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The Development by the Court of Justice of the Duties of Cooperation of National Authorities and Community Institutions Under Article 10 EC

John Temple Lang

Abstract

Article 10 of the European Community Treaty has gradually given rise to a large body of case law on a wide variety of subjects, including several profoundly important constitutional principles of Community law: the duty of national courts to give effective protection to rights given by Community law, the duty to give direct effect to directives against the State, the duty to interpret national law so as to be compatible with Community law, and the right to judicial review. These principles are the foundation of the constitutional structure that the Court of Justice has built, in which national courts ensure the rule of Community law in most of the circumstances in which it applies. This Article describes the development of the case law of the Court of Justice, divided for convenience, somewhat arbitrarily, into three periods. The periods are 1952 to 1990, 1990 to 2000, and 2000 to date. As will be seen, much of the elaboration of the case law occurred between 1990 and 2000, although several basic principles had been established before that. Before tracing this development, one feature of the Community legal system needs to be explained, since it is fundamental, and very different from other legal systems such as the U.S. legal system. The rules of European Community ("EC") law, and now of European Union ("EU") law, are primarily applied and enforced by national courts and authorities, and not by the Community institutions. The national law and Community law spheres are not separate bodies of law applied by separate institutions. There is no line of demarcation between the two. This fact makes Article 10 much more important than it would otherwise be. It also explains why the case law on Article 10 developed gradually, and is still developing.

THE DEVELOPMENT BY THE COURT OF JUSTICE OF THE DUTIES OF COOPERATION OF NATIONAL AUTHORITIES AND COMMUNITY INSTITUTIONS UNDER ARTICLE 10 EC

*Dr. John Temple Lang**

INTRODUCTION

Article 10 (formerly Article 5 but for convenience here referred to as Article 10) of the European Community Treaty ("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 jeopardize the attainment of the objectives of this Treaty.¹

This apparently vague Article has gradually given rise to a large body of case law on a wide variety of subjects, including several profoundly important constitutional principles of Community law: the duty of national courts to give effective protection to rights given by Community law, the duty to give direct effect to directives against the State, the duty to interpret national law so as to be compatible with Community law, and the right to judicial review. These principles are the foundation of the constitutional structure that the Court of Justice has built, in which national courts ensure the rule of Community law in most of the circumstances in which it applies.

This Article describes the development of the case law of the Court of Justice, divided for convenience, somewhat arbitrarily, into three periods. The periods are 1952 to 1990,² 1990 to 2000, and 2000 to date. As will be seen, much of the elaboration

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1. Consolidated Version of the Treaty Establishing the European Community art. 10, Dec. 24, 2002, O.J. C 325/33, at 42 (2002) [hereinafter EC Treaty].

2. Article 86 of the European Coal and Steel Community Treaty corresponds to

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Before tracing this development, one feature of the Community legal system needs to be explained, since it is fundamental, and very different from other legal systems such as the U.S. legal system. The rules of European Community ("EC") law, and now of European Union ("EU") law, are primarily applied and enforced by *national* courts and authorities, and not by the Community institutions. The national law and Community law spheres are not separate bodies of law applied by separate institutions. There is no line of demarcation between the two. This fact makes Article 10 much more important than it would otherwise be. It also explains why the case law on Article 10 developed gradually, and is still developing.

I. *THE FIRST PERIOD: THE DEVELOPMENT OF SOME BASIC PRINCIPLES*

At first, Article 5, as it then was, was considered to have little significance. It was too vague, and had no obvious content of its own. It sounded like a similarly worded provision of the Vienna Convention on the Law of Treaties. Even those lawyers who noticed the similarity to the clause in the German Basic Law obliging the Länder to cooperate with the German federal institutions did not see that Article 10 might become significant in the European Community.

In the first cases in which the Court of Justice expressly relied on the Article, it was mentioned almost incidentally, as confirmation of arguments and conclusions that might have been, and in some cases obviously were, based on first principles or on analysis of other parts of the Treaty. This was true both in the case of the positive duties under Article 10, to adopt specific measures, and the negative duties, to avoid interfering with Community law.

In the first significant case, the Italian *Fruit Trees* case,³ the Court had to consider whether Italian legislation, in terms substantially identical to those of a Community Regulation, was per-

Article 10. See Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, art. 86, 261 U.N.T.S. 140 (1952).

3. *Leonesio v. Ministero Dell'agricoltura e Foresete (Fruit Trees)*, Case 93/71, [1972] E.C.R. 287, ¶¶ 17-24.

missible under the Treaty. The Court held that it was not, because its presence on the statute book questioned the application of the Regulation in Italy, and because lawyers referring to it would be misled and would fail to realize that the Regulation was in force. Only the interpretation of the Regulation, and not of the Italian legislation, could be the subject of a reference to the Court of Justice under what is now Article 234.⁴ In the second *Fruit Trees* case, it was held that Italy had a legal duty under Article 10 formally to repeal the legislation, and could not merely rely on the fact that it was contrary to Community law and so, in effect, impliedly repealed.⁵ This case was one of the first cases brought by the Commission in which Article 10 was the principal legal basis for the Commission's arguments.

But even the Commission, which was then creative in its arguments on some Community law issues, did not at first see the full potential of Article 10. As a result, Article 10 was relied on initially in national courts, and the Commission based arguments on it only opportunistically, when and if the national courts referred a question to the Court of Justice.

As in many other respects, Judge Pierre Pescatore was far-sighted enough to see the significance of Article 10.⁶ He discussed it with me in the 1970s, and gave me a copy of a short note which he had already compiled on all of the case law of the Court, up to that time, on Article 10.

A. *The Fisheries Cases*

One of the first important occasions on which the Commission made deliberate use of Article 10 was a fisheries case.⁷ Under Annex VI to a series of Council Resolutions adopted in

4. The Court accepted questions of national law, when it is the same as EC law, only much later. See, e.g., *Leur-Bloem v. Amsterdam*, Case C-28/95, [1997] E.C.R. I-4161, ¶ 32.

5. See *Commission v. Italy*, Case 30/72, [1973] E.C.R. 161, ¶ 11; see also *Variola v. Amministrazione Italiana delle Finanze*, Case 34/73, [1973] E.C.R. 981, ¶ 10.

6. P. Pescatore, *Les objectifs de la Communauté Européenne comme principes d'interprétation dans la jurisprudence de la Cour de Justice*, in *MISCELLANEA GANSHOF VAN DER MEERSCH* Vol. 2, 350 (1972); Pierre Pescatore, *La carence du législateur communautaire et le devoir du juge*, in *RECHTSVERGLEICHUNG, EUROPARECHT UND STAATENINTEGRATION: GEDÄCHTNISCHRIFT FÜR LÉONTIN-JEAN CONSTANTINESCO* 559, 578 (1983); Vlad Constantinesco, *L'article 5 CEE, de la bonne foi à la loyauté communautaire*, in *DU DROIT INTERNATIONAL AU DROIT DE L'INTÉGRATION* 97 (F. Capotorti, C.-D. Ehleman, J. Frowein, F. Jacobs, R. Joliet, T. Koopmans & R. Kovar eds., 1987).

7. See *France v. United Kingdom*, Case 141/78, [1979] E.C.R. 2941, ¶¶ 1-13.

The Hague, it was declared that Member States could adopt national measures for conservation of fisheries, after seeking the approval of the Commission, until a certain date. The United Kingdom, after very perfunctory consultation which amounted to little more than informing the Commission what was proposed, adopted measures on minimum mesh size which had the effect of obliging French fishing boats fishing in U.K. waters either to stop fishing or to buy new nets. France, unusually, brought proceedings against the U.K. under what is now Article 227 EC. The United Kingdom argued that a Council Resolution has no binding legal effect, which in general is correct. The Commission argued, however, that Article 10 had the effect of making this Resolution legally binding, since it was intended to regulate, at least provisionally, an important and difficult subject matter of clear common interest, which was the subject of active negotiations in the Council. The Court accepted the argument, and declared the Resolution to be legally binding.

That ruling paved the way for two other cases, brought by the Commission itself against the United Kingdom, and again concerning fisheries measures. Again the United Kingdom's consultation with the Commission had been purely nominal, and the Commission argued that seeking the approval of the Commission meant that its consent to the measures, which had not been given, was legally required.⁸ The Commission also used Article 10 in a new way (although one clearly envisaged by the words of Article 10, which imposes positive obligations to act as well as negative duties not to obstruct). It argued that because conservation of fish stocks had been clearly accepted as a Community objective, the U.K. had a legal obligation under Article 10 to adopt measures prohibiting fishing of a herring stock when the clear scientific advice was that it should be stopped. The Court agreed with both arguments.⁹

In the third *Fisheries* case the Commission again used Article 10, and went even further.¹⁰ As already mentioned, the Hague

8. *See* Commission v. United Kingdom, Case 32/79, [1980] E.C.R. 2403, ¶¶ 25-29.

9. *See id.*; Opinion of Advocate General Reischl, Commission v. United Kingdom, Case 32/79, [1980] E.C.R. 2460, 2460-61; *see also* Thieffry v. Conseil de L'ordre des Avocats a la cour de Paris, Case 71/76, [1977] E.C.R. 765, ¶¶ 13-23; Ireland v. Commission, Case 325/85, [1987] E.C.R. 5041, ¶ 15; *Pluimveeslachterij*, Joined Cases 47 & 48/83, [1984] E.C.R. 171, ¶¶ 22-23.

10. *See* Commission v. United Kingdom, Case 804/79, [1981] E.C.R. 1045; *see also*

Resolution had said that Member States could adopt national fisheries conservation measures, having sought the approval of the Commission, up to a certain date. The Commission argued that as the Resolution was legally binding, it was to be interpreted as prohibiting national measures, even with the consent of the Commission, *after* the date in question. Once again, the Court upheld the argument, and the foundation of the Community fisheries policy had been laid. From the relevant date, the Community's competence over the biological resources of the sea had become exclusive, and the Commission had its normal role of proposing Community measures (although some powers were later delegated back to the Member States).

In another *Fisheries* case, the Advocate General said that when the Council has power to adopt conservation measures but has not yet done so:

[M]ember-States have an obligation, on the basis of Article 5 of the EEC Treaty, to adopt the necessary conservation measures *in the general interest*, while observing the substantive and procedural requirements of Community law. The interim decisions adopted by the Council . . . [are] to be regarded merely as a specific definition of Member-States' obligations under Article 5 of the EEC Treaty. [I]f the Council does not act, the Commission has power to grant such consent, irrespective of whether the decisions concerned are regarded as a restoration of powers to the Member-States or, more correctly, as a specific definition of the obligations arising from Article 5 of the ECC Treaty.¹¹

The Italian *Fruit Trees* case has not led to subsequent judgments based on the same principles, primarily because the circumstances that gave rise to them were too unusual. However, the fisheries cases have proved to be seminal in several respects.

B. *Emerging Lines of Cases*

During the 1980s the case law on Article 10 began to develop a characteristic feature which is now very pronounced, and which has had certain consequences for the general understand-

Commission v. Belgium, Case C-377/03, slip op., ¶ 93 (ECJ Oct. 5, 2006) (not yet reported) (stating that a Member State has a duty not to adopt legislation to which the Commission has objected).

11. Opinion of Advocate General Reischl, *Van Justitie v. Van Dam* (no. 2), Case 124/80, [1981] E.C.R. 1447, ¶¶ 93, 99 (emphasis in original).

ing by lawyers of Article 10. This feature is that the Court makes a statement, based on Article 10, of a principle that is applicable in circumstances that occur repeatedly, for example, the principle that Member States have a duty under Article 10 to give information to the Commission to enable the Commission to decide whether an infringement of Community law has occurred. Once stated, this principle, and some others mentioned below, are obviously correct, and they can be referred to and acted upon without discussion or elaboration in later cases. After the first judgments, the specific principle stated by the Court is repeated, usually using the same words, in later judgments. This is of course very common in the case law of the Community Courts. However, it is a feature of the case law on Article 10 that, because the principles are regarded as clear and so do not need discussion in later judgments, the principle is repeated later, without the Court mentioning that the principle is based on Article 10. The effect is to give readers of the later judgments the impression that the principle was in effect invented by the Court, and has no identifiable legal basis. If the principle in question is uncontroversial, this causes no difficulties. However, it gives an incorrect impression of "judicial legislation." It also has the unfortunate consequence that the importance of Article 10 is underestimated, because the fact that it is the legal basis for the principle or rule in question is unknown or forgotten. The most striking result of this failure to refer to Article 10 is the *Moorman* judgment.¹² This feature is compounded by the fact that when Article 10 is mentioned in judgments, it is almost always mentioned briefly, without discussion. This also causes its importance to be underestimated.

C. *The Direct Effect of Directives*

Directives according to the EC Treaty are binding as to the results to be achieved, but leave to Member States the choice of form and means. They are legislation, in other words, that is intended to be implemented by national measures, whether legislative or otherwise. So there is a general obligation to make all the changes needed in national law to give a directive "full effect."¹³

12. *Oberkreisdirektor v. Moorman*, Case 190/87, [1988] E.C.R. 4689.

13. *See Commission v. Greece*, Case 68/88, [1989] E.C.R. 2965, ¶¶ 22-23 (the en-

The question arose, however, whether a directive that had not been implemented could have any legal effects, and specifically whether a Member State that had not implemented a directive could take action against a private party which it could not have taken if it had given effect to the directive. In other words, could a State that had not implemented a directive take advantage of its own failure, in proceedings against a private party?

As is well known, the Court of Justice decided that Community law prevents a State from doing this.¹⁴ The Court gave several reasons. A State may not take advantage of its own failure to implement a directive, in order to enforce legislation that the directive obliges it to repeal. Also, Article 10 obliges Member States to give full effect to Community law rules, including those that are not otherwise directly applicable. This was controversial. But the Court repeated its finding in a number of later cases, without referring to Article 10. It was not until fourteen years later, in *Moorman*, that the Court, in reply to a direct and rather pointed question from a national court, confirmed that Article 10 was the legal basis for this rule.

D. *The Duty to Give Full Effect to Community Law*

By the end of the 1980s there was a substantial body of case law, all based more or less clearly on Article 10, stating the broad principle that national authorities have a legal duty to give full effect to Community law. That principle had been applied in a variety of circumstances. It had been held to impose positive du-

forcement procedures and the diligence with which they are applied must be the same as for breaches of national law); *Commission v. Belgium*, Case 239/85, [1986] E.C.R. 3645, ¶ 7 (Article 5 imposes a duty to implement a directive by a legally binding measure); *Deutsche Milchkontor GmbH v. Federal Republic of Germany*, Joined Cases 205-215/82, [1983] E.C.R. 2633, ¶¶ 17-23; Opinion of Advocate General Verloren Van Themaat, *Deutsche Milchkontor GmbH v. Federal Republic of Germany*, Joined Cases 205-215/82, [1983] E.C.R. 2633, 2680, 2683; Opinion of Advocate General Verloren Van Themaat, *Fromme v. BALM*, Case 54/81, [1982] E.C.R. 1466, 1469, 1477-78; *Commission v. Belgium*, Case 137/80, [1981] E.C.R. 2393, ¶ 9; Opinion of Advocate General Capotorti, *Commission v. Belgium*, Case 137/80, [1981] E.C.R. 2393, 2413-14, 2416; *Scheer v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 30/70, [1970] E.C.R. 1197, ¶ 10; *Commission v. Belgium*, Case 85/85, [1986] E.C.R. 1149, ¶¶ 22-23 (duty to implement Protocol on Privileges).

