C.M.L.R. 23; *Criminal Proceedings against Carra and Others*, Case C-258/98, [2000] E.C.R. I-4217, ¶ 16. See *Fiammiferi v. Autorita Garante*, Case C-198/01, [2003] ECR I-___ (discussed below).

37. Case 165/91, [1994] E.C.R. I-4661. See *Paraschi v. Landesversicherungsanstalt Württemberg*, Case C-349/87, [1991] E.C.R. I-4501.

38. Case C-106/89, [1990] E.C.R. I-4135.

39. See *Kutz-Bauer v. Hamburg*, Case C-187/00, [2003] E.C.R. I-2741.

G. The Duty to Provide Procedures to Allow EC Law Rights to be Claimed: Actions for Declarations, Class Actions, and Discovery

In *Superior Fruiticola v. Frumar Ltd.*,⁴⁰ the Court decided, in a brief judgment, that compliance with regulations on quality standards could be enforced by civil proceedings for an injunction brought by a competitor, and not only by a public authority or a consumer. This is necessary to ensure the "full effectiveness" of the regulations. The Advocate General in *Fruiticola* had said that a competitor can rely on the direct effect of the Regulation, as it has an interest, protected by the Regulation, in compliance with the Regulation by its competitors. Non-compliance with the Regulation results in an unlawful act adversely affecting other competitors. He specifically added that, under Article 10, Member States are obliged to secure implementation and enforcement of regulations, that penalties must be effective, must have a deterrent effect, and be proportionate, and that therefore competitors must have a right to get an injunction.⁴¹ But national law may require the competitor to have an actual economic interest, and to exhaust other remedies.

An important and unresolved question is whether national courts have a duty under Article 10 to enable groups of consumers or other individuals to join together to claim compensation in accordance with the principles stated in *Crehan* when each individual's claim is so small that it is impracticable to enforce it by court proceedings, but the total number of consumers affected is large, even when the national procedural laws do not otherwise provide for class actions. It seems likely that Article 10 does require this, at least in consumer protection cases and competition law cases, and the *Oceano Grupo* judgment provides some confirmation of this. This would greatly increase the number of claims for compensation under European competition law.

Article 10 may also require national courts to give declarations as to the rights of plaintiffs under Community law if that is the only way, or the only effective way, in which the rights can be

40. Case C-253/00, [2002] E.C.R. I-7289; see *Dansk Supermarked v. Imerco*, Case 58/80, [1981] E.C.R. 181, ¶ 17; *Boehringer v. Swingward Ltd.*, Case C-143/00 [2002] E.C.R. I-3703, ¶ 36.

41. *Fruiticola*, [2002] E.C.R. I-7289, at ¶ 53-54.

safeguarded and upheld. There is also a strong argument for saying that Article 10 (the effectiveness principle) obliges national courts to be more willing than they have usually been in civil law countries to order defendants to disclose all their internal documents concerning conduct which appears contrary to Articles 81-82. Absence of effective discovery procedures is a serious obstacle to private claims for compensation in some Member States.

H. *Liability Under the Francovich Principle*

In *Haim v. Nordrhein*,⁴² the Court was asked whether compensation for loss caused to individuals by violations of EC law by a public-law body may be paid by that body, or only by the State. The Court said that Community law did not prevent the body in question being liable, in addition to the Member State. It is the duty of each Member State to ensure that individuals obtain compensation, whichever authority is responsible for the violation or for making reparation. The conditions for reparation for loss must not be less favorable than those relating to similar national claims (the equivalence principle). In fact, if the authority responsible for causing loss had to pay the compensation itself, one would assume that the law would be more effectively enforced.

I. *The Duty to Safeguard Fundamental Rights in Commission Competition Inspections*

In *Roquette*, the Court was concerned with the duties of national courts under Article 10 to ensure that Community action, including Commission inspections, is effective, and also to ensure that it respects Community rules on fundamental rights.⁴³ These duties "take into account the requirements flowing from the duty to cooperate in good faith as enshrined in . . . [Article 10 EC]."⁴⁴ The national court must ensure that the Commission's powers are not supplemented or enforced by coercive national measures which are arbitrary or disproportionate to the subject matter of the investigation. If the national court is not

42. Case C-424/97, [2000] E.C.R. I-5123.

43. See *Roquette Freres SA v. Directeur General de la Concurrence*, Case C-94/00, [2002] E.C.R. I-9011, ¶¶ 30, 32, 35, 76, 80, 91.

44. *Id.* at ¶ 30.

satisfied that the Commission's explanations justify the coercive measures which have been requested, the court, under Article 10, may not simply dismiss the request, but must explain the difficulties and ask for clarification.

J. *The Duty of National Courts to Respect the Jurisdiction of the Community Courts, and the Commission's Duty to Help National Courts*

In *European Community v. First and Franex*,⁴⁵ the Court dealt with a case where a national court had requested the Commission to provide information which would enable an expert to assess whether the Commission had taken sufficient steps to avoid loss to the plaintiffs. The Court held that, as the Community Courts have exclusive jurisdiction in claims against the Community for compensation, a national court should not order preparatory measures for the purpose of making such a claim. In other words, the national court had been too inventive.

However the Court went on to repeat what it had said in *Zwartveld*,⁴⁶ that if a national court needs information which only the Commission can provide, the Commission has a duty under Article 10 to provide it, unless there is some clear justification for not doing so.

