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European Court of Justice: 1990 Cases

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Recent Development

European Court of Justice: 1990 Cases

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The Court of Justice of the European Communities, through its interpretation of the law of the European Economic Community, greatly impacts business enterprises in Europe. Those doing business in Europe must therefore keep abreast of the Court's major decisions. The purpose of this comment is to provide a survey of some of the Court's major decisions handed down in 1990 which will impact business in Europe. Although each of the Court's decisions necessarily impacts the European business environment, the cases selected for discussion are those considered in 1990 that will have the most direct effect. Before beginning the discussion of these cases, however, the introduction will provide a brief overview of the Court itself.

I. INTRODUCTION

The Court of Justice of the European Communities (ECJ) interprets and applies the law of the European Economic Community Treaties (Treaties). One of the ECJ's primary objectives is to eliminate differences that may exist between European Economic Community (EEC or Community) law and the national laws of the member states.¹ The ECJ has often given effect to the EEC's goal to facilitate the free movement of goods, capital and manpower among its member nations, by enforcing Community law over national law when conflicts arise. In doing so, the ECJ has stated that the Community provides a new legal order in international law which requires a limited surrender of sovereignty by the Member States, but in return creates new rights for those States and their citizens which become part of their legal heritage.²

1. Mahfood, *The EEC: European Law in the Court of Justice*, N.Y.L.J., Jan. 5, 1990, at 1 [hereinafter Mahfood]. See Treaty Establishing the European Economic Community, opened for signature Mar. 25, 1957 (entered into force Jan. 1, 1958) 298 U.N.T.S. 11 [hereinafter Treaty]. This Treaty is also known as the Treaty of Rome. For an excellent discussion of the history and development of the EEC, see generally Slynn, *Aspects of the Law of the European Economic Community*, 18 CORNELL INT'L L.J. 1 (1985).

2. See *id.* (citing Case 26/62, *NV Algemene Transport-en Expeditie Orderneming van Genl & Loos v. Netherlands Fiscal Admin.*, [1963] Common Mkt. Rpt. (CCH) ¶ 8008).

In its role as guardian of the Treaties, the ECJ performs both direct and indirect judicial functions. In the context of its direct judicial control, the ECJ has authority under the EEC Treaty both to interpret Community law and to apply that interpretation to specific cases brought before it. Under the Court's indirect judicial control, National Courts of the Member States may call upon the ECJ to interpret Community law. The ECJ's interpretation of Community law then enables the national courts to correctly apply that law in the context of impending national legislation and decisions.³ The ECJ acts as the court of first and last resort when interpreting EEC law. There are no avenues for appeal from its decisions.⁴ Relief from an unfavorable decision by the ECJ is possible only through a request for revision. This request must show the existence of previously unknown facts or circumstances which impact the outcome.⁵

Once the ECJ has issued its judgment and an order for enforcement, the rules of civil procedure of the member state in whose territory the judgment is to be executed govern the method of enforcement. The courts in those Member States must assure that the ECJ's judgments are properly carried out.⁶

Specific cases brought before the court fall into two categories: Actions against Member States and actions against Community Institutions.⁷ These Community Institutions are the European Community (EC) Council and the EEC Commission. The EEC Commission is the administrative and executive branch of the EEC, and has the power to propose legislation to the EC Council. However, before that legislation becomes effective, the EC Council must approve it.⁸

The ECJ has exclusive jurisdiction regarding actions against Member States arising from allegations that the Member State has

3. G. BEBR, *DEVELOPMENT OF JUDICIAL CONTROL OF THE EUROPEAN COMMUNITIES* 6 (1981) [hereinafter BEBR].

4. D. LASOK & J. BRIDGE, *LAW & INSTITUTIONS OF THE EUROPEAN COMMUNITIES* 255 (1987) [hereinafter LASOK & BRIDGE].

5. *Id.*

6. K. LASOK, *THE EUROPEAN COURT OF JUSTICE PRACTICE AND PROCEDURE* 320 (1984).

7. LASOK & BRIDGE, *supra* note 4, at 258.

8. Mahfood, *supra* note 1.

failed to fulfill its obligations under the EEC. Cases also arise when there is a dispute between Member States as to the subject matter of the Treaty. The ECJ can hear these cases by permission of the parties to the action.⁹