14. *See Salumificio v. Amministrazione delle Finanze dello Stato*, Case 130/78, [1979] E.C.R. 867, ¶ 27; *Haselhorst v. Finanzamt Dusseldorf*, Case 23/70, [1970] E.C.R. 881, ¶ 5; *see also Becker v. Finanzamt Munster-Innenstadt*, Case 8/81, [1982] E.C.R. 53; *Criminal Proceedings against Tullio Ratti*, Case 48/78, [1979] E.C.R. 1629; *Van Duyn v. Home Office*, Case 41/74, [1974] E.C.R. 1337.

ties on national courts and other national authorities. This is the most important single principle resulting from Article 10, and it is useful to explain that even in the 1980s it had given rise to a series of consequences, many of which have since led to distinct lines of cases.

During the 1980s, there was already a substantial body of case law requiring national authorities to take whatever measures were needed to allow Community regulations, in particular on the common agricultural policy, to operate as intended. Member States could not rely on their own legislation as a reason for non-fulfilment of their obligations under Community law. They must ensure that the judgments of the Court of Justice are complied with. The first of what later became a long series of cases on the implications of directives for national courts were also decided during this period.¹⁵

The duty to give full effect to Community law meant, among other things, that national courts had to protect the rights of private parties *against* the State. They were also obliged to ensure that Community law was enforced against *private* parties when necessary. This included a duty to recover money paid to private parties contrary to Community law, whether the money was paid out of Community funds or was unlawful State aid.¹⁶

It was in the cases declaring the duty of national courts to protect the rights of private parties against the State, and in particular their rights to recover tax which should not have been imposed on them, that the Court of Justice stated a formula that has grown in importance.¹⁷ The Court said that national law

15. See generally XVIII FIDE CONGRESS, COMMUNITY DIRECTIVES: EFFECTS, EFFECTIVENESS, JUSTICIABILITY Volume II (Stockholm, 1998).

16. See, e.g., Commission v. France, C-232/05, [2006] E.C.R. I-10071, ¶ 61; Commission v. Germany, Case 94/87, [1989] E.C.R. 175, ¶ 12; Deutsche Milchkontor GmbH v. Germany, Joined Cases 205-215/82, [1983] E.C.R. 2633, ¶ 25; Fromme v. Bundesanstalt für landwirtschaftliche Marktordnung, Case 54/81, [1982] E.C.R. 1449, ¶ 10; BayWa AG v. Bundesanstalt für landwirtschaftliche Marktordnung, Joined Cases 146, 192 & 193/81, [1982] E.C.R. 1503, ¶ 31; Amministrazione delle Finanze v. Srl Meridionale Industria Salumi, Fratelli Vasanelli & Fratelli Ultrocchi, Joined Cases 66, 127 & 128/79, [1980] E.C.R. 1237, ¶ 21; see also Von Colson v. Land Nordrhein-Westfalen, Case 14/83, [1984] E.C.R. 1891, ¶ 28; Comet BV v. Productschap voor Siergewassen, Case 45/76, [1976] E.C.R. 2043, ¶ 15; Rewe-Zentralfinanz eG et Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland, Case 33/76, [1976] E.C.R. 1989, ¶ 6.

17. See Commission v. Italy, Case 104/86, [1988] E.C.R. 1799, ¶¶ 12-13; Amministrazione delle finanze dello stato v. San Giorgio, Case 199/82, [1983] E.C.R. 3595, ¶ 20; Lippische Hauptgenossenschaft eG et Westfälische Central-Genossenschaft eG v.

must not make it impossible or excessively difficult for private parties to claim their rights, and that the relevant rules of national law must not be less favourable to those claiming their rights under Community law than the rules applying to similar claims under national law.¹⁸ These are the “effectiveness” and the “equivalence” principles.

E. The Duty Not to Interfere With the Operation of Community Law or Policy, or the Working of a Community Institution, or to Encourage Breach of Community Law

During the 1980's another substantial body of case law had developed, based on the “negative” duty of national authorities not to interfere with the operation of Community law in the way that it is intended to work. In *Lord Bruce of Donington* the Court said that national tax authorities must not interfere with the activities of Members of the European Parliament.¹⁹

More generally, in a line of cases concerned with common agricultural policy regulations, the Court held that national measures must not interfere with the operation, in practice, of Community measures.²⁰

Bundesanstalt für landwirtschaftliche Marktordnung, Joined Cases 119 & 126/79, [1980] E.C.R. 1863, ¶ 5; Amministrazione delle finanze dello stato v. Denkavit Italiana Srl., Case 61/79, [1980] E.C.R. 1205, ¶ 25; Amministrazione delle finanze dello stato v. Ariete SpA, Case 811/79, [1980] E.C.R. 2545, ¶ 17; Amministrazione delle finanze dello stato v. Sas Mediterranea importazione, rappresentanze, esportazione, commercio (MIRECO), Case 826/79, [1980] E.C.R. 2559, ¶ 16; Ferwerda BV v. Produktschap voor Vee en Vlees, Case 265/78, [1980] E.C.R. 617, ¶ 10; Hans Just I/S v. Danish Ministry for Fiscal Affairs, Case 68/79, [1980] E.C.R. 501, ¶ 25; Pigs & Bacon Comm'n v. McCarren and Co., Case 177/78, [1979] E.C.R. 2161, ¶ 26; Iannelli & Volpi SpA v. Meroni, Case 74/76, [1977] E.C.R. 557, ¶ 22; *Rewe*, [1976] E.C.R. 1989, ¶ 5; *Comet*, [1976] E.C.R. 2043, ¶ 13; Russo v. Azienda di Stato per gli interventi sul mercato agricolo (AIMA), Case 60/75, [1976] E.C.R. 45, ¶ 9; Humblet v. Belgium, Case 6/60, [1960] E.C.R. 559, 572.

18. See Van de Haar & Kaveka de Meern BV, Joined Cases 177 & 178/82, [1984] E.C.R. 1797, ¶ 12; Procureur Général v. Buys, Case 5/79, [1979] E.C.R. 3203, ¶ 30; SA G.B.-INNO-BM v. Association des détaillants en tabac (ATAB), Case 13/77, [1977] E.C.R. 2115, ¶¶ 30, 33.

19. Lord Bruce of Donington v. Aspden, Case 208/80, [1981] E.C.R. 2205, ¶ 14.

20. See, e.g., Commission v. Greece, Case C-281/87, [1989] E.C.R. 4015, ¶¶ 16-18; Commission v. Belgium, Case 85/85, [1986] E.C.R. 1149, ¶¶ 22-23; Irish Creamery Milk Suppliers Ass'n v. Ireland, Martin Doyle v. An Taoiseach, Joined Cases 36 & 71/80, [1981] E.C.R. 735, ¶¶ 15, 20; Prosecutor du Roi v. Kefer, Joined Cases 95 & 96/79, [1980] E.C.R. 103, ¶ 8; Buys, [1979] E.C.R. 3203, ¶ 18-30; McCarren, [1979] ECR 2161, ¶ 25; Grosoli, Case 223/78, [1979] E.C.R. 2621, ¶ 13; Danis, Joined Cases 16-20/79, [1979] E.C.R. 3327, ¶ 10; Procureur du Roi v. Dechmann, Case 154/77, [1978] E.C.R.

The first of a long line of cases saying that national measures must not interfere with Community competition rules also date from this period.²¹

In another case, *Hasselblad v. Orbison*, the Commission, unusually, intervened in a national court.²² *Hasselblad (GB) Ltd.*, as a kind of pre-emptive strike, had brought proceedings for defamation against an individual who had given the Commission evidence of a breach of Community competition law. The English Court of Appeal held that to allow a claim for defamation would be contrary to Article 10, since it would interfere with the giving of evidence to the Commission, and would create the risk of conflicts between national court judgments and decisions of

1573, ¶¶ 16-23; *Ministere public du Kingdom of the Netherlands v. Van Tiggele*, Case 82/77, [1978] E.C.R. 25, ¶ 23; *Pigs Mktg. Bd. v. Redmond*, Case 83/78, [1978] E.C.R. 2347, ¶ 65; *Amsterdam Bulb BV v. Produktschap voor Siergewassen*, Case 50/76, [1977] E.C.R. 137, ¶¶ 5-8; *Benedetti v. Munari F.lli s.a.s.*, Case 52/76, [1977] E.C.R. 163, ¶ 15; *Tasca*, Case 65/75, [1976] E.C.R. 291, ¶ 5; *Societa Sadam v. Comitato Interministeriale dei Prezzi*, Joined Cases 88-90/75, [1976] E.C.R. 323, ¶ 6; *Russo*, [1976] E.C.R. 45, ¶ 5; *Galli*, Case 31/74, [1975] E.C.R. 47, ¶ 29/30; *see also*, *Hurd v. Jones*, Case 44/84, [1986] E.C.R. 29, ¶¶ 38-39, 44-45, 48-49, 58; *Toffoli v. Regione de Venetie*, Case 10/79, [1979] E.C.R. 3301, ¶ 12; *Entreprise F.lli Cucchi v. Avez S.p.A.*, Case 77/76, [1977] E.C.R. 987, ¶¶ 27-35; *Hauptzollamt Hamburg-Oberelbe v. Firma Paul G. Bollman*, Case 40/69, [1970] E.C.R. 69, ¶ 4.

21. *See, e.g.*, *Van Eycke v. ASPA N.V.*, Case 267/86, [1988] E.C.R. 4769, ¶¶ 16-20; *ASBL Vereniging van Vlaamse Reisbureaus v. ASBL VZW Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten*, Case 311/85, [1987] E.C.R. 3801, ¶ 24; *Bureau National Interprofessionnel du Cognac v. Aubert*, Case 136/86, [1986] E.C.R. 4789, ¶ 23; *Centre belge d'etudes de marche-Telemarketing (CBEM) v. SA Compagnie luxembourgeoise de telediffusion (CLT) & Information publicite Benelux (IPB)*, Case 311/84, [1985] E.C.R. 3261, ¶¶ 16-17; *Cullet & Chambre Syndicale des reparateurs automobiles et detaillants de produits petroliers v. Centre Leclerc Toulouse*, Case 231/83, [1985] E.C.R. 305, ¶ 15; *Association des Centres distributeurs Edouard LeClerc v. SARL Aublever*, Case 229/83, [1985] E.C.R. 1, ¶¶ 14, 20; *Van de Haar and Kaveka de Meern BV*, Joined Cases 177 & 178/82, [1984] E.C.R. 1797, ¶ 12; *Van Tiggele*, [1978] E.C.R. 25, ¶ 23; *SA GB-INNO*, [1977] E.C.R. 2115, ¶¶ 30-33; *see also* Luc Gyselen, *State Action and the Effectiveness of the EEC Treaty's Competition Provisions*, 26 *COMMON MKT. L. REV.* 33, 34-35 (1989); Judge Rene Joliet, *National Anti-competitive Legislation and Community Law*, 1988 *FORDHAM CORP. L. INST.* 16-1, 16-2-16-3 (1989); John Temple Lang, *European Competition Law and Member State Action*, 10 *Nw. J. INT'L L. & BUS.* 114, 114-18 (1989); John Temple Lang, *Community Antitrust Law and Government Measures Relating to Public and Privileged Enterprises: Article 90 EEC Treaty*, 1984 *FORDHAM CORP. L. INST.* 543, 544 (1985); Pierre Pescatore, *Public and Private Aspects of Community Competition Law*, 1986 *FORDHAM CORP. L. INST.* 381, 385 (1987); Jean-Francoise Verstrynge, *The Obligations of Member States as Regards Competition in the EEC Treaty*, in 1988 *FORDHAM CORP. L. INST.* 17-1, 17-6-17-7 (Barry Hawk ed., 1989).

22. *Hasselblad v. Orbison*, [1984] 3 *C.M.L.R.* 540, 690; *see also* *Wilhelm v. Bundeskartellamt*, Case 14/68, [1969] E.C.R. 1, ¶ 13.

the Commission.²³

F. *The Duty to Provide Information to the Commission*

By the end of the 1980s, the Court had already established what has since become a long line of cases based on the principle that Member States have legal duties under Article 10 to provide information to the Commission, in particular where the Commission has reason to believe that it needs the information in order to decide whether there has been a breach of Community law. This principle had first been stated as early as 1962, under Article 86 in the European Coal and Steel Community Treaty, which corresponded to Article 10.²⁴

G. *The Duty to Resolve Difficulties by Using Community Procedures*

From time to time it happens that a Member State finds it difficult to carry out its obligations under Community law, and it may finally fail to carry them out. In some circumstances the Member States have tried to blame the Community institutions for failing to take action that, the State says, would have avoided the difficulty.

As early as 1971, in the *European Supply Agency* case, France tried to defend its failure to consult the Supply Agency by relying on the Council's failure to take certain decisions.²⁵ The Court, basing itself on the Article in the Euratom Treaty that corresponds to Article 5, rejected France's argument:

[T]he general obligation of cooperation imposed by Article 192, should have induced the defendant [France] to put an end to the uncertainty on which it relies, by making use of the means offered to it by the Treaty, which puts at the disposal of each interested State . . . suitable methods for remedying any lack of action on the part of the Council.²⁶

In another case in the same year, on the basis of Article 86 in the European Coal and Steel Community Treaty, the Court ruled that the duty of cooperation imposed on Member States obliged a State which considers a system of State aid to be con-

23. See *Hasselblad*, 3 C.M.L.R. at 692-96.

24. See *Netherlands v. High Authority of the European Coal and Steel Community*, Case 9/61, [1962] E.C.R. 213, 236.

25. See *Commission v. France*, Case 7/71, [1971] E.C.R. 1003, ¶¶ 16-17.

26. *Id.* ¶ 48.

trary to the Treaty to use the procedures provided by the Treaty, rather than taking unilateral action.²⁷

H. *Fundamental Rights and "General Principles" of Law*

By 1990 it had become clear that national authorities were bound, in the sphere in which Community law applied, by the fundamental rights principles of Community law, and by the "general principles of law" such as proportionality and legal certainty, at least in some circumstances.²⁸ It is now clear that national authorities are bound by these principles throughout the sphere of Community law. However, it is still not clear whether this should be considered the result of Article 10, and the broad principle is now so clearly stated in the Treaties themselves that the question no longer has much significance.

I. *The Duties of Member States in the Sphere of External Relations*

Certain duties of Member States in the sphere of external relations had also been based on Article 10, and again it seems that this was due to the influence of Judge Pierre Pescatore.

In the first of these cases, the Court held that in some circumstances Member States are legally obliged by Article 10 to act in international fora on behalf of the Community.²⁹ This is so in particular where the Community has exclusive competence over the subject matter in question, and so should itself be a member of the international body.

In Opinion 1/76, the Court held that the Community has exclusive competence to conclude international agreements if necessary to achieve Community objectives, or if they would affect the operation of the Community's internal rules, even outside the sphere of external trade.³⁰

27. See *Netherlands v. Commission*, Case 59/70, [1971] E.C.R. 639, ¶¶ 15, 18, 21.

28. See, e.g., *The Queen v. Ministry of Agriculture, Fisheries & Food*, ex parte Dennis Clifford Bostock (U.K.), Case C-2/92, [1994] E.C.R. I-955, ¶ 16; *Wachauf v. Forstwirtschaft*, Case 5/88, [1989] E.C.R. 2609, ¶ 18; see generally John Temple Lang, *Community Constitutional Law: Article 5 EEC Treaty*, 27 COMMON MKT. L. REV. 645, 654-56 (1990); John Temple Lang, *The Sphere in Which Member States Are Obligated to Comply With the General Principles of Law and Fundamental Rights Principles*, 1991/2 LEGAL ISSUES OF EUR. INTEGRATION 23 (1991).