K. *The Liability of a Member State for Breach of Community Law by a Supreme Court*

In *Köbler v. Republik Österreich*,⁴⁷ the Court had to decide whether a Member State could be liable for compensation if its supreme court had violated Community law. The Advocate General had pointed out that Article 10 required States to eliminate the unlawful consequences of breaches of EC law.⁴⁸ The Court did not refer to Article 10 directly, but referred to its case-law on the liability of States for breaches of EC law based on Article 10, and confirmed that in certain circumstances a State may be liable for loss caused by a breach by a supreme court. This judgment goes some way to solve the problem which may arise if a

45. Case C-275/00, [2002] E.C.R. I-10943.

46. Case C-2/88, [1990] E.C.R. I-3365.

47. Case C-224/01, [2003] E.C.R. I-_. See *Commission v. Italy*, Case C-129/00, [2003] ECR I-_.

48. Opinion of Advocate General Leger, *Köbler v. Republik Österreich*, Case C-224/01, [2003] E.C.R. I-_, ¶¶ 32, 55.

national supreme court fails to refer a question under Article 234 when it ought to do so.

L. *The Duty of a National Court of Final Appeal Under Article 234*

In *Valente v. Fazenda Publica*,⁴⁹ the question was whether the fact that the Commission had ended its proceedings against a Member State altered the duty of the national supreme court under Article 234 to refer to the Court of Justice any EC law issue to be decided, even if the issue in the two proceedings was the same. The Court said that the obligation of a national court under Article 234 is based on cooperation between the Court of Justice and national courts, as courts responsible for the application of Community law, to ensure the proper and uniform application of Community law in all Member States, and to prevent national case-law contrary to community law from being established. The Commission has no power to decide conclusively whether a Member State is in breach of its obligations, or to give any guarantees in this respect. The rights and duties of Member States can be decided only by the Court of Justice. The Court therefore treated the duty of a national court of final appeal under Article 234 as an example of the broader duty of cooperation under Article 10.

M. *The Duty to Adopt Penalties to Enforce Community Rules*

In *Andrade v. Director da Aflandega*,⁵⁰ the Court was asked whether a national customs law, by which goods overdue for clearance were either sold or subject to a surcharge, was contrary to the principle of proportionality. The Court repeated that when Community law provides no penalty for breach of Community rules or envisages that national law will provide it, Article 10 imposes a duty to take all measures necessary to ensure the effectiveness of Community law. Penalties imposed by national law must comply with the effectiveness principle and the equivalence principle, as well as the principle of proportionality.

Andrade concerned the duty of national courts under Article 10 to ensure that penalties imposed by national law for breach of Community law complied with these three principles. As far as

49. Case C-393/98, [2001] E.C.R. I-1327.

50. Case C-213/99, [2000] E.C.R. I-11083; *Boehringer v. Swingward Ltd.*, Case C-143/00 [2002] E.C.R. I-3703, ¶ 136.

the principle of equivalence is concerned, the national court could simply impose the fine provided for a similar breach of national law. But a national court could probably impose a penalty for breach of a Community regulation in order to comply with the effectiveness principle, even if the national court has no power under national law to impose a penalty for any similar violation. It would seem to be judicial legislation for any court to determine the minimum penalty needed to make Community law effective, and to adopt a criminal penalty without a statutory basis in national law. But the logic of the effectiveness principle may require this. The legal basis for the penalty would be the Community regulation, combined with Article 10.

It is clear from the *Factortame* judgment that a national court may have both the duty and the power under Article 10 to give a remedy which did not otherwise exist under national law, in order to protect a right given by Community law. It would be logical to say that a national court should impose a criminal penalty on a private citizen in order to enforce a duty imposed by Community law. The principle *nulla poena sine lege* would not prevent it, because there would be a prohibition imposed by the Community: the only thing lacking would be the penalty which would normally be imposed by national legislation.⁵¹ Such an issue may arise in connection with the Community fisheries policy. One possible solution would be for the national court to find that there had been an infringement of the Community regulation, prohibit the private party from continuing the infringement, and adjourn the imposition of the penalty until the necessary national legislation was enacted. That legislation should be retroactive, as it should specify penalties for any breach of the Community law rule which occurred after that rule came into force.

The position would be different if the Community measure was a directive. An unimplemented directive can confer rights on private parties against State authorities, but it cannot create duties for private parties.⁵² The question, therefore, would arise

51. *Contra*. LR af 1998 A/S v. Commission, Case T-23/99, [2002] E.C.R. I-___, ¶ 221 (dealing with pre-insulated pipes). The Court there said that the principle of non-retroactivity requires that "fines imposed on an undertaking for infringing the competition rules correspond with those laid down at the time when the infringement was committed." *Id*.

52. *See* *Salamander v. European Parliament*, Case T-172/98, [2000] E.C.R. II-2487.

only if a directive had been implemented but the implementing national measure provided no penalty, or specified a penalty which was insufficient to fulfill the effectiveness principle.

N. *A Duty to Prevent Misuse of Documents Obtained in Competition Cases*

In the context of Community competition rules, the Commission gives documents and information to interveners which would otherwise be confidential, and which they would not otherwise obtain, for the purposes of the Commission's procedure. The Commission does not always tell the companies receiving such information that they should not use it for any other purpose, and the Commission's instructions to this effect, if given, would not necessarily alter (though they would certainly clarify) the legal position. The Commission has no power under Article 10 to create new legal duties. However, when companies receive information in such circumstances, at least when the Commission has advised them that they are not free to use it for any other purpose, a national court should enjoin them from using it in any other way, and, if appropriate, order compensation for the owners of the documents. Community law probably includes or implies a duty to use the documents or information only for the purpose for which the parties received it. Even if this is so, it is not clear whether, for example, the party receiving the documents would be free to use them in proceedings for breach of Community competition rules before a national competition authority or in a national court (presumably it could use them), or for breach of national competition law (probably it could not use them).

This is one of a number of situations in which national courts may have a duty to order remedies, when they are asked to do so, to enforce principles of Community law which the Commission itself has no power to enforce directly (although the Commission could ask the national court for an injunction).