Actions against Community Institutions generally take the form of actions for annulment of legislation found in Regulations, Decisions, or Directives. Under Article 173, such actions can be brought only when the legislative act has binding effect. To have binding effect, the legislative act must be one which will have legal effect, and it must be a clear and final expression of the intent of a Community Institution.¹⁰ Article 173 allows any natural or legal person to lodge an annulment action, provided they have *locus standi* (i.e. standing), which requires that they have a legal interest in the action and be directly impacted thereby.¹¹

Because the ECJ's decisions based on EEC law have the effect of superseding national law, the ECJ is in a uniquely powerful position. As a multinational authority, the ECJ substantially impacts business conduct in the Community as a whole as well as within each individual Member State. While the ECJ is not bound by the principle of *stare decisis*, its prior decisions nonetheless represent persuasive authority which is considered in the context of the Court's reasoning. In practice, the Court has recognized its prior decisions as developing case law, and in its efforts to promote legal certainty, has tended to follow those precedents.¹² Recognizing the impact of the Court's decisions in the evolving interpretation of EEC law, those doing business with the Community as well as those proposing to enter this broadening market must become aware of the Court decisions that will impact the business community in Europe. To facilitate that effort, this comment will survey some of the ECJ's major decisions handed down in 1990.

9. *Id.*

10. BEBR, *supra* note 3, at 22.

11. LASOK & BRIDGE, *supra* note 4, at 267.

12. BEBR, *supra* note 3, at 10.

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The cases selected for discussion address a number of topics that most directly impact upon the European business environment including:

- (1) Clarification of EEC regulations on dumping;
- (2) Preservation of competition by preventing abuse of a dominant position;
- (3) Equal employment and equal pay requirements; and
- (4) Harmonization of EEC law with that of member states.

II. ANTIDUMPING DUTIES

The process of “dumping” is the sale of products for export at prices which are lower than the product’s normal value.¹³ Various motives for dumping include: (1) Maximizing of short term profits; (2) establishing or maintaining markets; or (3) protecting full employment. The primary motive giving rise to Community concern, however, is predation.¹⁴ An exporter motivated by predation attempts to eliminate competition in the import countries by selling products at prices which producers in the import countries cannot match. This elimination process creates a monopoly power for the exporter, destroys competition, and severely constricts the market shares enjoyed by producers in the import countries.

To implement EEC objectives related to competition within the Community and strength of Community business, the EC Council can, by resolution, impose antidumping duties on companies that engage in dumping. Because establishment of predatory intent is difficult at best, the EEC has not viewed such intent as a prerequisite to the imposition of antidumping duties. Instead, under Regulation 2176/84,¹⁵ the EEC will impose duties when dumping

13. J. BESSLER & A. WILLIAMS, *ANTI-DUMPING AND ANTI-SUBSIDY LAW: THE EUROPEAN COMMUNITIES* 42 (1986).

14. *Id.* at 44.

15. EEC Reg. 2176/84, O. J. Eur. Comm. (No. L 201) (1984).

that results in injury to existing Community interests occurs.¹⁶ During 1990, the Court heard three major cases regarding antidumping duties. In particular, it decided cases brought by businesses which had taken issue with the effect of these duties and the method of their application.

A. *Extramet Industrie SA v. EC Council*¹⁷

In *Extramet Industrie SA v. EC Council*, an importer of calcium metal brought an action to stay antidumping duties. Council Resolution 2808/89 imposed antidumping duties of 21.8% and 22% on imports of calcium metal originating in China and the U.S.S.R. The two largest processors of calcium metal in the EEC were a Community producer and an importer which relied on material primarily from China and the U.S.S.R.