29. *Commission v. Council of the European Communities*, Case 22/70, [1971] E.C.R. 263, ¶ 90.

30. See *Draft Agreement Establishing a European Laying-up Fund for Inland Waterway Vessels*, Opinion 1/76, [1977] E.C.R. 741, ¶¶ 3-4, 12; see also *Competence of the*

The Court also held that Member States have a duty to use every means at their disposal to ensure that the Community can participate in international conventions, either because the Community has exclusive competence, or because the Council has decided that the Community should participate.³¹

In a third case, also in the 1970s, the Court said that it might be contrary to Article 10 for a Member State to prejudge or compromise the result of internal discussions on the Community's international negotiating position, or to weaken it in any way.³²

More obviously, the Court in a slightly later case held that it would be contrary to Article 10 for a Member State to do anything that would lead to the Community being in breach of its obligations under any international agreement to which the Community is a party, whether or not the State itself is separately bound by the agreement in question.³³

The Court also held that "Member States are subject to special duties of action and abstention in a situation in which the Commission has submitted to the Council proposals which, although they have not been adopted by the Council, represent the point of departure for concerted Community action."³⁴

J. *The Duties of the Community Institutions to Member States*

In several important judgments the Court extended the duty of cooperation under Article 10 by ruling that the Community Institutions and Member States have *reciprocal* duties of cooperation in the Community sphere.³⁵

Subsequently, the Court concluded that Article 10 imposed a legal obligation on the Commission to give confidential infor-

Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property, Opinion 1/94, [1994] E.C.R. I-5267; Competence of the Community or One of Its Institutions to Participate in the Third Revised Decision of the OECD on National Treatment, Opinion 2/92, [1995] E.C.R. I-521, ¶ XIII.

31. Cornelis Kramer, Joined Cases 3-5/76, [1976] E.C.R. 1279, ¶¶ 44-45.

32. Commission v. Ireland, Case 61/77, [1977] E.C.R. 417, ¶¶ 37, 64, 83-86.

33. See Mainz v. Kupferberg, Case 104/81, [1982] E.C.R. 3641, ¶ 13.

34. Commission v. Germany, Case C-433/03, [2005] ECR I-6985, ¶ 65; see also Commission v. United Kingdom, Case 804/79, [1981] E.C.R. 1045, ¶ 28; Commission v. Luxembourg, Case C-266/03, [2005] ECR I-4805, ¶ 59.

35. Commission v. Federal Republic of Germany, Case 94/87, [1989] E.C.R. 175, ¶¶ 6-8; France v. European Parliament, Joined Cases 358/85 & 51/86, [1988] E.C.R. 4821, ¶ 34; Commission v. Belgium, Case 52/84, [1986] E.C.R. 89, ¶ 16; Hurd v. Jones, Case 44/84, [1986] E.C.R. 29, ¶ 38; Luxembourg v. European Parliament, Case 230/81, [1983] E.C.R. 255, ¶ 37.

mation to a national court enforcing Community law.³⁶

K. *The Case Law Situation by 1990*

Vlad Constantinesco, writing in 1987, said that the Court had used Article 10 (then Article 5) as a way of reinforcing the effectiveness of other obligations under Community law, and as a basis for limiting the exercise of national powers, in the absence of precise obligations under Community law.³⁷ Article 10 must be linked to a specific obligation, and can reinforce a pre-existing obligation.

It will be seen that by 1990 there was already a considerable body of case law based explicitly on Article 10. Most of the cases concerned the principle described here as the duty to give full effect to Community law. Since few direct actions based on Article 10 were initiated in the Court of Justice, most of the cases in which the Court referred explicitly to Article 10 (and some in which Article 10 was applied without being referred to explicitly) were cases that had begun in national courts and were referred to the Court under what is now Article 234 (then Article 177). Most such cases are necessarily concerned primarily with the effective application and enforcement of Community law at the national level, and primarily with questions about effective application by national courts.

By 1990, the duty to give "full effect" to Community law had already given rise to several identifiable lines of cases, and the judgments in those cases already tend to cite previous judgments on similar issues, rather than referring on every occasion to the duty to give full effect. The duty under Article 10 to give "full effect" to Community law is referred to usually when a new situation arises in which there is no direct precedent, and the Court chooses to base its judgment or its reference to Article 10 on the

36. See J.J. Zwartveld, Case C-2/88, [1990] E.C.R. I-4405, ¶¶ 16-19, 21-22.

37. See Vlad Constantinesco, *L'article 5 CEE, de la bonne foi à la loyauté communautaire*, in *DU DROIT INTERNATIONALE AU DROIT DE L'INTÉGRATION* 97, 110-11 (Francesco Capotori et al. eds., 1987) (citing Henri Cullet & *Chambre syndicale des réparateurs automobiles et détaillants de produits pétroliers v. Centre Leclerc à Toulouse* & *Centre Leclerc à Saint-Orens-de-Gameville*, Case 231/83, [1985] E.C.R. 305; *BayWa AG v. Bundesanstalt für landwirtschaftliche Marktordnung*, Joined Cases 146, 192 & 193/81, [1982] E.C.R. 1503; *Firma Wilhelm Fromme v. Bundesanstalt für landwirtschaftliche Marktordnung*, Case 54/81, [1982] E.C.R. 1449; *Geddo v. Ente Nazionale Risi*, Case 2/73, [1973] E.C.R. 865; *Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Groß märkte GmbH & Co. KG.*, Case 78/70, [1971] E.C.R. 487).

principle of "full effect," in order to explain a new example of that principle.

The Court was therefore already applying Article 10 in practice without always mentioning it explicitly, when there were previous judgments (some of which themselves had mentioned Article 10) to which reference could be made. The *van Duyn-Moorman* cases are only the most striking example of this. The effect, as already mentioned, was to make Article 10 less obviously important. Another effect was that the Court never thought it necessary or useful to attempt to write any general statement or formula covering or describing the whole range of Article 10 case law. Its scope was already too wide and too varied, and the Court did not need to devise any such general formulation. It is not easy to state as a useful single principle, for example, both the rules on full effect and the rules on cooperation in external relations, although they are both based on Article 10.

It will also be seen that the difficulty of classifying cases under Article 10 had already become clear, at least as far as the cases on the duty to give full effect are concerned. Some of the cases state the principle in general terms, others state merely whatever specific rule is regarded as relevant to the case before the Court. As the precedents accumulate, the tendency to cite only the directly relevant judgments (a perfectly normal result of judicial economy in writing judgments) increases. The result is increasing sub-division or speciation (Article 10 seems to lead to biological metaphors).

Although so many of the cases in which the Court referred to Article 10 were referred to it by national courts, the national courts themselves seem to have understood the broad duty to give full effect without being very explicit about what they were doing. This is partly because national courts frequently ask questions under Article 234 without first giving judgments or undertaking detailed analysis. It may well have been that national courts, like the Court of Justice itself, felt that Article 10 was too vague and general in its term to be the subject of useful textual analysis. But the basic explanation probably is that the two principles that are the foundation of the duty of national courts to give full effect were already well known: the principle that many

rules of Community law are directly applicable,³⁸ and the principle that Community law prevails over national law where they are inconsistent.³⁹ Both of these principles had been stated by the Court in seminal judgments in the 1960s, and national judges were well aware of them, even if not all of their implications had yet been worked out.

There is therefore a contrast between the "full effect" case law, on the one hand, and the case law on some of the other principles based on Article 10, on the other. In the case law on the duty to give full effect, the Court clearly felt that the principle was already established, and could be taken for granted, and that in each case the Court was simply applying (or at least drawing out the implications of) a well-recognized principle to specific facts. The Court did not seem to consider that it was adopting new or seminal judgments. One of the most important judgments concerning full effect, *Francovich*, discussed below, in which Article 10 was referred to explicitly and which was clearly seminal in the sense that it led to a series of important judgments, was given only in 1991. In contrast, in the judgments on the duties under Article 10 in external relations, and the reciprocal duties of Community institutions, the Court (and importantly also the Advocates General) were obviously aware of the novelty, as well as the significance, of what was being decided. Some of this awareness was certainly due, as already mentioned, to Judge Pescatore, as both his questions in Court and his extra-judicial writings made clear during that period.

Another reason why the Court did not mention Article 10 expressly, as often as might have been expected, is that in some situations the result required by Article 10 could also have been arrived at on other grounds. This is most clearly true of the duties of national authorities, in the sphere in which Community law applies, to respect (and to ensure respect for) fundamental rights principles and the "general principles of law" such as proportionality, legal certainty, legitimate certainty, legitimate expectations, and non-discrimination. In cases involving national authorities' duties to comply with these principles, Article 10 is referred to, if it is referred to at all, merely to confirm and sup-

38. *NV Algemene Transport-en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, Case 26/62, [1963] E.C.R. 1.

39. *Flaminio Costa v. E.N.E.L.*, Case 6/64, [1964] E.C.R. 585.

port a conclusion reached on other grounds. This does not mean that, even in the cases in question, Article 10 has no effect: the Community legal order is thought of by the Court as a seamless whole, and there are a number of leading cases that could have been (and in some cases were) decided on several grounds of principle.

In short, even in the period before 1990 the Court was already using Article 10 as what it has since become, a stimulus and a basis for the first judgments on new issues, but an Article that, because it is so general in its terms, is not very useful in subsequent judgments on the same issue. As the number of potential new lines of cases appeared to decline, the potential of Article 10 was underestimated, and the Commission became less imaginative.

II. THE SECOND PERIOD: THE ELABORATION OF THE BASIC PRINCIPLES

By 1990, it was estimated that the Court had already cited Article 10 in more than 120 judgments. By 2000, the next date at which it is useful to summarize the developments, there were many more. But because of the Court's practice of citing previous judgments for which Article 10 was the ultimate legal basis rather than citing Article 10 itself, estimating the total number of judgments ultimately based on Article 10 now seems unrealistic and no longer useful.

A. *The Duty to Give Full Effect to Community Law*

The duty under Article 10 to give full effect to Community law rules during the decade 1980-1990 clearly separated into three duties: the duty to enforce Community law rules against national authorities, the duty to protect fully rights given to private parties by Community law, and the duty to enforce Community rules against private parties.

The decade began with two important and well-known judgments: *Factortame*⁴⁰ and *Francovich*.⁴¹ In fact, in spite of the surprise and controversy that resulted from them, neither case in-

40. *The Queen v. Sec'y of State for Transp., ex parte: Factortame Ltd. & Others*, Case C-213/89, [1990] E.C.R. I-2433. In *Intervention Board for Agricultural Produce v. Penycod Farming Partnership*, Case C-230/01, [2004] E.C.R. I-937, ¶ 41, the Court held that "Member States' obligation under Article 10 . . . includes the power to take direct

volved entirely new issues—they merely made clear the implications of what the Court had ruled previously. In *Factortame*, the Court decided that national courts had a duty to disregard any rule of national law that interfered with the full application of Community law.⁴² That had been decided previously in *Simmenthal*, which itself had been striking because the Court held that national courts have both the duty and the power to set aside even national primary legislation, and to do so even if the courts in question would have no power to set aside the legislation as being contrary to the national constitution.⁴³ In *Factortame*, the genuine novelty lay in the fact that the national law had to set aside a rule that no national court had power to suspend, provisionally, an Act of the U.K. Parliament.⁴⁴ The effect of setting aside this rule was therefore to oblige and empower U.K. courts to adopt a new kind of remedy that had never previously been considered. More recently, in *Unibet* the Court repeated that the Treaty was “not intended” to create new remedies in national courts to ensure observance of Community law, but “it would be otherwise only if it were apparent from the overall scheme of the national legal system in question that no legal remedy existed which made it possible to ensure, even indirectly, respect for an individual’s rights under Community law.”⁴⁵ In other words, Article 10 imposes a duty to invent a new national procedural remedy only when necessary.

In *Francovich*, the Court said that national courts have a duty to award compensation to private parties for breach, by the State or State bodies, of Community law rules.⁴⁶ In fact, this had been

action against the producer with a view to recovering the amount payable” (emphasis added).

41. See *Francovich & Bonifaci & Others v. Italy*, Joined Cases C-6 & C-9/90, [1991] E.C.R. I-5357. There is a corresponding rule under the European Economic Area Agreement. See *Sveinbjörnsdóttir v. Iceland*, Case E-9/97, [1998] EFTA Ct. Rep. 95. Recently, the Court has stated some of the rules limiting State liability for breach of Community law. See, e.g., *Brinkmann Tabakfabriken GmbH v. Skatteministeriet*, Case C-319/96, [1998] E.C.R. I-5255, ¶¶ 25-33; *The Queen v. H.M. Treasury, ex parte British Telecommunications plc.*, Case C-392/93, [1996] E.C.R. I-1631, ¶ 46; see also John Temple Lang, *The Principle of Effective Protection of Community Law Rights*, in *JUDICIAL REVIEW IN EUROPEAN UNION LAW 235-74* (David O’Keefe ed., 2000).

42. See *Factortame*, [1990] E.C.R. 2433, ¶ 20.

43. *Amministrazione delle Finanze dello Stato v. Simmenthal SpA.*, Case 106/77, [1978] E.C.R. 629, ¶¶ 21-26.

44. See *Factortame*, [1990] E.C.R. 2433, ¶¶ 17-23.

45. *Unibet Ltd. v. Justitiekanslern*, Case C-432/05, [2007] E.C.R. I-2271, ¶¶ 40-41.

46. See *Francovich*, [1991] E.C.R. I-5357, ¶ 37.

said before by the Court, in *Humblet*,⁴⁷ and by the Advocate General in *Russo v. AIMA*,⁴⁸ but in the context of a claim primarily for repayment of a specific sum of tax that had been imposed contrary to Community law, and without the full discussion of the principle of State liability that was included in the *Francovich* judgment. It had not previously been made clear that a claim for an unliquidated amount of compensation, as distinct from a refund, could be made. The novelty lay also in the fact that the national courts are obliged to award damages (provided that certain conditions are fulfilled) for breach of or failure to implement a directive, although directives in general have no direct effects in themselves, but are intended to be implemented by national measures. The conditions are that the Community law rule must be intended to create rights for individuals, the breach is sufficiently serious, and there is a direct causal link between the breach and the loss for which compensation is claimed.

The *Francovich* judgment draw attention to two principles, both based on Article 10 as previously mentioned, governing the enforcement of Community law by national courts, both against public authorities and against private parties. The substantive and procedural rules applicable are those provided by national law ("national autonomy"), but subject to two overriding principles. The first is the principle of "equivalence," which requires that rights given by Community law must be given protection equivalent to, or not less favourable than, that given to corresponding rights under national law.⁴⁹ The second is the principle of "effectiveness," which requires that rights given by Community law must be protected "effectively." This principle is gradually obliging the Court to define rights given by Community law more fully, when that is necessary to decide what "effective" or full protection requires.⁵⁰

The *Francovich* judgment was controversial because it was thought that governments of Member States might have to pay

47. See *Humblet v. Belgium*, Case 6/60, [1960] E.C.R. 559, 569; see also *Nat'l Pensions Office v. Jonkman & Vercheval*, Joined Cases C-231-233/06, slip op., ¶ 37 (ECJ June 21, 2007) (not yet reported); *Wells v. Sec'y of State for Transp., Local Gov't and the Regions*, Case C-201/02, [2004] E.C.R. I-723, ¶ 64.

48. *Russo v. AIMA*, Case 60/75, [1976] E.C.R. 45, ¶ 9.