O. *Litigation Between Private Parties*

Many of the duties of national courts under Article 10 arise in cases brought against the authorities of a Member State, or against the State itself. But all cases against private parties for breach of Community law must begin in national courts, and Ar-

ticle 10 requires the courts to give remedies when the defendant's duty under Community law is clear and no other remedy is available. This would apply for instance, if a former Community official was acting in breach of his or her duties of confidentiality.

National courts also have a duty not to enforce clauses in contracts which are contrary to overriding principles of EC law. This duty arises most often under EC rules on equal pay and competition rules. But the duty would also prevent enforcement of, for example, a contract to indemnify against a Commission fine, or a clause intended to prevent a private party from giving evidence to the Commission. A national court has both a duty and a power under Article 10 to prevent a party from abusing rights, whether under statute or contract, to cause a breach of Community law.⁵³ At least some rules of Community law are overriding rules of public policy which prevail over private contracts.⁵⁴

P. The Duty to Refer Questions to the Court of Justice When National Judgments Conflict

Although the question has not come before the Court of Justice, a national court probably has a duty under Article 10 to refer a question of Community law if there are conflicting judgments of national courts of similar authority on the issue, whether the national courts are in the same or different Member States. This duty would be particularly clear where uniform application is important, for example, customs questions.⁵⁵ Article 10 also creates a duty on a national court to give weight to a judgment of a national court in another Member State on an issue of Community law.

Q. Private Rights to Claim Damages and Injunctions on the Basis of Article 10

It is clear that in many circumstances private parties have

53. See *Intel Corp. v. Via Tech. Inc.*, [2002] E.W.H.C. 1159, ¶ 106 (Ch. 2002) (reversed on other grounds, Court of Appeal, [2002] E.W.C.A. Civ. 1905); see also *Dansk Supermarked v. Imerco*, Case 58/80, [1981] E.C.R. 181, ¶ 17.

54. See *Eco Swiss China Time Ltd. v. Benetton Int'l NV*, Case C-126/97, [1999] E.C.R. I-3055.

55. See *Valente v. Fazenda Publica*, Case C-393/98, [2001] E.C.R. I-1327 (dealing with the duty of national courts to ensure uniform application of Community law).

rights to claim damages and to seek injunctions, declarations, or judicial review of State action under Article 10. It seems that the existence of this right depends largely on whether the Community law rule or objective which Article 10 requires to be fulfilled is directly applicable or not. This seems to have been taken for granted by national courts, but in *Francovich* the court held that, under certain conditions, a private party can recover compensation against a State even for breach of a directive, which by definition is not directly applicable.

II. THE DUTIES OF NON-JUDICIAL AUTHORITIES

A. *The Duty to Use Community Procedures and to Cooperate with the Commission to Resolve Difficulties*

In *Commission v. France*,⁵⁶ the Court said that a Member State may not question the validity of a State aid decision addressed to it, in the course of proceedings brought against it later for failure to comply with the decision. If a Member State, when carrying out a Commission decision on State aid, encounters unforeseen or unforeseeable difficulties, or becomes aware of consequences not contemplated by the Commission, it must submit the problems for consideration by the Commission, with proposals for amending the decision. The Commission and the State must respect the duty of cooperation imposed by Article 10, and must work together in good faith to overcome difficulties while respecting the Treaty rules.

The Court had occasion to say substantially the same thing in *Commission v. Belgium*,⁵⁷ in which the Commission had criticized Belgium for failing to comply with a State aid decision ordering Belgium to recover illegal aid. Belgium argued that compliance was difficult, but the Court ruled that Article 10 obliges the State and the Commission to work together to resolve the difficulties.

B. *The Duty Not to Encourage or Approve Infringements of Community Competition Rules*

In *Arduino v. Compagnia*,⁵⁸ the Court was asked whether Arti-

56. Case C-261/99, [2001] E.C.R. I-2537.

57. Case C-378/98, [2001] E.C.R. I-5107, ¶¶ 33-37, 50.

58. Case C-35/99, [2002] E.C.R. 1529. See *France v. Ladbrooke Racing*, Joined Cases C-359/95 P and C-379/95 P, [1997] E.C.R. I-6265; *Conte v. Rossi*, Case C-221/99,

cle 10 prevents a Member State from adopting a measure approving a tariff of fees for lawyers, on the basis of a draft produced by a professional lawyers' body. The Court repeated what it has often said before, that Article 10 requires Member States not to introduce or maintain in force measures which may render ineffective the competition rules applying to enterprises. This prohibits the State from favoring or requiring the adoption of agreements contrary to Article 81, from reinforcing their effects, or from delegating to private operators responsibility for decisions affecting the economic sphere.⁵⁹ The tariff proposed by the Italian lawyers' body was only a draft, and was not binding. The Minister who approved the tariff was advised by two public bodies. Italy therefore had neither delegated regulatory responsibilities nor required or encouraged the adoption of agreements contrary to Article 81, nor reinforced the effects of such an agreement.

The Advocate General, in an important Opinion in *Arduino*, had made it clear that a State measure may infringe Articles 10 and 81 independently of the lawfulness of the conduct of the private parties who propose it. A State measure might be contrary to the Treaty because it restricted competition, even if the behavior of the private parties which gave rise to the State measure was lawful. But a Member State may have legitimate reasons for restricting competition, and a measure which reinforces the effect of an agreement is lawful if the State exercises effective control over the content of the agreement, the State measure pursues a legitimate aim in the public interest, and the measure is proportionate to the aim which it pursues.

The *Arduino* case involved two distinct principles. The first was that States must not require, encourage, or reinforce infringements of Article 81. The second broader principle,⁶⁰

[2001] E.C.R. I-9359. See also *AOK Bundesverband v. Ichthyol-Gesellschaft Cordes*, Case C-264/01, [2004] E.C.R. I-__.