The importer brought proceedings before the ECJ seeking an interim stay on application of the antidumping duties until the Court made a final ruling in the underlying action.¹⁸ The importer claimed that, because of the duty, it had lost nearly all its sales in the Community, representing about one-third of its production.¹⁹ The importer also claimed that its current profitability was only a matter of luck prompted by a rise in demand for its metals on the world market. Should such a demand decrease, the importer asserted that the increased price and decreased demand in Europe would result in failure of its business. The importer further contended that the Community producer had aggravated its problem by refusing to supply the importer with calcium metal and that the Community producer's difficulties were not a function of dumping, but rather bad management and high fixed costs.

In analyzing the petition, the ECJ acknowledged that, pending a final judicial decision regarding application of the definitive duty,

16. LASOK & BRIDGE, *supra* note 4, at 450.

17. [1990] 2 Comm. Mkt. L.R. 406 (Feb. 14, 1990).

18. *Id.* at 408-09. Article 185 of the EEC Treaty states that although actions before the ECJ do not automatically have suspensory effect, the ECJ may in its discretion order such suspension if the circumstances warrant it. Treaty, *supra* note 1, at art. 185.

19. *Id.* at 409, ¶ [18].

the Court could order suspension of the antidumping duty if there were sufficient factual and legal grounds which create an urgency.²⁰ The ECJ further stated that the urgency was determined by the need to prevent serious, irreparable damage to the party seeking suspension.²¹ The ECJ case law states that the urgency required for suspension cannot be sufficiently justified by pleading the effects inherent in the imposition of the antidumping duty.²² In this case, the ECJ found that the importer was pleading urgency based on the increase in production costs within the Community and the resulting market share loss. The Court found these impacts to be inherent in the antidumping duty and thereby decided that they were an inadequate justification for suspension of the duty.²³ To justify the Court's finding of urgency beyond the effects of the duty, the importer alleged in its pleading that there was a risk that it may not be able to survive after losing part of its market in Europe should the world market drop. The ECJ found this risk to be speculative and therefore inadequate to justify suspension of the duty. The Court looked at the world market for the importer's product, and found that the demand was rising. Furthermore, concluded the Court, because the importer's business overall was profitable, no urgency existed to justify suspension of the duty.

The ECJ's decision in *Extramet*, therefore provides the model for assessing the urgency necessary to justify suspension of antidumping duties. When definitive antidumping duties have been imposed, the ECJ has authority to grant suspension for urgency pending judicial appeal of those duties. The urgency necessary to justify such a suspension, however, must be independent of the results inherent in the antidumping duty itself. The ECJ will examine the business's current profitability and its position with respect to the entire world market, not simply its position within the European Community. To fulfill the condition of urgency, the

20. *Id.* at 409, ¶ [16] (citing Article 82(2) of the Rules of Procedure).

21. *Id.* at 409, ¶ [17].

22. *Extramet* at 409, ¶ [20] (citing *Technointorg v. EC Council*, [1987] E. Comm. Ct. J. Rep. 1793, [1987] 3 Comm. Mkt. L.R. 491).

23. *Id.*

importer must show with particularity existing conditions which would lead to irreparable serious damage.

In analyzing the request for the suspension, the *Extramet* Court did not address the petitioner's allegation that the Community producer had caused its own injury. The Court's analysis in this case implies that the actions of the Community producer in causing the injury which led to the imposition of antidumping duties is not a relevant factor in determining whether sufficient urgency exists to justify suspension of the antidumping duty.

B. Antidumping as Applied to Original Equipment Manufacturers

In 1990, the ECJ decided two antidumping cases, *Nashua Corp. and Others v. EEC Commission and EC Council*²⁴ and *Gestetner Holdings plc v. EC Council and EEC Commission*.²⁵ These cases resulted from the imposition of antidumping duties on plain paper copiers (PPCs) manufactured in Japan. In each of these cases, the complaining party was an Original Equipment Manufacturer (OEM). An OEM is a company that imports foreign-made products, manufactured to the OEM's specifications, into the Community under its own brand name.²⁶ The nature of the importers in each case raised questions regarding the calculation of the dumping duty, how the duty should apply to the OEM, and whether the OEM had standing to protest the imposition of the duty at all.