49. See *Ferwerda v. Productschap voor Vee en Vlees*, Case 265/78, [1980] E.C.R. 61, ¶¶ 10-12; *Rewe v. Landwirtschaftskammer für das Saarland*, Case 33/76, [1976] E.C.R. 1989, ¶ 5.

50. See *Ferwerda*, [1980] E.C.R. 61, ¶¶ 10-12; *Rewe*, [1976] E.C.R. 1989, ¶ 5.

large amounts of compensation, not because there was real doubt about the correctness of the Court's legal analysis. (The direct effects of directives against the State had been long established by 1991). Since 1991, when *Francovich* was decided, there have been several Intergovernmental Conferences discussing the revision or even replacement of the Community Treaties, and it has not been seriously suggested that the judgment should be reversed. No doubt it was understood that the possibility of having to pay compensation would be an important influence promoting the proper respect for the Community law obligations of Member States. Also, there would have been no basis, and no justification, for depriving private parties of their rights under Community law against Member States.

B. The Duty of National Authorities Not to Deprive Community Rules of Their Effectiveness

As already mentioned, in the 1970s the Court had repeatedly held that national measures must not interfere with the operation of the Community's agricultural policy. Cases of that kind arose seldom between 1990 and 2000. Instead, in that decade in a series of judgments the Court said that national measures, whether legislative, regulatory or decisional, must not deprive Community competition law of its effectiveness. This is clearly the same principle as that in the agricultural policy cases, and both are based on Article 10.

This broad principle⁵¹ led to several specific rules, which in

51. For the cases before 1990 *see supra*, note 20. There are many cases concerning the duty not to interfere with the operation of Community competition law. *See, e.g.*, *Centro Servizi Spediporto v. Spedizioni Marittima del Golfo*, Case C-96/94m, [1995] E.C.R. I-2883, ¶ 20; *Esso Española v. Canary Islands*, Case C-134/94, [1995] E.C.R. I-4223, ¶ 18; *DIP v. Comune di Bassano del Grappa*, Case C-140/94, [1995] E.C.R. I-3257, ¶ 14; *Germany v. Delta*, Case C-153/93, [1994] E.C.R. I-2517, ¶ 14; *Peralta*, Case C-379/92, [1994] E.C.R. I-3453, ¶ 21; *Heukske*, Case C-401/92, [1994] E.C.R. I-2199, ¶ 16; *van Schaik*, Case C-55/93, [1994] E.C.R. I-4837, ¶ 22; *Meng*, Case C-2/91, [1993] E.C.R. I-5751, ¶ 14; *Bundesanstalt für den Güterfernverkehr v. Reiff*, Case C-185/91 [1993] E.C.R. I-5801, ¶ 14; *Schadeverzekeringen*, Case C-245/91, [1993] E.C.R. I-5851, ¶ 10; *Corbeau*, Case C-320/91, [1993] E.C.R. I-2533, ¶ 11; *Netherlands v. Commission*, Case C-48/90, [1992] E.C.R. I-565, ¶ 23; *Batista Morais*, Case C-60/91, [1992] E.C.R. I-2085, ¶ 11; *Tiléorassi v. Pliroforissis*, Case C-260/89, [1991] E.C.R. I-2925, ¶ 35; *Höfner v. Macrotron*, Case C-41/90, [1991] E.C.R. I-1979, ¶ 26; *see also Mauri v. Ministero della Giustizia*, Case C-250/03, [2007] E.C.R. I-1267, ¶ 29-30; *United Pan-Europe Communications v. Belgium*, Case C-250/06, [2007] E.C.R. ___, ¶ 17 (ECJ Dec. 13, 2007) (LEXIS, Eurcom Library, Cases File); *Servizi Ausiliari Dottori Commercialisti v. Calafiori*, Case C-451/03, [2006] E.C.R. I-2941, ¶ 23; *Cipolla v. Fazari*, Case C-94/04, [2006] E.C.R. I-

their current form can be summarized as follows:

- States may not without sufficient justification create or extend a dominant position. It is unjustified to set up a monopoly which cannot meet the demand for the services in question, since the monopoly prevents them being provided by others.
- States may not order or encourage conduct contrary to Community competition rules.
- States may not create a situation in which a dominant enterprise has a conflict of interest and is enabled to abuse a dominant position, because it has been given power to regulate or supply services to its competitors.

Article 86 (on competition rules concerning State-owned and privileged enterprises) is regarded as a specific example of the duties under Article 10.

It is important to understand that the duty under Article 10 not to interfere with the operation of a Community rule, a Community policy, or a Community institution is distinct from, and goes further than, the duty to have no national law rules that are *directly* incompatible with Community law. The duty not to interfere makes it necessary to look at how the two bodies of law operate, or should operate, in practice.

C. "Effective" Implementation of Directives and Regulations

The definition of directives in the Treaty describes them as binding on Member States as to the result to be achieved, but leaving it to national authorities to decide the form and means. The obligations imposed on Member States by this Article do not obviously need to be supplemented by duties based on Article 10, but the Court has referred to Article 10 several times in

11421, ¶¶ 46-47, 54; *Conorzio Industri Fiammiferi v. Autorità Garante della Concorrenza e del Mercato*, Case C-198/01, [2003] E.C.R. I-8055, ¶ 45; *Arduino*, Case C-35/99, [2002] E.C.R. I-1529, ¶ 34; *Pavlov v. Stichting Pensioenfonds Medische Specialisten*, Case C-180/98, [2000] E.C.R. I-6451, ¶ 127; *CNSD v. Commission*, Case T-513/93, [2000] E.C.R. II-1807, ¶ 39; *Albany International v. Stichting Bedrijfspensioenfonds Textielindustrie*, Case C-67/96, [1999] E.C.R. I-5751, ¶ 65; *Irish Sugar v. Commission*, Case T-228/97, [1999] E.C.R. II-2629, ¶ 130; *Commission v. Italy*, Case C-35/96, [1998] E.C.R. I-3851, ¶ 53; *Futura Participations v. Administration des Contributions*, Case C-250/95, [1997] E.C.R. I-2471, ¶ 19; *Hoechst v. Commission*, Case 46/87, [1989] E.C.R. 2859, ¶ 33. In these cases the Court said Member States must "refrain from introducing or maintaining in force measures . . . which may render ineffective the competition rules applicable to undertakings." *Autotrasporti Librandi v. Cuttica Spedizioni e Servizi*, Case C-38/97, [1998] E.C.R. I-5955, ¶ 44.

this context.⁵²

It has traditionally been considered that Community law could not include rules of criminal law.⁵³ As a result, it was common in both regulations and directives to provide that Member States should legislate for appropriate penalties for breach of, for example, Community fisheries legislation. Article 10, however, goes further: it imposes a duty on national authorities to impose penalties to enforce Community rules “effectively.”⁵⁴ In other words, they must not only provide effective penalties in legislation, they must enforce the legislation effectively.

A more surprising conclusion was reached by the Court in *Marleasing*,⁵⁵ and repeated in later cases, in which it was held that national courts have a legal duty under Article 10 “as far as possible” to interpret and apply national law so as to be consistent with a directive. This duty applies in cases between private parties, and not merely as against the Member State.⁵⁶

In another perhaps surprising series of cases, the Court has said that even before a directive comes into force, national authorities must not do anything that would compromise the result required by the directive.⁵⁷

52. *See, e.g.*, *Commission v. Austria*, Case C-507/04, slip op., ¶ 344 (ECJ July 21, 2007) (not yet published) (mentioning Article 10 in the operative part of the judgment, without discussion).

53. *But see* *Commission v. Council*, Case C-176/03, [2005] E.C.R. I-7879, ¶ 5.

54. *Lidl Italia v. Comune di Arcole*, Case C-315/05, [2006] E.C.R. I-11181, ¶ 58; *Berlusconi*, Case C-387/02, [2005] E.C.R. I-3565, ¶ 65; *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.*, Case C-167/01, [2003] E.C.R. I-10155, ¶ 62; *Ebony Maritime v. Brindisi*, Case C-177/95, [1997] E.C.R. I-1111, ¶ 35; *Anklagemyndigheden v. Hansen*, Case C-326/88, [1990] E.C.R. I-2911, ¶ 17; *Commission v. Greece*, Case 68/88, [1989] E.C.R. 2965, ¶ 24.

55. *Marleasing v. Comercial Internacional de Alimentacion*, Case C-106/89, [1990] E.C.R. I-4135, ¶ 8.

56. *See, e.g.*, *Pfeiffer v. Deutsches Rotes Kreuz*, Case C-397/01, [2004] E.C.R. I-8835, ¶ 110; *Connect Austria Gesellschaft für Telekommunikation*, Case C-462/99, [2003] E.C.R. I-5197, ¶ 38; *Mau v. Bundesanstalt für Arbeit*, Case C-160/01, [2003] E.C.R. I-4791, ¶ 35.

57. *See, e.g.*, *Commission v. Belgium*, Case C-422/05, slip op., ¶ 62 (ECJ, Nov. 28 2007) (not yet published); *Bund Naturschutz in Bayern v. Freistaat Bayern*, Case C-244/05, [2006] E.C.R. I-8445, ¶¶ 46, 47, 51; *Stichting Zuid-Hollandse Milieufederatie v. Minister van Landbouw, Natuur en Voedselkwaliteit*, Case C-138/05, [2006] E.C.R. I-8339, ¶¶ 42-44; *Adeneler v. Ellinikos Organismos Galaktos [ELOG]*, Case C-212/04, [2006] E.C.R. I-6057, ¶¶ 121-24; *Stichting Zuid-Hollandse Milieufederatie v. College voor de toelating van bestrijdingsmiddelen*, Case C-316/04, [2005] E.C.R. I-9759, ¶ 42; *Rieser Internationale Transporte v. Autobahnen-und Schnellstraßen-Finanzierungs-AG [Asfinag]*, Case C-157/02, [2004] E.C.R. I-1477, ¶ 66; *Inter-Environnement Wallonie v.*

D. *The Right to Judicial Review to Protect Community Law Rights*

In the years 1990-2000, the Court gave a series of judgments recognizing that there is a right of judicial review of national measures, in order to protect Community law rights. National courts may therefore be obliged to review national decisions in order to ensure that full effect is given to Community law. It is only if a case can be brought before a national court or tribunal that a question of Community law can be referred, if necessary, to the Court of Justice under Article 234. Again, the first cases on the right to judicial review had been earlier,⁵⁸ and then the

Wallonne, Case C-129/96, [1997] E.C.R. I-7411, ¶ 45; *see also* Opinion of Advocate General Mengozzi, Commission v. Netherlands, Case C-523/04, [2007] E.C.R. I-3267, ¶ 149 (negotiation of a new air traffic agreement with the United States after EC Regulations adopted and before they came into force, contrary to Article 10).

58. *See* Unectef v. Heylens, Case 222/86, [1987] E.C.R. 4097, ¶ 14; Johnston v. Chief Constable of the Royal Ulster Constabulary, Case 222/84, [1986] E.C.R. 1651, ¶¶ 17-18. Since then, the duty to provide judicial review of national measures and Community acts has been referred to in numerous cases. *See, e.g.*, Opinion of Advocate General Maduro, Arcor v. Germany, Case C-55/06, ¶¶ 96-99 (ECJ July 18, 2007) (Court decision not yet issued); Alrosa Company Ltd. v. Commission, Case T-170/06, slip op., ¶¶ 194 *et seq.* (ECJ July 11, 2007) (not yet published); Unibet v. Justitiekanslern, Case C-432/05, [2007] E.C.R. I-2271, ¶ 37; Commission v. France, Case C-232/05, [2006] E.C.R. I-10071, ¶ 57; Wilson v. Ordre des avocats du barreau de Luxembourg, Case C-506/04, [2006] E.C.R. I-8613, ¶ 45; R.J. Reynolds Tobacco Holdings, Inc. v. Commission, Case C-131/03 P, [2006] E.C.R. I-7795, ¶¶ 79 *et seq.*; Traghetti del Mediterraneo v. Italy, Case C-173/03, [2006] E.C.R. I-5177, ¶ 33; Yusuf v. Council, Case T-306/01, [2005] E.C.R. II-3533, ¶ 261; Gaston Schul v. van Landbouw, Case C-461/03, [2005] E.C.R. I-10513, ¶ 22; Commission v. T-Mobile Austria, Case C-141/02 P, [2005] E.C.R. I-1283, ¶ 20; Rothley v. Parliament, Case C-167/02 P, [2004] E.C.R. I-3149, ¶ 46; Siemens v. Hauptverband der österreichischen Sozialversicherungsträger, Case C-314/01, [2004] E.C.R. I-2549, ¶ 50; Safalero v. Genova, Case C-13/01, [2003] E.C.R. I-8679, ¶ 50; P&O European Ferries v. Commission, Case T-116/01, [2003] E.C.R. II-2957, ¶ 209; Union de Pequeños Agricultores v. Council, Case C-50/00 P, [2002] E.C.R. I-6677, ¶ 42; MRAX v. Belgium, Case C-459/99, [2002] E.C.R. I-6591, ¶ 101; Joynson v. Commission, Case T-231/99, [2002] E.C.R. II-2085, ¶¶ 32-34; Commission v. Austria, Case C-424/99, [2001] E.C.R. I-9285, ¶ 45; Empresas Navieras de Lineas Regulares [Analir] v. Administración General del Estado, Case C-205/99, [2001] E.C.R. I-1271, ¶ 39; Nachi v. Krefeld, Case C-239/99, [2001] E.C.R. I-1197, ¶ 34; Kofisa Italia v. Ministero delle Finanze, Case C-1/99, [2001] E.C.R. I-207, ¶ 47; Krombach v. Bamberski, Case C-7/98, [2000] E.C.R. I-1935, ¶ 44; Dounias v. Ikonomikon, Case C-228/98, [2000] E.C.R. I-577, ¶ 69; Netherlands v. Van der Wal, Case C-174/98 P, [2000] E.C.R. I-1, ¶ 22; Upjohn Ltd. v. Medicines Act Licensing Authority, Case C-120/97, [1999] E.C.R. I-223, ¶ 25; Coote v. Granada Hospitality Ltd., Case C-185/97, [1998] E.C.R. I-5199, ¶ 20; Antonissen v. Commission, Case C-393/96 P (R), [1997] E.C.R. I-441, ¶ 36; Atlanta Fruchthandelsgesellschaft v. Bundesamt für Ernährung und Forstwirtschaft, Case C-465/93, [1995] E.C.R. I-3761, ¶ 20; Borelli v. Commission, Case C-97/91, [1992] E.C.R. I-6313, ¶ 13; Verholen v. Sociale Verzekeringsbank Amsterdam, Case C-87/90, [1991] E.C.R. I-3757, ¶ 24; Vlassopoulou v. Ministerium für Justiz, Bundes-und Europaangelegenheiten Ba-

principle came to be stated more generally.

The Court has recently, in the *Unibet* judgment, confirmed that, “[u]nder the principle of cooperation laid down in Article 10 EC, it is for the Member States to ensure judicial protection of an individual’s rights under Community law.”⁵⁹ The Court has also recently, in *City Motors*, explained what is meant by “effective” judicial review.⁶⁰

In the case of acts of Community institutions, Article 230 gives a private party the right to challenge the validity of an act that is of “direct and individual concern” to the party challenging it.⁶¹ In the case of general Community measures, which cannot be challenged in this way, there is in principle a right to judicial review that can be exercised through national courts,⁶² although national courts have themselves no power to annul an act of a Community institution or to declare it invalid.⁶³ A private party may rely, before a national court, on the invalidity of a Community act that is pleaded against it (Article 241, ex-184, EC made that clear). It seems that national courts also have duties under Article 10 to allow actions for declarations that general Community measures are invalid, even though this can only be done if the national court refers the question of validity to the Court of Justice.⁶⁴

den-Württemberg, Case C-340/89, [1991] E.C.R. I-2357, ¶ 22; *Parliament v. Council*, Case 302/87, [1988] E.C.R. 5615, ¶ 20; *Commission v. Belgium*, Case C-249/88, [1991] E.C.R. I-1275, ¶ 25; *Les Verts v. Parliament*, Case 294/83, [1986] E.C.R. 1339, ¶ 23.