59. Opinion of Advocate General Van Gerven, *Netherlands v. Commission*, Case C-48/90, [1992] E.C.R. I-565, 616.

60. In relation to the freedom of establishment, the freedom of services, and the freedom to compete, see the following judgments: *van Binsbergen*, Case 33/74, [1974] E.C.R. 1299; *Coenen v. Sociaal-Economische Raad*, Case 39/75, [1975] E.C.R. 1547; *Bond von Adverteerders*, Case 352/85, [1988] E.C.R. 2055; *Commission v. Netherlands*, Case C-353/89, [1991] E.C.R. I-4069; *Antennevoorziening Gouda v. Commissariaat voor de Media*, Case C-288/89, [1991] E.C.R. I-4007; *Säger v. Denemeyer*, Case C-76/90, [1991] E.C.R. I-4221; *Corbeau*, Case C-320/91, [1993] E.C.R. I-2533; *Her Majesty's*

which is discussed below, is that Member States may restrict freedoms given or guaranteed by the Treaty (including freedom of competition) only if the State is pursuing a legitimate objective in the public interest, and is doing so by proportionate means. This second principle applies whether or not the State measure was prompted by any kind of agreement or proposal which, if it had been adopted by private parties, might have been contrary to Article 81.

The distinction between these two principles reinforces the importance of the argument which the Advocate General made. In a democracy, it must be lawful for competitors to join in asking the legislature or other public authorities to adopt measures, provided that the competitors do not do anything which infringes Article 81. Such a request or submission cannot be less lawful because the competitors requested it. The principle that State measures restricting freedom of establishment and services must have legitimate objectives and be proportional, must apply whether the measures were initiated by private interests or by an official request. State measures which do not fulfill these conditions are contrary to Community law, and in particular to Article 10.

C. The Duty Not to Limit or Regulate Fundamental Freedoms without Adequate Justification

It is well established by a long line of cases that a Member State must not enact or maintain measures which regulate or restrict the fundamental freedoms of establishment, services, movement of capital and individuals, and (apparently) also competition, without adequate justification in the public interest,

Customs and Excise v. Schindler, Case C-275/92, [1994] E.C.R. I-1039; Crespelle, Case C-323/93, [1994] E.C.R. I-5077; Alpine Investments BV v. Minister van Financien, Case C-384/93, [1995] E.C.R. I-1141; Franzén, Case C-189/95, [1997] E.C.R. I-5909, 5976-77; I.C.I. v. Colmer, Case C-264/96, [1998] E.C.R. I-4695, ¶¶ 28-29; Parodi v. Banque Bary, Case C-222/95, [1997] E.C.R. I-3899; Reina v. Seymour Smith, Case C-167/97, [1999] E.C.R. I-623; Centros Ltd. v. Erhvervs, Case C-212/97, [1999] E.C.R. I-1459; Vlaamse Televisie v. Commission, Case T-266/97, [1999] E.C.R. II-2329; Opinion of Advocate General La Pergola, Läära v. Kihlakunnansyyttaja, Case C-124/97, [1999] E.C.R. I-6067; di Verona v. Zenatti, Case C-67/98, [1999] E.C.R. I-7289; Mac Quen, Case C-108/96, [2001] E.C.R. I-837; Commission v. Italy, Case C-58/99, [2000] E.C.R. I-3811; Commission v. Portugal, Case C-367/98, [2002] E.C.R. I-4731, ¶ 49; Commission v. France, Case C-483/99, [2002] E.C.R. I-4781, ¶ 45; Commission v. Belgium, Case C-503/99, [2002] E.C.R. I-4809, ¶ 45; John Temple Lang, *State Measures Restricting Competition*, 2 *EUROPÄRTSLIG TIDSKRIFT* 206 (2001).

and other than by means which are necessary and proportionate to the objective sought. This principle is based ultimately on Article 10.

The Court substantially clarified this principle in *Piorgio Gambelli* and several other judgments.⁶¹ *Gambelli* concerned Italian regulation of gambling. The Court said that reserving the collection and transmission of sporting bets for the State and its licensees was a restriction on freedom of establishment and services which would be permissible only if it was necessary and proportionate. Management of revenue is not a public interest objective which justifies restrictions on these freedoms. The objective cannot justify a restriction if it is not consistently pursued, or if the means used to pursue it are discriminatory.

D. *The Power and Duty of a National Competition Authority to Disregard National Measures Restricting Competition*

In an important judgment in *Fiammiferi v. Autorita Garante*,⁶² the Court decided that a national competition authority applying Community competition law is bound to disregard national legislation requiring anticompetitive conduct, if the legislation is contrary to Community law because it requires or leads to a breach of Articles 81-82. This duty (with the corresponding power given by Community law) arises from Article 10.⁶³ That Article requires Member States not to introduce or maintain measures, even if legislative or regulatory, which may make ineffective the competition rules applying to enterprises. The duty to disregard or disapply national measures applies to non-judicial authorities as well as courts. Member States' obligations under Article 10 are distinct from the duties of enterprises

61. See *Piorgio Gambelli*, Case C-243/01, [2003] E.C.R. I-; *Lindman*, Case C-42/02, [2003] ECR I-; *Anomar v. Estado portugues*, Case C-6/01, [2003] E.C.R. I-; *van Financien v. Verkooijen*, Case C-35/98 [2000] ECR I-4071, ¶¶ 48, 59 (holding that aims of a purely economic or revenue nature not enough to justify restriction); *Ambulanz Glöckner v. Landkreis Sudwestpfalz*, Case C-475/99, [2001] E.C.R. I-8099 (finding that extension of a dominant position by national measure requires justification). Considerations of a purely administrative nature, or of administrative convenience, are not enough. See *Arblade v. Leloup*, Case C-369/96, [1999] E.C.R. I-8453, ¶¶ 37, 76.

62. Case C-198/01, [2003] E.C.R. I-; ¶¶ 45-51. See *Connect Austria v. Telekom-Control*, Case C-462/99, [2003] E.C.R. I-5197.

63. See *Stato v. Simmenthal*, Case 106/77, [1978] E.C.R. 629; *Ahmed Saeed v. Centrale*, Case 66/86, [1989] E.C.R. 803; *Fratelli Constanzo v. di Milano*, Case 103/88, [1989] E.C.R. 1839.

under Articles 81-82. However, penalties can be imposed only for conduct committed after it has been definitively ruled that the national measure is contrary to EC law.

Fiammiferi is important because it confirms that, although much of the case-law under Article 10 deals with the duties of national courts, the Court regards non-judicial authorities as having duties similar to, and as strict as, those of courts under Article 10. The significance of *Fiammiferi* is not limited to competition authorities, and it shows that Article 10 confers powers, as well as duties, on regulatory and other non-judicial authorities, within the spheres of their competences. These powers will have to be recognized by national administrative courts in appeals against the decisions of these authorities.

E. *Other Duties of a National Competition Authority*

In *Royal Philips Electronics v. Commission*,⁶⁴ the Court of First Instance was asked to annul a Commission decision allowing a merger on conditions, and referring part of the case to the French competition authority. The Court dismissed the application, noting that the French authority was bound by Article 10 in its examination of the case. If there was a subsequent breach of Article 10, the Commission could, if necessary, bring proceedings against France.

Recently, a new issue has arisen. The Commission is now imposing much higher fines for infringement of Community competition rules, than have been imposed in the past. This policy is partly moderated by the effects of Notice on Leniency,⁶⁵ under which the Commission guarantees to reduce the otherwise appropriate fine if a company voluntarily gives the Commission full information about a price-fixing agreement. However, if a national competition authority used the information so disclosed to impose a full fine for violation of national competition law, it would defeat the aims of the Leniency Notice (just as a national tax authority which allowed a company to deduct a Commission fine against its tax liability would be acting contrary

64. Case T-119/02, [2003] E.C.R. I-___, ¶¶ 370, 383; *Cableuropa v. Commission*, Joined Cases T-346/02 and 347/02, [2003] E.C.R. I-___, ¶ 198.

65. Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, O.J. C 45/3 (2002) (replacing a previous Notice); John Temple Lang, *The Implications of the Commission's Leniency Policy for National Competition Authorities*, 28 EUR. L. REV. 430 (2003).

to Article 10, because it would be altering the effective cost of the fine to the company). It seems clear, therefore, that to avoid interfering with the operation of the Community policy on leniency, national competition authorities have a duty under Article 10 not to impose full fines under national law using information disclosed to the Commission which has led the Commission to impose no fine, or a reduced fine.

National competition authorities applying Community competition rules are obliged, under Article 10, to respect Community general principles of procedural due process.⁶⁶ But it is not yet clear whether a national competition authority to which the Commission transfers a complaint under Reg. 1/2003 has a duty to give the parties *all* the same procedural rights as they would have in a Commission procedure. If there is no such duty, the transfer substantially alters the rights of the parties, and must be open to challenge under Article 230. The arrangements between the Commission and the national competition authorities of Member States are set out in Notices or guidelines agreed between them. While this kind of act is not formally binding (the Commission has no power under Article 10 to issue binding instructions), these arrangements will be binding under Article 10 because they have been agreed to and are intended to regulate the cooperation between the Commission and the national authorities. (When a Member State agrees to do certain things to resolve a legal disagreement between it and the Commission, to help to resolve a difficulty, or to deal with a competition case between the Commission and a company, the State's promise is legally binding under Article 10 because it is made in the context of a legal arrangement and is intended to regulate legal relationships).⁶⁷ It is not yet clear how far these Notices on cooperation will create legal rights for companies, whether under Article 10 or under the principle of legitimate expectations.⁶⁸

Another substantive issue under Article 10 is likely to arise because Regulation 1/2003 allows national competition law to go further in abuse of dominance cases than Article 82. Some national laws seem to protect competitors from competition, for

66. See *supra* notes 34-35 (commenting on *max.mobil Telekommunikation*).

67. See John Temple Lang, *Community Constitutional Law: Article 5 EEC Treaty*, 27 COMMON MKT. L. REV. 645, 668-69 (1990).

68. John Temple Lang, *Legal Certainty and Legitimate Expectations as General Principles of Law*, in GENERAL PRINCIPLES OF EUROPEAN COMMUNITY LAW, *supra* note 2, at 163-84.

example, by strict non-discrimination rules. But a national decision which in fact protected a competitor against competition, even if it was based on national competition law, would be contrary to Article 3 of the EC Treaty, which says that competition is a Community objective. So such a national decision would be contrary to the duties of the competition authority under Article 10, and would be open to challenge in national administrative courts.⁶⁹

F. *The Duty to Reopen Administrative Procedures*

In *Kühne & Heitz v. Productschap*,⁷⁰ the Court had to answer a question which referred expressly to Article 10. If an administrative body is asked to review a final administrative decision to take account of an interpretation given subsequently by the Court, has it a duty to reopen the case? The Court said it had a duty under Article 10, but only under the following conditions: 1) the administrative body has power under national law to reopen its decision; 2) the earlier decision became final as a result of a judgment of a national court of final instance which did not refer a question under Article 234; 3) the judgment might have been based on a misinterpretation; and 4) the interested party asked immediately for the case to be reopened.