59. *Unibet*, [2007] E.C.R. I-2271, ¶ 38.

60. *See City Motors Groep (NV) v. Citroen Belux (NV)*, Case C-421/05, [2007] E.C.R. I-653, ¶¶ 31-36.

61. *See Union de Pequeños Agricultores v. Council of the European Union*, Case C-50/00P, [2002] E.C.R. I-6677, ¶¶ 44, 45.

62. *See id.*

63. *See Foto-Frost v. Hauptzollamt Lubeck-Ost*, Case 314/85, [1987] E.C.R. 4199, ¶ 15. *But see Atlanta Fruchthandelsgesellschaft mbH v. Bundesamt für Ernährung und Forstwirtschaft*, Case C-465/93, [1995] E.C.R. I-3761, ¶¶ 21-22 (“coherence of the system of interim legal protection therefore requires that national courts should also be able to order suspension of enforcement of a national administrative measure based on a Community regulation, the legality of which is contested”).

64. *See* John Temple Lang, *Declarations, Regional Authorities, Subsidiarity Regional Policy Measures and the Constitutional Treaty*, 29 *EUR. L. REV.* 94, 105 (2004); 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, 111 (2003).

E. *The Duty of National Courts to Raise Questions of Community Law on Their Own Initiative*

The period 1990-2000 also saw the emergence of a line of judgments concerning the duty of national courts to raise questions of Community law on their own initiative.⁶⁵

An important example of this principle was *Eco Swiss China Time v. Benetton*.⁶⁶ In that case it was held that national courts in Member States must, on their own initiative, refuse to enforce an arbitral award if the award is contrary to Article 81 EC, because Article 81 is public policy and overrides private agreements to submit disputes to arbitration.⁶⁷

F. *The Duty to Inform the Commission*

Repeated judgments confirmed that Member States have a duty to inform the Commission about the measures they have taken to implement directives, and to provide information required by the Commission to see if an infringement of Community law has occurred.

This is similar to the duty, accepted in various judgments, to consult and work with the Commission to overcome difficulties, rather than trying to use the supposed difficulties as excuses for not carrying out the Member States' obligations.⁶⁸

65. See, e.g., *J. van der Weerd v. Minister van Landbouw, Natuur en Voedselkwaliteit*, Joined Cases C-222/05 & C-225/05 (ECJ June 7, 2007) (not yet reported); *Jeroen van Schijndel & Johannes Nicolaas Cornelis van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten*, Joined Cases C-430/93 & C-431/93, [1995] E.C.R. I-4705, ¶¶ 13-15; *Peterbroeck, Van Campenhout & Cie SCS v. Belgium*, Case C-312/93, [1995] E.C.R. I-4599, ¶ 21; *Verholen v. Sociale Verzekeringsbank*, Joined Cases C-87/90 & C-89/90, [1991] E.C.R. I-3757, ¶¶ 12-16.

66. *Eco Swiss China Time Ltd. v. Benetton Int'l (NV)*, Case C-126/97, [1999] E.C.R. I-3055, ¶¶ 36-41.

67. See *id.* ¶ 41.

68. See *Commission v. Spain*, Case C-499/99, [2002] E.C.R. I-6031, ¶ 24; *Commission v. France*, Case C-261/99, [2001] ECR I-2537, ¶ 24; *Commission v. Belgium*, Case C-378/98, [2001] E.C.R. I-5107, ¶ 31; *Commission v. Portugal*, Case C-404/97, [2000] E.C.R. I-4897, ¶ 40; *Commission v. Belgium*, Case C-75/97, [1999] ECR I-3671, ¶ 88; *Commission v. Germany*, Case C-217/88, [1990] E.C.R. I-2879, ¶ 33; *Commission v. Germany*, Case 94/87, [1989] E.C.R. 175, ¶ 9; *Commission v. Belgium*, Case 52/84, [1986] E.C.R. 89, ¶ 16; *Commission v. United Kingdom*, Case 804/79, [1981] E.C.R. 1045, ¶ 32. The duty to cooperate in good faith with inquiries of the Commission includes an obligation to provide all information requested for the purpose. See, e.g., *Commission v. Belgium*, Case C-275/04, [2006] E.C.R. I-9883, ¶¶ 77, 82-85; *Commission v. Germany*, Case C-105/02, [2006] E.C.R. I-9659, ¶¶ 29, 60, 87; *Saxonia Edelmetalle GmbH v. Commission*, Joined Cases T-111/01 & T-133/01, [2005] E.C.R.

*G. The Duty to Protect Community Law Rights Against
Private Parties*

In the *French Farmers* case, the Court decided that national authorities and courts have a duty under Article 10 to protect rights given by Community law against interference from other private parties, as well as against interference from State authorities.⁶⁹

This is obviously an important principle, and it is perhaps surprising that it has since given rise to relatively few cases. In a more recent case, more explicitly based on constitutional principles and on the need to reconcile fundamental rights, it was held that authorities may authorise a lawful and peaceful protest even if it interferes to a limited extent with free movement of goods, because the right of peaceful protest is a consequence of the fundamental right to freedom of expression and freedom of assembly.⁷⁰

H. The Duty to Keep Information Confidential

Under the former competition law procedural Regulation 17/62, the Commission was obliged to keep confidential certain kinds of information that it obtains in competition cases, but was obliged by the same Regulation to give this information to national competition authorities. The Court in *Samenwerkende* held that Article 10 obliged the national authorities to ensure that the

II-1579, ¶ 6; *United Kingdom v. Commission*, Case C-46/03, [2005] E.C.R. I-10167, ¶ 40; *Commission v. Italy*, Case C-456/03, [2005] E.C.R. I-5335, ¶¶ 26, 46; *Lidl Italia Srl v. Commune di Stradella*, Case C-303/04, [2005] E.C.R. I-7865, ¶ 17; *Italy v. Commission*, Case C-400/99, [2005] E.C.R. I-3657, ¶¶ 48, 55; *Commission v. Italy*, Case C-82/03, [2004] E.C.R. I-6635, ¶ 15; *Commission v. Luxembourg*, Case C-478/01, [2003] E.C.R. I-2351, ¶ 24; *Commission v. Spain*, Case C-404/00, [2003] E.C.R. I-6695, ¶ 26; *see also* *Germany v. Commission*, Case C-344/01, [2004] E.C.R. I-2081, ¶¶ 79-81 (defining the burden of proof).

69. *Commission v. France*, Case C-265/95, [1997] E.C.R. I-6959, ¶¶ 55, 56, 63 [hereinafter *French Farmers*].

70. *Eugen Schmidberger, Internationale Transporte und Planzuge v. Austria*, Case C-112/00, [2003] E.C.R. I-5659, ¶¶ 59, 64, 94; *see also* *Int'l Transp. Workers' Fed'n v. Viking Line ABP*, Case C-438/05, slip op., ¶ 55 (ECJ Dec. 11, 2007) (not yet reported) (holding that a collective agreement intended to deter Viking from changing the State of registration of a ship was a restriction on freedom of establishment and that Article 43 EC can confer rights in a private undertaking which can be asserted against a trade union and such a restriction could be justified if it is suitable to attain a legitimate objective and does not go beyond what is necessary to achieve it).

duty of confidentiality was “given full effect.”⁷¹ In other words, the Court used Article 10 as a basis for filling what would otherwise have been an anomalous gap in the law.

I. *A Duty to Take Positive Measures to Promote Community Objectives*

In *Van Munster* the Court said that national authorities may have a legal duty to take positive measures to promote recognized Community objectives—in that case, the objectives of free movement of workers, and the objective of allowing workers in other Member States to benefit from social welfare regimes.⁷² This had previously been stated by the Court in the *Fisheries* cases, where the Community objective was the conservation of fish stocks.⁷³ In the *Fisheries* case the scientific advice about what needed to be done was clear. In *Van Munster*, there was a specific gap in the Community measures on social welfare for migrant workers, and the Court considered that Article 10 imposed an obligation to fill the gap. However, there can only be a duty under Article 10 if the relevant Community objective is precisely defined.⁷⁴ There can be no broad obligation under Article 10 to promote Community objectives that need, in practice, to be the subject of Community legislation to clarify the details: the objective must have already been stated precisely if it is to be justiciable.

J. *Restriction of Freedoms Guaranteed by Community Law*

The duty to restrict freedoms given by Community law only for a legitimate purpose in the public interest and by proportional means emerged as an important source of case law in the period 1990-2000. The case law developed in connection with freedom of establishment and freedom to provide services. This duty should probably be regarded as based on Article 10, but it could also be regarded as a deduction from the fact that the

71. See *Samenwerkende Elektriciteits-Productiebedrijven v. Commission*, Case T-39/90, [1991] E.C.R. II-1497, ¶ 57; see also *Samenwerkende Elektriciteits-Productiebedrijven v. Commission*, Case C-36/92 P, [1994] E.C.R. I-1911, ¶ 37.

72. *Van Munster v. Rijkdienst voor Pensioenen*, Case C-165/91, [1994] E.C.R. I-4661, ¶¶ 34-35.

73. *Commission v. United Kingdom*, Case 32/79, [1980] E.C.R. 2403, ¶ 19; see also *Pluimveeslachterij*, Joined Cases 47-48/83, [1984] E.C.R. 1721, ¶ 29.

74. *Association des Centres distributeurs Edouard Leclerc v. SARL “Au ble vert,”* Case 229/83, [1985] E.C.R. I, ¶¶ 20, 30.

Treaty explicitly envisages restrictions on free movement of goods, but is less explicit about freedom of establishment and freedom to provide services, which clearly could not be absolute freedoms. However, it is not easy to see how far Article 10 adds to the interpretation of the Treaty that would anyway have been adopted. If this case law is correctly regarded as a result of Article 10, it is an example of the duty not to interfere, without sufficient justification, with the achievement of Community objectives.⁷⁵

K. *The Duty to Carry Out Commitments Made to the Commission*

When the Commission makes a recommendation to a Member State for the amendment or abolition of a State aid scheme, and the Member State accepts the recommendation, it becomes binding on the State concerned, in accordance with Article 10.⁷⁶

This is a specific example of a broader principle, based on Article 10, that commitments by Member States that are intended to resolve legal issues are legally binding on the State giving them.

L. *Article 10 in International Relations*

Between 1990 and 2000 the Court gave several further judgments in the area of international relations. In the *Opinion on*

75. *But see* Opinion of Advocate General Colomer, *Procuratore della Repubblica v. Massimiliano Placanica, Christian Palazzese & Angelo Sorrichio*, Joined Cases C-338/04, C-359/04 & C-360/04, [2007] E.C.R. I-1891, ¶¶ 129-130 (suggesting that when deciding whether to grant licenses for gambling, national authorities have a duty under the principle of proportionality to consider what obligations are already imposed on the proposed licensee by other Member States, and to impose only whatever supplementary obligations may be required under the national law of the authority concerned); *see also* *United Pan-Europe Commc'n Belgium SA*, Case C-250/06, slip op. ¶¶ 46, 48, 49 (ECJ Dec. 13, 2007) (not yet reported) (noting that legislation imposing must-carry obligations on cable television companies, to maintain pluralism in programs, is legitimate in the general interest, provided that it is not disproportionate and is transparent, objective and non-discriminatory); *Rijksdienst voor Sociale Zekerheid v. Kiere NV*, Case C-2/05, [2006] E.C.R. I-1079, ¶ 24 (noting that in social security for migrant workers cases, the Member State from which the worker comes must guarantee the correctness of the certificate it issues, and the host State is bound under Art. 10 to accept it); *Idryma Koinonikon Asfaliseon v. Ioannides*, Case C-326/00, [2003] E.C.R. I-1703, ¶ 40 (concluding that medical benefits guaranteed under Article 31 of Reg. No. 1408/71 cannot be deferred until the insured person returns to his State of residence).

76. *See* *Ijssel-Vliet Combinatie BV v. Minister van Economische Zaken*, Case C-311/94, [1996] E.C.R. I-5023, ¶ 49; *see also* ANTHONY M. COLLINS & CONOR QUIGLEY, *EC STATE AID LAW AND POLICY* 281 (2003).

the *International Labour Organisation Convention on the Safe Use of Chemicals*, the Court held that Member States must not interfere with exclusive Community competence or interfere with the operation of Community rules.⁷⁷ If Community participation is not possible (for example, because the convention in question is not open to regional economic integration organizations, but only to States), Member States have a duty to act on behalf of the Community, in close consultation with the Commission.

Where the subject matter of an international agreement falls partly within Community competence and partly within Member State competence, close cooperation between Member States and the Community institutions is essential, because of the "requirement of unity in the international representation of the Community" in such circumstances.⁷⁸

A Member State must not take any measures that would put the Community in breach of a treaty by which the Community is bound.⁷⁹

Probably the two most important opinions of the Court in the international sphere, during the period under discussion, were the *Opinions on the European Economic Area*.⁸⁰ In the first of these opinions, the Court held that Member States, even by an international agreement with non-Member States, must not cre-

77. See Opinion on Convention No. 170 of the International Labour Organization Concerning Safety in the Use of Chemicals at Work, Opinion 2/91, [1993] E.C.R. I-1061, ¶ 8.

78. *Commission v. Council of the European Union*, Case C-25/94, [1996] E.C.R. I-1469, ¶ 48; see also Opinion on Competence of the Community to Conclude the New Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Opinion 1/03, [2006] E.C.R. I-1145, ¶ 173; Opinion on Competence of the Community or one of its institutions to participate in the Third Revised Decision of the OECD on National Treatment, Opinion 2/92, [1995] E.C.R. I-521, part D, ¶ 5; Competence of the Community to Conclude International Agreement concerning Service and the Protection of Intellectual Property, Opinion 1/94, [1994] E.C.R. I-5267, ¶ 108; *Convention No. 170 of the International Labour Organization*, [1993] E.C.R. I-1061, ¶ 36; Ruling on Draft Convention of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transports, Ruling 1/78, [1978] E.C.R. 2151, ¶¶ 34-36.

79. *The Queen v. Sec'y of State for Home Dep't*, Case C-324/93, [1995], E.C.R. I-563, ¶ 32.

80. See Opinion on Draft Agreement Between the Community, on the One Hand, and the Countries of the European Free Trade Association, on the Other, Relating to the Creation of the European Economic Area, Opinion 1/91, [1991] E.C.R. I-6079; Opinion on Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, Opinion 1/92, [1992] E.C.R. I-2821.

ate institutions that would interfere with the institutional balance within the Community.

If provisions of a treaty to which the Community is a party are directly applicable, they must be applied by national courts of Member States, even if no implementing measures have been adopted either by the Community or by the national authorities.⁸¹

Recently, in its Opinion on the new Lugano Convention on recognition and enforcement of judgments, the Court noted that "in all the areas corresponding to the objectives of the Treaty, Article 10 EC requires Member States to facilitate the achievement of the Community's tasks and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty."⁸²

In *Commission v. Netherlands*, the last of a series of "open skies" cases all decided on similar grounds,⁸³ the Court held that the Netherlands had infringed Article 10 by renegotiating and maintaining treaty commitments to the United States concern-

81. See *Sevince v. Staatssecretaris van Justitie*, Case C-192/89, [1990] E.C.R. I-3461, ¶ 19; *Zoubir Yousfi v. Belgian State*, Case C-58/93, [1994] E.C.R. 1353, ¶¶ 16-19; *Office national de l'emploi v. Bahia Kziber*, Case C-18/90, [1991] E.C.R. I-199.