G. *Duties of Telecommunications Regulatory Authorities to Ensure that the Community's WTO Obligations are Fulfilled*

The individual implementation of the Community's obligations under the World Trade Organisation agreements on telecommunications is the responsibility of national telecommunications regulatory authorities. If the wording of the Community directives implementing the WTO obligations, or the wording of the national legislation implementing the directives, does not correspond precisely to the words of the WTO obligations, the national regulatory authorities have a duty under Article 10 to ensure that their decisions comply not only with the relevant Community directives but also with the WTO obligations. Oth-

69. John Temple Lang, *Anticompetitive Non-pricing Abuses Under European and National Antitrust Law*, in 2003 *FORDHAM CORP. L. INST.* 235, 235-40, 335-39 (B. Hawk ed., 2004).

70. Case C-453/00, [2004] E.C.R. I-__.

erwise the Community might be in breach of its international obligations.

H. *The Duty to Safeguard Specially Protected Areas Under the Habitats and Bird Conservation Directives*

Another issue arose, but was not resolved, in *Re WWF-UK and the Royal Society for the Protection of Birds*.⁷¹ Areas had been set aside for special protection under the two Community directives on habitats and bird conservation, but there was extensive tourist skiing activity nearby. If this activity interfered with wildlife conservation in the special protection areas, it would be contrary to Article 10 to allow the interference to continue.

I. *Article 10 and International Institutional Questions*

Although Article 10 has proved to be surprisingly important in the international relations of the Community in the past,⁷² it has arisen less often in the period under review. In the *Tobacco Advertising Directive* case,⁷³ Advocate General Fennelly referred to it when discussing whether the directive was consistent with the principle of subsidiarity. He said that when harmonization of national laws is needed, "collective action by the 15 Member States (for example by way of a treaty concluded under public international law) is excluded, in my view, as a matter of law, having regard, in particular, to the terms of Article 5 of the EC Treaty (now Article 10)."⁷⁴ It would be contrary to Community principles to use an international agreement between Member States to do something which could appropriately be done by a directive, because it would mean that Article 234 would not apply to the interpretation of the measure, and because the validity of the measure could not be challenged under Article 230 (since it would not be an act of a Community institution) but would have to be challenged indirectly in proceedings by the Commission

71. [1999] 1 C.M.L.R. 1021; Council Directive No. 92/43, O.J. L 206/7 (1992) (habitats); Council Directive No. 79/409 O.J. L 103/1 (1979) (bird conservation). See Damian Chalmers, *The Application of Community Law in the United Kingdom, 1994-1998*, 37 COMMON MKT. L. REV. 83, 126-27 (2000).

72. See HELSINKI GENERAL REPORT, *supra* note 2, at 412-13.

73. See Opinion of Advocate General Fennelly, *Germany v. Parliament and Council*, Case C-376/98, [2000] E.C.R. I-8419.

74. *Id.* at ¶ 136.

against the Member States concerned under Article 226.⁷⁵

J. *Air Navigation Agreements*

In the air navigation judgments, the Court held that it was contrary to Article 10 for a Member State to enter into bilateral air navigation agreements with a non-Member State. The Court quoted Article 10, and went on:

In the area of external relations . . . the Community's tasks and the objectives of the Treaty would be compromised if Member States were able to enter into international commitments containing rules capable of affecting rules adopted by the Community or altering their scope . . . by entering into or maintaining in force . . . international commitments concerning air fares and rates charged by carriers designated by the United States of America on intra-Community routes and concerning CRSs offered for use or used in Belgian territory, the Kingdom of Belgium has failed to fulfil its obligations under Article 5⁷⁶

Advocate General Tizzano in his opinion in the air navigation cases⁷⁷ referred to the duty of Member States under Article 10 to cooperate with the Community institutions to enable the States to amend their existing agreements. He distinguished between agreements which were in conflict with Community rules, agreements which cover the same subject-matter as Community rules, and those which are "liable to affect" Community rules.

Advocate General Tizzano said that the logic of the Community competence theory is that Member States could not undertake international obligations in matters governed by common rules even to eliminate conflicts between those rules and their earlier bilateral agreements. If only the Community is competent, but is not able to conclude international agreements directly, it would be necessary, in accordance with the principles

75. See *Leonesio v. Ministero*, Case 93/71, [1972] E.C.R. 287.

76. *Commission v. Belgium*, Case C-471/98, [2002] E.C.R. I-9681, ¶¶ 125-26. See *Commission v. Denmark*, Case C-467/98, [2002] E.C.R. I-9519, ¶¶ 110-12; *Commission v. Sweden*, Case C-468/98, [2002] E.C.R. I-9575, ¶¶ 106-08; *Commission v. Finland*, Case C-469/98, [2002] E.C.R. I-9627, ¶¶ 111-13; *Commission v. Luxembourg*, Case C-472/98, [2002] E.C.R. I-9741, ¶¶ 116-18; *Commission v. Austria*, Case C-475/98, [2002] E.C.R. I-9797, ¶¶ 124-26; *Commission v. Germany*, Case C-476/98, [2002] E.C.R. I-9855, ¶¶ 135-37. These cases involved one of the most important explicit uses of Article 10 ever made by the Court.

77. *Belgium*, [2002] E.C.R., at ¶¶ 74-75, 115, 117.

laid down in Article 10, for its institutions and the Member States to cooperate to enable the States to amend the existing agreements in a manner consistent and in accordance with the Community's interest. Member States should seek authorizations to negotiate amendments themselves, on the basis of agreed Community positions and procedures. If necessary, they should continue to look to the Community to achieve the solution most apt to ensure the greatest possible adherence to Community principles. If necessary, they should adopt concerted action in negotiations. In any event, they should take into consideration their obligations under Community law, and keep themselves informed of the interests of the other Member States. In turn, the Community institutions should give Member States their full cooperation in the search for appropriate solutions, including assistance in the negotiations, where possible.