82. *Competence of the Community to Conclude the New Lugano Convention*, [2006] E.C.R. I-1145, ¶ 119.

83. *Commission v. Netherlands*, Case C-523/04, [2007] E.C.R. 3267. The Court summarized the previous "open skies" cases as follows:

The Court gave its ruling in [the open skies cases] on 5 November 2002 by judgments in Case C-466/98 *Commission v United Kingdom* [2002] ECR I-9427, Case C-467/98 *Commission v Denmark* [2002] ECR I-9519, Case C-468/98 *Commission v Sweden* [2002] ECR I-9575, Case C-469/98 *Commission v Finland* [2002] ECR I-9627, Case C-471/98 *Commission v Belgium* [2002] ECR I-9681, Case C-472/98 *Commission v Luxembourg* [2002] ECR I 9741, Case C 475/98 *Commission v Austria* [2002] ECR I 9797, and Case C 476/98 *Commission v Germany* [2002] ECR I 9855.

In the seven latter judgments (the action against the United Kingdom of Great Britain and Northern Ireland concerned a separate situation), the Court held that, by entering into or maintaining in force, despite the renegotiation of existing agreements, international commitments towards the United States concerning air fares and rates charged by carriers designated by the United States on intra-Community routes, concerning CRSs offered for use or used in the territory of the respective defendant Member State, and by recognising the United States as having the right to withdraw, suspend or limit traffic rights in cases where air carriers designated by the defendant Member State were not owned by the latter or its nationals, the defendant Member States had failed to fulfil their obligations under Articles 5 and 52 of the Treaty and under Regulations Nos. 2409/92 and 2299/89, as amended by Regulation No 3089/93.

Id. ¶¶ 15-16.

ing air fares charged by U.S. carriers on intra-Community routes, computerized reservation systems used in the Netherlands, and giving the United States the right to alter traffic rights if carriers designated by the Netherlands cease to be owned by Dutch nationals. After quoting Article 10, the Court said, “[i]n the area of external relations, the Court has held that the Community’s tasks and the objectives of the EC Treaty would be compromised if Member States were able to enter into international commitments containing provisions capable of affecting rules adopted by the Community or of altering their scope.”⁸⁴

This principle is not, of course, limited to transport cases. It goes back to Opinion 1/76 and the AETR judgment in 1971, referred to above.

M. *The Duties of the Commission to the Member States*

In a variety of situations, the Court has said that the Commission has a legal duty to Member State authorities to provide information to them, to enable the national authorities to fulfil their duties under Community law.

So, for example, the Commission has a legal duty to provide information to national courts dealing with possible breaches of Community law.⁸⁵ This is particularly important in the sphere of Community competition law.⁸⁶ But the Commission also has a duty to tell national authorities, for example, the time limits for applications for the approval by the Commission of agricultural premiums.⁸⁷

N. *The Duties of the Community Institutions to One Another*

The Court again had to deal with cases involving controversy about where sessions of the European Parliament should be held, which involved both the powers of the Parliament to ensure the proper conduct of its own proceedings, and its duty to “have regard to” the powers of the Member States to decide

84. *Id.* ¶ 75.

85. *See* Tillack v. Commission, Case T-193/04, [2006] E.C.R. II-3995, ¶ 72; Netherlands v. Zwartfeld, Case C-2/88, [1990] E.C.R. I-3365, ¶ 22.

86. *See* Masterfoods Ltd. v. HB Ice Cream Ltd., Case C-344/98, [2000] E.C.R. I-11369, ¶ 23; Delimitis v. Henninger Bräu, Case, C-234/89, [1991] E.C.R. I-935, ¶ 53; *see also* Council Regulation No. 1/2003, art. 15, O.J. L 1/1 (2003) (on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty).

87. *See* Italy v. Commission, Case C-10/88, [1990] E.C.R. I-1229.

the seat of the institutions.⁸⁸ The Court said Article 10 imposed “mutual duties.”⁸⁹

III. THE ASSESSMENT OF THE CASE LAW ON ARTICLE 10

A. *The FIDE Congress, Helsinki, 2000*

It is convenient to use the year 2000 as a basis for dividing the periods identified in this Article because in that year the Fédération Internationale pour le droit Européen (“FIDE”) in Helsinki had a broad discussion of the legal duties under Article 10.⁹⁰ In accordance with normal FIDE procedure, there were

88. *See, e.g.*, Parliament v. Council, Case C-392/95, [1997] E.C.R. I-3213; Parliament v. Council, Case C-65/93, [1995] E.C.R. I-643; Luxembourg v. Parliament, Case C-213/88, [1991] E.C.R. I-5643, 5692; European Parliament v. Council of the European Communities, Case C-70/88, [1990] E.C.R. I-2041.

89. *Parliament*, [1995] E.C.R. I-643, ¶ 23.

90. *See* 1 John Temple Lang, *General Report: The duties of cooperation of national authorities and courts and the Community Institutions under Article 10 EC*, in XIX F.I.D.E. CONGRESS 373-426 (Sundström & Kauppi eds., 2000) [hereinafter FIDE GENERAL REPORT]; *see also* P.J.G. KAPTEYN & P. VERLOREN VAN THEMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES: FROM MAASTRICHT TO AMSTERDAM 148-63 (Laurence W. Gormley ed., 3rd ed. 1998). By the time of the Helsinki Congress, there was a substantial body of published comment of Article 10. *See generally* MARC BLANQUET, L'ARTICLE 5 DU TRAITÉ CEE: RECHERCHE SUR LES OBLIGATIONS DE FIDÉLITÉ DES ÉTATS MEMBRES DE LA COMMUNAUTÉ (1994); Durand, *Chapitre II: Le principe de coopération loyale entre les états membres et les institutions*, in 1 COMMENTAIRE MÉGRET: LE DROIT DE LA CEE 25-43 (2d ed. 1992); Ole Due, Article 5 du traité CEE—une disposition de caractère fédérale?, Conférence Robert Schuman sur le droit communautaire (Florence, 1991); 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, 113-18 (Ulf Bernitz & Joakim Nergelius eds., 2000); John Temple Lang, *The Principle of Loyal Cooperation and the Role of the National Judge in Community, Union and EEA Law*, 4 ERA-FORUM 476, 476-501 (2006); John Temple Lang, *Developments, Issues and New Remedies: The Duties of National Authorities and Courts Under Article 10 of the EC Treaty*, 27 *FORDHAM INT'L L.J.* 1904, 1904-39 (2004); John Temple Lang, *The Duties of Cooperation of National Authorities and Courts Under Article 10 E.C.: Two More Reflections*, 26 *EUR. L. REV.* 84, 84-93 (2001); John Temple Lang, *The Duties of National Authorities Under Community Constitutional Law*, 23 *EUR. L. REV.* 109, 109-31 (1998); John Temple Lang, *The Duties of National Courts Under Community Constitutional Law*, 22 *EUR. L. REV.* 3, 3-18 (1997); John Temple Lang, *The Core of the Constitutional Law of the Community - Article 5 EC*, in CURRENT AND FUTURE PERSPECTIVES ON EC COMPETITION LAW 41, 51-68 (Laurence W. Gormley ed., 1997); John Temple Lang, *Community Constitutional Law*, *supra* note 28, at 645-82; 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.* 503-537 (1987); KOEN LENAERTS & PIET VAN NUFFEL, CONSTITUTIONAL LAW OF THE EUROPEAN UNION 115-23 (Robert Bray ed., 2d. ed., 2005); Koen Lenaerts, *Le Devoir de Loyauté Communautaire*, in LA LOYAUTÉ: MÉLANGE OFFERT À ETIENNE CEREXHE 229, 229-47 (Joe Verhoeven ed., 1997); HENRY G. SCHERMERS & DENIS F. WAELEBROECK, JUDICIAL PROTECTION IN THE EUROPEAN UNION 112-15, 300 (6th ed. 2001); Van Raepenbusch, *Le devoir de loyauté dans l'ordre juridique com-*

national reports from all of the then Member States, a Community report by former Advocate General van Gerven, a report on the European Free Trade Association ("EFTA"), a national report from Switzerland and a general report. This was the largest conference ever to discuss Article 10. The conclusions, or at least the General Rapporteur's impressions of the conclusions reached, are set out in Volume IV of the conference proceedings.⁹¹

One of the most important results of the FIDE conference was a list of the limits of Article 10. This list (set out below) said little that was new, but it was useful to put Article 10 duties into proportion, and to show that they do not represent a serious encroachment on national authorities' powers. At the same time the conference brought Article 10 to the attention of many lawyers, and in particular called their attention to the very large number of cases in which, by 2000, the Court had cited or relied on Article 10.

The FIDE conference did not try to agree on any comprehensive paraphrase or explanation of Article 10 which would be helpful in all cases to courts responsible for interpreting it. It had been suggested that "all national authorities, judicial and non-judicial, have a duty to take whatever action is necessary to make the Community legal system work effectively in the way that it is objectively intended to work, and a corresponding duty to avoid any action which would interfere with this working."⁹²

There was some questioning of the importance of Article 10, essentially on the basis that some of the consequences which the Court had drawn from Article 10 could probably have been arrived at on other grounds. That is probably correct. Article 10 did not bring into Community law a large body of rules which would not otherwise have been there. But the fact remains that Article 10 is in the Treaty, and that it has been cited and relied on by the Court in a great many cases that have progressively established principles concerning the many and varied relationships between national authorities and the Community institu-

munautaire, DROIT SOCIAL, No. 11, November 1999, at 908-915; see also Monica Claes, THE NATIONAL COURTS' MANDATE IN THE EUROPEAN CONSTITUTION 58-68 (2006); Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 VA. L. REV. 731, 781-82 (2004).

91. See FIDE GENERAL REPORT, *supra* note 90.

92. *Id.* at 376.

tions. These principles can fairly be described as constitutional. They had to be developed by the Court in its case law, both because the Community Treaties were not drafted as a constitution (they did not say many things that a constitution ought to say) and because the legal system or legal order set up by the Treaties was unique and unprecedented, and gave rise to many legal questions which had never previously arisen. In some cases no doubt the answers were fairly clear, and would have been reached without Article 10. In other cases the answers, even those which seem clear now, were certainly not obvious, and were highly controversial. Some of the Court's judgments that are based on Article 10 were criticized, wrongly, as "judicial activism,"⁹³ largely because the Court had not consistently referred to Article 10 even when its judgments were in fact based on that Article. In many cases, the answers given by the Court, even when clearly correct, had simply not been anticipated.

Another reason why Article 10 was important, which can perhaps be seen more clearly now than in 2000, is that it states a principle that is equally applicable to both "dualist" States (which regard international law as quite separate from national law) and "monist" States (which accept more readily the idea that treaty obligations, once accepted and ratified, become part of national law even without implementing legislation). As already mentioned, once the Court had accepted the principle of direct application of Community law⁹⁴ and the principle of primacy of Community law over national law,⁹⁵ the inevitable consequence was that national courts, in a legal system in which almost all powers are concurrent, would become the allies of the Court of Justice in ensuring that in the application of the Treaties, the law is observed. A Treaty Article on the lines of Article 10 was therefore important to indicate to national courts what they were progressively asked to do.

At a more recent international conference on Article 10, organized by the Academy of European Law of Trier, a large number of national judges discussed Article 10 at length, without any significant dissent from the principles based on it by the case

93. *Id.* at 411-12.

94. See *NV Algemene Transport-en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, Case 26/62, [1963] E.C.R. 1, part B.

95. See *Flaminio Costa v. ENEL*, Case 6/64, [1964] E.C.R. 585.

law.⁹⁶

It may be said that if the conclusion reached by the Court is correct, the question whether Article 10 is the legal basis for it is unimportant. That may be true in any specific case, but it is relevant to know when Article 10 is being applied, so as to see whether a proposed conclusion is correct, and so that when other similar cases arise, the courts dealing with them know whether Article 10 is applicable or not.

B. *The FIDE Congress Conclusions—The Limits of Article 10*

The limits of Article 10 concern the scope of the Article's effects, its substantive consequences, and its procedural aspects. They were summarized for the FIDE Congress in substantially the following way.⁹⁷

Article 10 by itself never creates duties, but only together with some other rule of Community law, or some principle or objective of Community policy which is to be facilitated or, at least, not jeopardized. Legal consequences cannot be deduced from the general words of Article 10 alone, but only in combination with other specific rules. The content of the obligation results from the other rule or objective.

Article 10 does not create any wholly *new* duties, not related to those which are already binding on Member States or to which they have agreed as Community objectives or policies. A Member State cannot have a duty under Article 10 to which it has neither agreed in principle (by agreeing to the measure, policy or objective which Article 10 obliges it not to frustrate) or become bound through majority voting or under the Treaties themselves.

Article 10 applies only in the absence of a *lex specialis*. Article 10 applies only in combination with some other rule or policy which is *not* complete and sufficient in itself. It is a general, residual, supplementary provision.⁹⁸ But if the other rule is comprehensive enough, there is no need to rely on Article 10.

96. See generally Access to Justice in Community Law, 4 ERA FORUM (2006).

97. John Temple Lang, *The Duties of Cooperation of National Authorities*, *supra* note 90, at 84-93.

98. See, e.g., Commission v. Portugal, Case C-84/04, [2006] E.C.R. I-9843, ¶ 40; Commission v. Denmark, Case C-392/02, [2005] E.C.R. I-9811, ¶ 69; Commission v. Denmark, Case C-464/02, [2005] E.C.R. I-7929, ¶ 84; see also Union française de l'express (UFEX) v. Commission, Case T-60/05 (ECJ Sept. 12, 2007) (not yet reported).

Article 10 is *not* an exception to the principle that duties are imposed on *private* parties only by or on the basis of Community or national legislation (or of the Treaties themselves). The duty of private parties not to interfere with the freedoms of others given by Community law, and the duty of national authorities to ensure that private parties do not interfere with the freedoms of others under Community law,⁹⁹ both result from the Treaty itself.

Article 10 cannot be used by a national court unless the Community rule or objective is clear enough to be a basis for precise, justiciable obligations.¹⁰⁰ It is not a device for filling in or developing the content of a policy which has not been agreed in detail, and which needs to be dealt with by general Community measures.

Article 10 does not say which national authority should be responsible for achieving the result, or what its procedures should be, provided that the result is achieved or avoided. Member States are free to use a wide variety of different procedures to achieve the result required by Community law.¹⁰¹

The legal consequences of Article 10 depend on the rule of Community law with which it is combined. Article 10 always has direct effects when the *other* rule of Community law is directly applicable. If the other rule is not directly applicable, Article 10 may create some direct effects, for example, *Van Munster*¹⁰² and the *Moorman*¹⁰³ principles, but does not necessarily do so. The consequences of Article 10 for the inter-institutional relations of the Community, or in the area of international relations, are unlikely to include direct effects in national courts.

The Commission has no power under Article 10 to adopt

99. See *Schmidberger v. Austria*, Case C-112/00, [2003] E.C.R. I-5659, ¶¶ 31-34; *Commission v. France*, Case C-265/95, [1997] E.C.R. I-6959, ¶¶ 52, 53, 86.