K. *The Limits of Article 10*

In *PreussenElektra v. Schleswag*,⁷⁸ German legislation obliging certain companies to buy, at minimum prices, electricity produced from renewable energy sources, had the effect of guaranteeing producers of that electricity, without risk, higher profits than they would otherwise have made. The cost of this obligation was borne by electricity supply companies and upstream private electricity network operators. The question was whether this benefit to the producers of this kind of electricity was State aid. The Commission argued that, to preserve the effectiveness of the Treaty Articles on State aid, they should be interpreted in conjunction with Article 10 so as to include financial support given by State measures, even though it is financed by obligations imposed on private interests. The Court said that Article 10 does not extend the scope of the State aid Articles to conduct by States which does not fall within those Articles. The Court rejected the analogy, suggested by the Commission, of the principle that Article 10 prohibits Member States from encouraging agreements by companies which are contrary to Article 81, since the State aid Articles apply directly to State measures.

Another limit on the extent of Article 10 arose in *Pavlov v.*

78. Case C-379/98, [2001] E.C.R. I-2099.

Pensioenfonds Medische.⁷⁹ It had been argued that the decision of a Member State to make membership of a pension fund compulsory for all members of a profession is contrary to Article 10. The Court said that as the profession's request to have membership made compulsory was not contrary to Article 85 (now Article 81), the measure which made it compulsory was not contrary to Article 10.⁸⁰

L. *The Duty to Protect Fundamental Freedoms*

In *Ferlini v. Centre hospitalier*,⁸¹ the question was whether a Member State has a duty to prevent discrimination on the grounds of nationality by healthcare providers affiliated with a national social security scheme. The Court held that this was contrary to Article 6 of the EC Treaty.⁸² But the Advocate General also said that Member States may have a duty under Article 10 to take all necessary and appropriate measures to ensure that fundamental freedoms are respected, and he referred to the French farmers' case.⁸³

M. *The Duty of Community Institutions to Respect Each Others' Powers*

The Community institutions have a duty to respect each others' powers. The Court of Justice has recognized this in the context of litigation over the place of meetings of the Parliament.⁸⁴ However, the Parliament itself does not seem always to respect this principle, since it has, on a number of occasions, encroached on the exclusive right of the Commission to propose Community measures. Parliament has even sometimes given the Commission a draft (no doubt drafted by a lobbyist) of the measure the Parliament wants the Commission to propose, or told

79. Joined Cases C-180/98 and C-184/98, [2000] E.C.R. I-6451, ¶¶ 95-101. See *Arduino*, Case C-35/99, [2002] E.C.R. I-1529.

80. This may not be logical. See *Arduino*, [2002] E.C.R. I-1529.

81. Case C-411/98, [2000] E.C.R. I-8081.

82. *Id.* at ¶ 26.

83. See *Commission v. France*, Case C-265/95, [1997] E.C.R. I-6959; *Schmidberger v. Republik Österreich*, Case C-112/00, [2003] E.C.R. I-5659.

84. *Luxembourg v. Parliament*, Case 230/81, [1983] E.C.R. 255; *Parliament v. Council (Chernobyl)*, Case C-70/88, [1990] E.C.R. I-2041; *Greece v. Council*, Case 204/86, [1988] E.C.R. 5323; *France v. Parliament*, Case 358/85, [1988] E.C.R. 4821; *Parliament v. Council*, Case C-65/93, [1995] E.C.R. I-643; *Parliament v. Council Case*, C-392/95, [1997] E.C.R. I-3213.

the Commission how it should decide a competition case on which the Parliament had heard no evidence or arguments. Resolutions calling on the Commission to propose measures are not legally binding on the Commission, and the Commission is free to ignore them. So the Commission would not be able to ask the Court to annul such a resolution of the Parliament. But some resolutions seem to infringe the principle of reciprocal respect for the competences of the institutions. The question would arise in a competition case (whether a State aid case, a merger, or a case under Articles 81-82) before the Community Courts if there was any evidence that the Commission had been influenced in any way by a resolution of the Parliament: any such influence would be improper, and if proved, would presumably lead to the Commission's decision being annulled.

N. Directives and Article 10

Article 10 has been referred to in a series of judgments of the Court of Justice involving failure to transpose or fully to implement directives, or the effect in national courts of incomplete or incorrect transposition.⁸⁵ In *Hospital Ingenieure Krankenhaus-technik*,⁸⁶ one of the questions asked by a national court was whether, when the directives on review procedures for public contracts had not been implemented, the review bodies for public supply and public works contracts could also deal with reviews of public service contracts. The Court said that, under Article 10, Member States are obliged to achieve the result prescribed by the directive and to take all appropriate measures, general or particular, to fulfill that obligation, and that this obligation applies, for matters within their jurisdiction, to national courts. National courts, therefore, must interpret national law as far as possible to achieve the result required by the directive. Even when the directive has not been transposed, the question of the body competent to hear appeals in relation to public service contracts is relevant, and individuals may be able to rely on the directive against a defaulting Member State. If the national law cannot be appropriately interpreted and applied, the individual may be able to recover compensation from the State. The na-

85. See GENERAL REPORT, LES DIRECTIVES COMMUNAUTAIRES: EFFETS, EFFICACITÉ, JUSTICIABILITÉ, XVIII FIDE CONGRESS, STOCKHOLM (Bernitz ed., 1998).

86. Case C-258/97, [1999] E.C.R. I-1405.

tional court should therefore decide whether, in the light of these requirements of Community law, the national law allows an appeal, and to what bodies. This judgment is an extremely clear indication that national courts should do everything which they consider possible to interpret and apply national law in a way which is consistent with Community law.