100. See *Association des Centres Distributeurs Edouard Leclerc v. SARL "Au bleu vert"*, Case 229/83, [1985] E.C.R. I, ¶¶ 1-30; *Cava v. Regione Lombardia*, Case C-236/92, [1994] E.C.R. I-483, ¶¶ 1-16.

101. See *Unibet Ltd. v. Justitiekanslern*, Case C-432/05, [2007] E.C.R. I-2271, ¶ 38; *Cooperativa Lattepiù arl v. AIMA*, Joined Cases C-231, C-303 & C-451/00, [2004] E.C.R. I-2869, ¶¶ 56-57.

102. *Simon J.M. van Munster v. Rijksdienst voor Pensioenen*, Case C-165/91, [1994] E.C.R. I-4661, ¶ 20; see also *Thieffry v. Conseil de l'ordre des Avocats de Paris*, Case 71/76, [1977] E.C.R. 765, ¶ 16.

103. *Oberkreisdirektor des Kreises v. Handelsonderneming Moorman BV*, Case 190/87, [1988] E.C.R. 4689, ¶¶ 21-24.

measures which are themselves legally binding, even to give effect and practical detail to already existing obligations, or to create new legal obligations. The Commission's only means of enforcing Article 10 is to bring proceedings under Article 226 (ex-169). Article 10 is *not* the equivalent of Article 86(3) EC. Nor has the Commission any power to relieve Member States of their duties under Community law, at least insofar as private rights might be affected.

Article 10 is not a justification for making Community law rules broader, by analogy, than the relevant rules themselves. So Article 10 cannot be grounds for saying that a State measure requiring private companies to buy electricity from renewable energy sources, at minimum prices and at the buyers' expense, is contrary to State aid rules.¹⁰⁴ Similarly, price control legislation cannot be objected to merely on the grounds that it has the same effect as an illegal price-fixing agreement between companies.¹⁰⁵ Where tax powers have been given to local or regional authorities, a low tax rate imposed by one authority cannot be considered a State aid merely because a similar effect might have been caused by national legislation.¹⁰⁶ However, Article 10 does oblige national courts to prevent companies achieving by indirect means results that they would not legally achieve directly.¹⁰⁷

In short, Article 10 is *not* a legal basis for making justiciable every weakness or filling every gap in the national application of Community rules. This is important, because in the area of Police and Judicial Cooperation there will be many such gaps.

104. See *PreussenElektra AG v. Schlesweg AG*, Case C-379/98, [2001] E.C.R. I-2099, ¶ 58.

105. See *Wolf W. Meng*, Case C-2/91, [1993] E.C.R. I-5751, ¶¶ 14, 19; *Ohra Schadeverzekeringen NV*, Case C-245/91, [1993] E.C.R. I-5851, ¶ 12; *Bundesanstalt für den Güterfernverkehr v. Gebrüder Reiff GmbH & Co. KG*, Case C-185/91, [1993] E.C.R. I-5801, ¶ 14. Legislation is, of course, democratically adopted, but price fixing agreements between companies are not. See Harm Schepel, *Delegation of Regulatory Powers to Private Parties under EC Competition Law: Towards a Procedural Public Interest Test*, 39 COMMON MKT. L. REV. 31, 33, 46 (2002).

106. See *Portugal v. Commission*, Case C-88/03, [2006] E.C.R. I-7115, ¶¶ 3, 5; see also *Herrera v. Servicio Cantabro de Salud*, Case C-466/04, [2006] E.C.R. I-5341, ¶¶ 44-45; *Staat der Nederlanden v. Ten Kate Holding Musselkanaal BV*, Case C-511/03, [2005] E.C.R. I-8979, ¶¶ 28, 31; *EU Wood-Trading GmbH v. Sonderabfall*, Case C-277/02, [2004] E.C.R. I-11957, ¶ 48.

107. See *Etablissements Consten S.a.R.L. & Grundig-Verkaufs-GmbH v. Commission*, Joined Cases 56 & 58/64, [1966] E.C.R. 299, ¶¶ 5, 6, 10; see also *Coote v. Granada Hospitality Ltd.*, Case C-185/97, [1998] E.C.R. I-5199, ¶¶ 17-20.

Two other limitations should also be mentioned. In some of the most difficult cases, merely knowing that the principle is based on Article 10 may not help much in applying it. Also, Article 10 does not necessarily provide solutions to all the problems that arise if one or more Member States, even by agreement, does not take part in an arrangement for closer cooperation between most or all of the other Member States.¹⁰⁸

These limits are important, because if they are understood they should help to dispel some nationalist prejudices against Community law.

IV. DEVELOPMENTS SINCE 1990

A. *The Constitutional Treaty and the Treaty of Lisbon*

One striking development since 2000 was the adoption of the draft Treaty Establishing a Constitution for Europe, which contained two Articles replacing Article 10.¹⁰⁹ Although it never came into force, its provisions are still of interest. Article 5(2) dealt with the relations between the European Union and Member States, and said:

[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.¹¹⁰

Article 10 of the draft Constitution dealt with Union law. It said:

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 Institu-

108. See, e.g., *United Kingdom v. Council of the European Union*, Joined Cases C-77 & C-137/05, slip op. (ECJ Dec. 18, 2007) (not yet reported).

109. Draft Treaty establishing a Constitution for Europe, Dec. 16, 2004, O.J. C 310/1 (2004) (not ratified) [hereinafter Draft Treaty].

110. *Id.* art. 5(3), at 7.

tions' acts.¹¹¹

These two Articles substantially repeat the existing words of Article 10, and confirm that Member States did not wish to limit its scope or effects.¹¹² This was the first time that any proposal had been made to add to or clarify Article 10. The new Articles would have made explicit for the first time the reciprocal nature of the obligations which result, for Member States and EU Institutions, from the duty of "loyal cooperation." These draft Articles would explicitly extend the principles of Article 10 into the area of Common Foreign and Security Policy and the area of Police and Judicial Cooperation in criminal matters, two wholly new spheres. This aspect of the draft Article has been controversial.

The draft Article 10 is right to link the principle of primacy (never previously stated in the Treaty) of Community law with the duty to ensure fulfilment of Community obligations. The duty to give "full effect" results from the principle of primacy, and draws out its implications.

In theory it was no doubt correct to distinguish between effects on relations between the EU and the Member States, and effect on EU law. But it is not clear that this separation would have had any important effects in practice in the Community law sphere (the First Pillar). By distinguishing two kinds of effects of what is now Article 10, the new Treaty would have called attention to them, and this in itself might have led to further consequences.

Article 3a(3) of the Treaty of Lisbon provides that:

Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of

111. *Id.* art. 10, at 10.

112. In Protocol 30 to the EC Treaty, on subsidiarity and proportionality, the Member States specifically said that Article 10 binds Member States when the subsidiarity principle leads to no action being taken by the Community. This Protocol seems to apply whenever there is a Community policy but no Community legislation. *See* EC Treaty, *supra* note 1, Protocol 30.

the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.¹¹³

As in the case of the corresponding provision of the abortive Constitutional Treaty, the significance of this is to extend into the areas of Common Foreign and Security Policy and of Police and Judicial Cooperation the legal principles developed by the Court of Justice under Article 10.

B. *Member State Liability for Constitutionally Independent Courts*

In *Commission v. Italy* the Court held that, to determine whether national legislation correctly implements Community law, it is necessary to look at the judgments of the national courts, even though they are constitutionally independent.¹¹⁴ Isolated judgments, especially if contrary to national Supreme Court judgments, can be ignored. But a widely held interpretation, confirmed by the Supreme Court, must be taken into account. So the State is in breach of its obligations if it maintains in force legislation that is interpreted by its courts in such a way that a taxpayers' claims, under Community law, to repayment of taxes are made excessively difficult. In the same year the Court held that a Member State was in breach of its obligations when its Supreme Court infringed Community law, and would have to pay damages.¹¹⁵

C. *The Pupino Judgment*

The Court of Justice, without waiting for the draft Constitution, but almost certainly encouraged by it, decided that the principle of loyal cooperation is binding in the area of police and judicial cooperation in criminal matters (the Third Pillar). This was decided, in general terms, though in a specific context, in *Pupino* in 2005.¹¹⁶ That case concerned the interpretation of

113. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community art. 3a(3), Dec. 17, 2007, O.J. C 306/10, at 12 (2007) [hereinafter Treaty of Lisbon].

114. See *Commission v. Italy*, Case C-129/00, [2003] E.C.R. I-14637, ¶¶ 30-32. In particular, this was the result of a mere presumption that indirect taxes are passed on, and therefore could not be reclaimed. A rule that failure to produce accounts and a rule that failure in the company's accounts to treat the refund claim as an improper payment and as an asset in the balance sheet led to the presumption.

115. See *Köbler v. Austria*, Case C-224/01, [2003] E.C.R. I-10239, ¶¶ 126-27.

116. *Pupino*, Case C-105/03, [2005] E.C.R. I-5285; see also *United Kingdom v. Council of the European Union*, Case C-137/05, slip op., ¶¶ 50, 55, 59 (ECJ Dec. 18,

a Framework Decision on the standing of victims in criminal proceedings. The Framework Decision had been adopted by the Council in the context of Title VI of the EU Treaty, on police and judicial cooperation. The Framework Decision was one of the kinds of measures on the interpretation of which the Court has power to give a preliminary ruling. The question was whether the Framework Decision could have direct effect, or should be interpreted as purely inter-governmental. The Court said that because Framework Decisions are binding, they place on national authorities, and particularly national courts, an obligation to interpret national law in conformity with the Decisions. The jurisdiction to give rulings on the interpretation of Decisions would be meaningless if individuals were not entitled to invoke Framework Decisions in national courts. The Court said:

It would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law, were not also binding in the area of police and judicial cooperation in criminal matters When applying national law, the national court that is called on to interpret [Title VI] must do so as far as possible in the light of the wording and purpose of the framework decision.¹¹⁷

In effect, the Court said that the *Marleasing*¹¹⁸ principle in

2007) (not yet reported) (interpreting the Schengen Protocol, and the system of closer cooperation when one Member State is not participating on the same basis as the others); *Organisation des Modjahedines du Peuple D'Iran v. Council of the European Union*, Case T-228/02, [2006] E.C.R. II-4665, ¶¶ 122-23 (holding that Article 10 “is especially binding in the area of JHA governed by Title VI of the EU Treaty, which is moreover entirely based on cooperation between the Member States and the institutions”); *Calfa*, Case C-348/96, [1999] E.C.R. I-11, ¶ 17 (holding that state legislation may not restrict the fundamental freedoms guaranteed by Community law); *Sacha Prechal, Domestic Legal Effects on EU Criminal Law: Variations on Three Themes*, in *INTERFACE BETWEEN EU LAW AND NATIONAL LAW* 335, 344-45 (L. Lavranos & D. Obradovic eds., 2007) (pointing out that the German Constitutional Court and the Polish Constitutional Tribunal in the European arrest warrant cases seem to disagree with the *Pupino* judgment, but that the Czech Constitutional Court, referring explicitly to Article 10 EC, interpreted the arrest warrant legislation to be consistent with European legal principles); *Jolande Prinssen, Domestic Legal Effects of EU Criminal Law: A Transfer of EC Law Doctrines?*, in *INTERFACE BETWEEN EU LAW AND NATIONAL LAW*, *supra*, at 318, 318-26.

117. *Pupino*, [2005] E.C.R. I-5285, ¶¶ 42-43.

118. *Marleasing v. La Comercial Internacional de Alimentacion*, Case C-106/89, [1990] E.C.R. I-4135, ¶ 8 (holding that “the national court called upon to interpret

particular, and the principles stated in Article 10 in general, already apply in the Third Pillar sphere, the sphere of police and judicial cooperation.

Article 10 is potentially very important in the sphere of police and judicial cooperation, the Third Pillar sphere, especially as the relevant Treaty Articles are badly drafted. One would expect, for example, that the duty of national courts under Article 10 to raise questions of Community or EU law on their own initiative would be particularly important in these cases, particularly when the question raised issues of fundamental rights.¹¹⁹ One would also expect that the duty of national courts to give “effective” protection in practice to rights given or guaranteed by European law would lead to important judgments in this sphere. If a national court had ordered the release of an accused person, it might have a duty under Article 10 to ensure that he was not immediately re-arrested on other grounds. When the Court of Justice has given a judgment in response to a question from a national court, other national courts would be bound by the judgment even if they had no power, under national law, to ask the Court questions. Indeed, Article 10 is likely to be particularly important because the provisions on police and judicial cooperation are *not* as effective as Article 234 to ensure uniform interpretation and application of European law rules. One would expect that there is a duty under Article 10 to limit forum shopping by prosecuting authorities. If national courts differ on an important issue, a court that has power to do so may have a duty under Article 10 to refer the issue to the Court of Justice.

D. *Article 10 When a Member State Has “Opted Out”*

Two cases were brought by the United Kingdom to challenge Regulations on standards for security features in passports issued by Member States and setting up an agency for cooperation at the external borders of the Community. The challenge arose because the Schengen Protocol, made Community law by the Treaty of Amsterdam, did not apply to the United Kingdom, and the Title IV Protocol on the position of the United Kingdom

[national law] is required to do so, as far as possible, in the light of the working and the purpose of the directive”).

119. See, e.g., *Miraglia*, Case C-469/03, [2005] E.C.R. I-2009, ¶ 28 (*ne bis in idem* principle); *Commission v. Council*, Case C-257/01, [2005] E.C.R. I-345, ¶ 59 (duty to give reasons for measures).

and Ireland said that no measure pursuant to that Title would be binding on the United Kingdom. However, proposals to build upon the Schengen *acquis* are subject to the normal Treaty provisions, and the United Kingdom and Ireland are free to declare that they wish to take part in the areas of cooperation in question. Taking part would give them the right to veto.

The Advocate General considered that the United Kingdom cannot take part in the arrangements to cooperate unless the proposed development of the Schengen Protocol can exist autonomously, that is, separate from and not dependent on the Schengen arrangements in which the United Kingdom is not participating. The United Kingdom is not entitled to obtain the benefits of participating in part of the arrangements if it is not bearing the burdens of participation in other related parts. The Council had argued that Article 10 was not enough to protect the integrity of the arrangements already made under Schengen.¹²⁰ This is probably correct: it would be difficult if not impossible to use Article 10 to determine when or how a Member State should vote in the Council. The Court decided that the clause in the Schengen Protocol applies only to proposals to build on the Schengen *acquis* which the United Kingdom has been authorized to take part in.¹²¹

E. *The Competition Law Decentralization Regulation*

Another important development was Regulation 1/2003, the Community competition law decentralization regulation. It envisages close cooperation between national competition authorities, and makes explicit the duties, which already resulted from Article 10, of national courts to avoid adopting judgments inconsistent with Commission decisions. This cooperation raises a number of issues under Article 10, and has done so in the *Inntrepreneur* case.¹²²

120. Opinion of Advocate General Trstenjak, *United Kingdom v. Council*, Case C-77/05, slip op., ¶¶ 107-08 (ECJ Dec. 18, 2007) (not yet reported); Opinion of Advocate General Trstenjak, *United Kingdom v. Council*, Case C-137/05, slip op., ¶¶ 97, 105, 110 (ECJ Dec. 18, 2007) (not yet reported).

121. *United Kingdom v. Council*, Case C-77/05, slip op., ¶ 68 (ECJ Dec. 18, 2007) (not yet reported); *United Kingdom v. Council*, Case C-137/05, slip op., ¶ 50 (ECJ Dec. 18, 2007) (not yet reported).

122. *Inntrepreneur Pub. Co. v. Crehan* [2006] UKHL 38, [2007] 1 A.C. 333 (appeal taken from Eng.) (U.K.); see John Temple Lang, *Inntrepreneur and the Duties of National Courts under Article 10 EC*, 5 COMPETITION L.J. 231, 231-35 (2006); see also John D. Cooke,

The Court has also confirmed that national courts have a duty under Article 10 to award compensation for breach of Community competition law.¹²³ Also, although the judgment in *Roquette Frères* was given before Regulation 1/2003 came into force, it illustrates how far the Court insists on the duty of national courts under Article 10 to coordinate the exercise of its powers with those of the Commission.¹²⁴ If the national court considers that the Commission has not given it enough information to justify help with a surprise inspection, it cannot simply dismiss the request for help, but must ask the Commission for further information.

F. *Some Specific Judgments Since 2001*

Article 10 is still developing. Disregarding cases in which principles based on Article 10 were applied or referred to without mentioning the Article itself, there were fifty-seven citations of the Article in judgments or Advocate Generals' conclusions in 2006, and approximately twenty-seven in 2007. As already mentioned, Article 10 is relied on most often when a new legal issue or a new situation arises, where there is little or no relevant case law, and arguments are being based on general principles.

One such case was the Sellafield nuclear reactor case, which was brought by the Commission and is one of the relatively few cases initiated by the Commission primarily on the basis of Article 10.¹²⁵ The Commission argued that it was contrary to Article 10 for Ireland to have referred a dispute with the United Kingdom over the Sellafield nuclear reactor to arbitration under the United Nations Law of the Sea Convention, without first informing and consulting the Commission, and instead of using Article

General Report, in FIDE 2004 NATIONAL REPORTS, THE MODERNIZATION OF EU COMPETITION LAW ENFORCEMENT IN THE EUROPEAN UNION 630, 636-52 (Dermot Cahill ed., 2004); JOHN TEMPLE LANG, FIDE CONGRESS 1998, GENERAL REPORT ON THE APPLICATION OF COMMUNITY COMPETITION LAW ON ENTERPRISES BY NATIONAL COURTS AND NATIONAL AUTHORITIES (1998), available at http://ec.europa.eu/comm/competition/speeches/text/sp1998_027_en.pdf.

123. See Manfredi, Case C-295/04, [2006] E.C.R. I-6619, ¶ 60; Crehan v. Courage, Case C-453/99, [2001] ECR I-6297, ¶ 25.

124. See *Roquette Frères v. Directeur general de la concurrence*, Case C-94/00, [2002] E.C.R. I-9011, ¶ 90; see also *France Télécom v. Commission*, Case T-339/04, slip op., ¶ 47 (ECJ Mar. 8, 2007) (not yet reported).

125. *Commission v. Ireland*, Case C-459/03, [2006] E.C.R. I-4635 [hereinafter *Sellafield Nuclear Reactor*].

292 EC. The Court agreed that Ireland was in breach of both Article 10 and Article 292.¹²⁶ The Court considered the two articles separately.¹²⁷

In a case brought against Germany for ratifying and implementing bilateral agreements on transport with (then) non-Member States without cooperating or consulting with the Commission, when Community legislation had been adopted, Article 10 was relied on, and the infringement of Article 10 was the only infringement upheld by the Court.¹²⁸ Once the Commission has been authorized to negotiate a multilateral international agreement on behalf of the Community, Member States have a duty of close cooperation to ensure consistency of action.

In a case in which the Commission had adopted a decision ordering France to recover illegally paid State aid, the Court found that France had infringed its duty under Article 10 by continuously disputing the amount to be recovered, instead of carrying out the decision.¹²⁹ Interestingly, the Court made this finding in addition to the ruling that France had infringed the decision itself.

G. *Private Litigation*

The *Laboratoires Boiron* judgment concerned the duty of national courts to order disclosure of evidence in private litigation.¹³⁰ This is a potentially important and interesting example of the effectiveness principle.¹³¹ A pharmaceutical laboratory argued that it should not have to pay a social security contribution because wholesale distributors with which it was competing were exempt from the same contributions. The laboratory argued that this exemption constituted State aid to the wholesalers, because the advantage exceeded the wholesalers' costs of their public service obligations. The Court said that the laboratory could recover the proportion of what it had paid to the State

126. See *id.* ¶¶ 123-33, 172; see also *Commission v. Italy*, C-35/96, [1998] E.C.R. I-3851, ¶ 53; *Commission v. France*, Case 7/71, [1971] E.C.R. 1003, ¶¶ 47-48.

127. See *Sellafield Nuclear Reactor*, [2006] E.C.R. I-4635, ¶ 171.

128. See *Commission v. Germany*, Case C-433/03, [2005] E.C.R. I-6985, ¶¶ 60-73; *Commission v. Luxembourg*, Case C-266/03, [2005] E.C.R. I-4805, ¶ 41.

129. See *Commission v. France*, Case C-441/06, slip op., ¶ 26 (ECJ Oct. 18, 2007) (not yet reported).

130. See *Laboratoires Boiron v. Urssaf*, Case C-526/04, [2006] E.C.R. I-7529, ¶¶ 55, 57.

131. See *id.*

which corresponded to the advantage unlawfully obtained by the wholesalers. However, the laboratory had not got the necessary information about the wholesalers' costs, and the wholesalers were not parties to the proceedings between Boiron and the State. The Court held that, to comply with the effectiveness principle, "the national court is required to use all procedures available to it under national law, including that of ordering the necessary measures of inquiry, in particular the production by one of the parties or a third party" of documents, if otherwise it would be impossible or excessively difficult for the evidence to be produced by the claimant.¹³²

This judgment shows that the effectiveness principle may oblige national courts to obtain evidence needed by a claimant to make a claim under Community law, if the claim would otherwise be excessively difficult for the claimant to prove. This judgment is obviously relevant to claims by private companies for discrimination or for infringement of Community competition rules, in which often only the defendant has the information needed to prove the case.

This judgment is likely to be particularly important for claimants in Member States without a developed practice of disclosure or discovery in litigation, since the judgment should help to solve one of the problems that have made it difficult to bring private claims for discrimination, or for breach of Community competition law.

In *Muñoz & Superior Fruiticola v. Frumar Ltd.*, the Court decided that Community Regulations on quality standards for products could be enforced by a competitor by civil proceedings for an injunction.¹³³ National law must allow this, to ensure the "full effectiveness" of the Regulation. The claimant has an interest in compliance with the Regulation by all of its rivals, and non-compliance is an unlawful act adversely affecting the claimant. This judgment implies that Community measures that appear to be primarily intended to protect the general interest or the interests of consumers may also protect the private rights of competitors. The right of rivals to sue for injunctions is not limited

132. *Id.* ¶ 57.

133. *Muñoz & Superior Fruiticola v. Frumar Ltd.*, Case C-253/00, [2002] E.C.R. I-7289, ¶ 30; Opinion of Advocate General Geelhoed, *Muñoz & Superior Fruiticola v. Frumar Ltd.*, Case C-253/00, [2002] E.C.R. I-7289, ¶ 63.

to breaches of competition law, and applies even when the non-compliance causes loss to the claimant only indirectly.¹³⁴

H. *The Duty of National Administrative Authorities to Set Aside National Legislation Inconsistent With Community Law*

An even more important judgment was given by the Court a year later, in *Fiammiferi v. Autorita Garante*.¹³⁵ The Court decided that when a national competition authority is applying Community competition law, it must disregard national legislation ordering or encouraging conduct that is contrary to Community rules.¹³⁶ The duty to disregard national legislation inconsistent with Community law applies to non-judicial authorities as well as national courts.¹³⁷ This judgment is important because it enables national competition authorities to challenge and nullify the effects of anticompetitive national legislation insofar as it leads to breaches of Community competition law.

I. *The Court's Increasing Concern With the Effectiveness of National Procedures*

As already mentioned, the need to determine whether national court procedures provide "effective" protection for Community law rights and effective enforcement of Community law duties is increasingly involving the Court in assessing how national procedures work in practice. There have been several cases concerned with the duty of national courts to reconsider cases wrongly decided if they are not final decisions.¹³⁸ The need to consider how national rules work in practice is illustrated in *Roquette Frères, Unibet, and Commission v. Italy*.¹³⁹ This

134. See *Crehan v. Courage*, Case C-453/99, [2001] E.C.R. I-6297; *Manfredi v. Adriatico Assicurazioni SpA, Cannito v. Fondiaria Sai SpA & Tricarico & Murgolo v. Asitalia SpA.*, Joined Cases C-295-298/04, [2006] E.C.R. I-6619, ¶ 7.

135. Case C-198/01, [2003] E.C.R. I-8055.

136. See *id.* ¶ 58.

137. See *Fratelli Costanzo SpA v. Comune di Milano*, Case 103/88, [1989] E.C.R. 1839, ¶ 33.

138. See, e.g., *Kapferer v. Schlank & Schick GmbH*, Case C-234/04, [2006] E.C.R. I-2585, ¶¶ 20-24 (holding that principle of cooperation does not require national court to disapply internal rules of procedure in order to review and set aside final judicial decision if that decision is contrary to Community law); *Kühne & Heitz NV v. Productschap voor Pluimvee en Eieren*, Case C-453/00, [2004] E.C.R. I-837, ¶ 28 (holding that Article 10 does not require a national court to ignore its internal rules of procedure to set aside a final judicial decision).

139. See *Roquette Frères v. Directeur general de la concurrence*, Case C-94/00,

tendency is certain to continue. The long established duty not to interfere with the operation of Community law and policy, discussed above, also involves some assessment of how the relevant national law rule works in practice. The Court has held that Member States have a general obligation to take measures to satisfy themselves that transactions financed by the European Agricultural Guidance and Guarantee Fund ("EAGGF") are executed correctly.¹⁴⁰

This kind of case gives rise to a difficulty in Article 234 cases, because in those cases, the Court's jurisdiction is only to answer questions of law asked by national courts, and it is not supposed to apply the law to the facts. The difficulty faced by the national courts in Article 234 cases is often precisely to apply known legal principles to the facts. This kind of difficulty in Article 234 cases is not limited to Article 10 issues. However, the Court is accustomed to trying where possible to provide useful answers to questions asked by national courts, without exceeding its jurisdiction.¹⁴¹ Various arrangements have been suggested to make it easier for national courts to deal with situations of this kind in Article 234 cases, usually involving specialized judges or courts.

CONCLUSION

Article 10 has repeatedly been used in the first cases in many important lines of judgments in the Court's case law. It is the legal basis for some of the most important principles of Community law. Its importance is constitutional because it deals with the many interrelationships between Community law and national law, which in the Community is not a dividing line, as in

[2002] E.C.R. I-9011; *Unibet Ltd. v. Justitiekanslern*, Case C-432/05, [2007] E.C.R. I-2271, ¶ 42; *Commission v. Italy*, Case C-129/00, [2003] E.C.R. I-14637, ¶ 30; *see also* *Commission v. Greece*, Case C-178/05, slip op., ¶ 25 (ECJ Apr. 18, 2007) (not yet reported); *Commission v. Italy*, Case C-135/05, [2007] E.C.R. I-3475, ¶ 18; *Opinion of Advocate General Sharpston*, *Slob v. Productschap Zuivel*, Case C-496/04, [2006] E.C.R. I-8257, ¶¶ 50-51 (opining that Member States may have a duty under Article 10 to adopt measures to supplement EC Regulations if that is necessary to ensure correct payment of a Community levy).

140. *See* *Greece v. Commission*, Case C-157/00, [2003] E.C.R. I-153, ¶ 11.

141. *See* *United Pan-Europe Commc'ns Belg. SA v. Etat belge*, Case C-250/06, slip op., ¶¶ 18-22 (ECJ Dec. 13, 2007) (not yet reported) ("the Court is unable to provide a useful answer" because of insufficient information); *see also* *Viacom Outdoor Srl v. Giotto Immobilier SARL*, Case C-134/03, [2005] E.C.R. I-1167, ¶¶ 28-29 ("It is impossible to establish whether in circumstances such as those of the case . . . the questions relating to the interpretation of those Articles are therefore inadmissible.").

most federations, but a symbiosis. The case law to which it has led has developed from its origins and has become generally accepted, and the role of Article 10 at the start has been largely forgotten. The Court has used it cautiously, but wisely, in particular in cases involving new issues, when it was most useful. The Court stated some basic principles initially, with great foresight, and has built a valuable body of case law on those principles. Indeed, the Court has made more and better use of Article 10 than the Commission. But the very general words of the Article have meant that when legal analysis was needed, it is not Article 10 that is analyzed, but whatever other rule or objective it is linked with in each case. It is still giving rise to new and important conclusions,¹⁴² and it will certainly lead to new practical results in Third Pillar cases, on police and judicial cooperation. It is the Treaty Article with the greatest potential for further development.

Article 10 has proved to be a valuable feature of a new and developing legal system, and a source of useful rules and principles. This was especially important in the Community, because the Treaties were not written as a complete constitution, but as a foundation or framework designed ultimately to be transformed into a constitution.¹⁴³ Article 10 enabled the Court to make explicit and to develop constitutional principles that had not been stated in the first Treaties. Article 10, in other words, filled many of the gaps in the Treaties. Professor Tridimas has written that “[t]he more interventionist approach of the Court . . . reached its apex in the establishment of State liability for damages and the cognate right to reparation for private parties. Notably, Article 10 EC proved instrumental in this development. The Court has interpreted that provision creatively.”¹⁴⁴

In fact, as this Article shows, the principle of State liability for damages is only one of several important constitutional principles based on Article 10, although it is probably the single prin-

142. See, e.g., Temple Lang, *Developments, Issues and New Remedies*, *supra* note 90 (canvassing the variety of conclusions the Court has drawn from the words of Article 10).

143. See JOHN TEMPLE LANG, *IS THERE A RATIONAL EUROPEAN CONSTITUTION NOW?* (1998); John Temple Lang, *The Development of European Community Constitutional Law*, 25 INT'L LAW. 455, 455-70 (1991) (analyzing the gradual shift from Member States' powers to an integrated Community legal system).

144. TAKIS TRIDIMAS, *THE GENERAL PRINCIPLES OF EU LAW* 421 (2d ed. 2006).

principle which did most to make the Community law into an effective legal system.

Some rules derived from Article 10, although often used, are no longer changing or developing. The most obvious example is the duty to inform the Commission when asked, and the duty to consult the Commission when problems arise. But other rules are still developing, most notably the duty to apply Community law fully and "effectively." A third category of rules are only beginning to be significant, most obviously the duties arising from Third Pillar activities. Whenever the Community adopts new objectives or new laws, Article 10 can give rise to additional supplementary rights and duties.

The role of the Advocates General is particularly important when new issues come before the Court, and a whole range of new issues will certainly arise as a result of Third Pillar matters coming under its jurisdiction. When new issues arise, Advocates General try to set out all of the factors to be taken into account, and all of the principles and problems involved. Advocates General have referred to Article 10 more often than the Court has done, and they will certainly continue to do so, in particular when new issues arise, when Article 10 is most important. It is an Advocate General or the Commission, rather than the Court, who might some day attempt to summarize the case law on Article 10, if that seemed necessary in the context of an individual case (although it is hard to imagine a case in which the *entire* case law would need to be summarized). It is very much to be hoped that there will be time, in Third Pillar cases that often involve personal liberty, for adequate consideration of all the issues involved.

Today, every national court is, within the sphere of its responsibilities, a Community law court of general jurisdiction, with the duty and the power to apply all rules of Community law that may be relevant to the cases coming before it. This is largely due to Article 10. Judge Pescatore, who first understood the importance and the potential of Article 10, should be well pleased.