In *Commission v. Italy*,⁸⁷ Italy had set up authorities for drawing up plans for dealing with certain industrial accidents, but the plans had not all been drawn up. The Court used the traditional formula that, under Article 10,

the Member States are to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty or resulting from action taken by the institutions of the Community directives . . . are binding as to the result to be achieved Under the Court's case-law, that obligation implies, for each Member State to which a directive is addressed, adopting, within the framework of its national legal system, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective which it pursues.⁸⁸

The objective of the directive would be compromised if Member States did not ensure that the plans and inspections were completed.⁸⁹

*Commission v. Ireland*⁹⁰ involved simple non-transposition of a directive. The Court noted that under Article 249 (ex Article 189) directives are binding as to the result to be achieved, and that under Article 10 Member States are required to take all appropriate measures to ensure fulfilment of obligations arising from the Treaty. Member States may not rely on circumstances in their domestic legal systems to justify a failure to comply with a directive.

In *Jimenez Melgar v. Los Barrios*,⁹¹ the Court again used the

87. Case C-336/97, [1999] E.C.R. 3771.

88. *Id.* at ¶ 19.

89. For examples of where the Court used the same language, see *Commission v. France*, Case C-320/99, [2000] E.C.R. I-10453; *Commission v. France*, Case C-97/2000, [2001] E.C.R. I-2053 (public contracts); *Commission v. France*, Case C-207/2000, [2001] E.C.R. I-4571 (television broadcasting); *Commission v. Luxembourg*, Case C-119/2000, [2001] E.C.R. I-4795 (television broadcasting).

90. Case C-213/98, [1999] E.C.R. I-6973. The Court used the same language in *Commission v. Luxembourg*, Case C-138/99, [1999] E.C.R. I-9021.

91. Case C-438/99, [2001] E.C.R. I-6915.

traditional formula, and added that since the directive on measures to improve the safety and health of mothers had direct effect, even in the absence of transposition measures, the directive confers on individuals rights on which they can rely before a national court against the authorities of the State, including municipalities.

It will be seen that the Court distinguishes between the duty to bring national law into line with the directive, which results directly from Article 249 (ex Article 189), and the duty to adopt supplementary or consequential measures to make the directive fully effective, which (if the circumstances make it relevant) results from Article 10. This is an interesting example of how Article 10 supplements other rules of Community law.

In this context it is worth mentioning the English High Court judgment *R. (ex parte T-Mobile) v. Competition Commission and Director General of Telecommunications*.⁹² Insofar as relevant to Article 10, it was argued on behalf of the companies that the telecommunications access directive prevented the adoption of any controls over the prices of termination calls in the period before the directive took effect. The High Court rejected this interpretation of the directive, since the principles of Community law, founded upon Article 10, are sufficient. Member States are required to refrain from taking any measures liable seriously to compromise the results required by a directive, even if the date for its implementation has not yet expired. But they may introduce a new regulation in the meanwhile so long as it does not seriously compromise the new regime.

O. *The Duty to Supply Information to the Commission*

It is well established that even in the absence of any express duty under Community secondary legislation, national authorities have duties under Article 10 to provide information requested by the Commission to enable it to assess whether the Member State is in breach of its obligations under EC law. This was confirmed once again in *Commission v. Luxembourg*.⁹³

92. [2003] E.W.H.C. 1555 (Admin), ¶ 69; *Inter Environnement Wallonie v. Région Wallonne*, Case C-129/96, [1997] E.C.R. I-7411.

93. Case C-478/01, [2003] E.C.R. I-2351 (patent agents).

P. *A Duty to Apply National Laws Adequately for Purposes of Mutual Recognition*

In a variety of areas, national authorities are obliged to recognize authorizations granted by other Member States and are, in effect, not allowed to question or criticize them. Each national authority depends on the others to ensure that their own laws are properly applied, so that mutual recognition will be justified. This means that there is a duty under Article 10 on every national authority to ensure that it applies its own law fully and thoroughly.

CONCLUSIONS

The Court has continued to apply its case-law under Article 10 in a relatively straightforward way to both substantive and procedural issues. However, it has been given few opportunities to answer new questions or call attention to new implications. It rejected the only new argument made by the Commission (in *Preussen Elektra*), but that argument was clearly made opportunistically. The Commission has still not been trying to use Article 10 on new issues. However, the fact that the Court has needed to deal with so few new issues under Article 10 is a sign of the scope, richness, and variety of the Court's previous judgments under this Article, (especially those on the principle of equivalence and the principle of effectiveness), which have proved sufficient to resolve all the issues which have recently arisen before it. This also helps to explain why the Court so often refers to its previous judgments without mentioning the Article which is their legal base. Surprisingly, few practicing lawyers seem to have tried to use Article 10. It is not clear whether practitioners have failed to make Article 10 arguments in national courts, or whether national courts have not thought it necessary or appropriate to refer them to the Court. However, there seems to be a gradual increase in the number of cases in which Article 10 is applied or referred to, both in cases referred by national courts and cases brought directly in the Court of Justice. The Court of First Instance also shows an increasing tendency to cite Article 10, but its case law deserves a separate paper, and is not dealt with here.

This Article has identified a number of practical issues for which Article 10 is relevant, which are likely to be raised in the

Community Courts or in national courts. Whatever the answers may be to the questions raised here, the questions are clearly important, and will certainly have to be answered in due course. Article 10 still has considerable potential for producing new kinds of practical consequences.

At the FIDE conference in Helsinki, it was suggested that the case law on Article 10 can be summarized by saying that national authorities and courts have a legal duty to make the Community legal system work in the way that it was objectively intended to work.⁹⁴ That still seems a valid summary, although the Court looks at each specific situation and has not tried to state any wider principles. That is another reason why the importance of Article 10 continues to be underestimated. Its importance should become obvious if and when similar new provisions apply to foreign and security policy and to justice and home affairs.

94. See HELSINKI GENERAL REPORT, *supra* note 2, at 373-426 (vol. I), 65-72 (vol. IV); Durand, in 1 COMMENTAIRE MÉGRET, *supra* note 2, at 25-43; Temple Lang, *The Duties of Cooperation*, *supra* note 2, at 84.