I. Nashua Corp. and Others v. EC Commission and EC Council

The first of these two cases, decided the same day, was brought by the Nashua Corporation, a company headquartered in the United States with subsidiaries in the Community. Nashua purchases most of its PPCs from the Japanese company, Ricoh, with the purchase

24. [1990] 1 Comm. Mkt. L.R. 6 (Mar. 14, 1990).

25. [1990] 1 Comm. Mkt. L.R. 820 (Mar. 14, 1990).

26. *Nashua Corp. and Others v. EEC Commission and EC Council*, [1990] 2 Comm. Mkt. L.R. 6, 11 (Mar. 14, 1990).

taking place in Japan. Ricoh makes the PPCs to Nashua's specifications and bearing Nashua's trademark livery. Nashua is solely responsible for exporting, shipping, marketing, selling, and servicing the machines once they are purchased from Ricoh.

In February, 1987, the EC Council, based on a recommendation of the EEC Commission, passed Regulation 535/87 imposing a definitive antidumping duty on PPCs purchased in Japan.²⁷ The twenty percent antidumping duty applied to all PPCs exported by Ricoh, whether sold through an OEM or not. In response, Nashua proposed an undertaking²⁸ under EC Council Regulation 2176/84, Article 10 in an effort to limit the injury caused by the dumping.²⁹ The undertaking proposed limiting the number of units brought into the Community and included Nashua's pledge to "do its utmost to prevent evasion by resales from outside the EEC and . . . supply regular reports and information to the EEC Commission to ensure effectiveness of the undertaking."³⁰ The EEC Commission rejected the undertaking. This prompted Nashua to file suit seeking annulment of the rejection and the antidumping duty imposed by EC Council Regulation 535/87.

Nashua's complaint first argued that the Court should annul the EEC Commission's rejection of their undertaking offered in accord with Article 10, Regulation 2176/84. In dismissing this portion of Nashua's complaint, the ECJ pointed out that EEC Commission decisions are not final, but rather are only recommendations which the EC Council is free to disregard if it so chooses.³¹ Because the EC Commission's decisions are not final, they lack the binding effect required for annulment actions under Article 173. Rejection of the undertaking by the EEC Commission becomes binding only after the EC Council confirms the rejection by imposing a definitive antidumping duty.³² In the ECJ's view, therefore,

27. EEC Council Reg. 535/87 (1987) O. J. Eur. Comm. (No. L 54/12) (1987).

28. An undertaking is a proposal in which the offeror commits to a specific modification of its pricing or volume of exports in order to eliminate the Community injury and thereby avoid imposition of an antidumping duty.

29. EEC Reg. 2176/84, *supra* note 15.

30. *Nashua* at 15.

31. *Id.* at 16.

32. *Id.* at 42, ¶ [8].

Nashua's proper procedural course was to go before the EC Council and argue against the adoption of the definitive duty, and if that failed, to then contest the duty itself before the Court. The ECJ therefore found this portion of Nashua's complaint inadmissible.

Nashua's second argument was to seek annulment of EC Council Regulation 535/87 imposing the duty on Ricoh PPCs. The Court considered whether Nashua had standing to bring an action for annulment of the regulations. To have standing, the regulations must be of direct and individual concern to the exporter in question.³³

Based on the Court's previous cases, the Council argued that a finding of direct and individual concern required one of two circumstances. The trader must be either: (1) A producer or exporter whose own business activities showed a practice of dumping or (2) an importer whose resale prices were used to substantiate the existence of dumping.³⁴ Independent importers, on the other hand, were not seen as being directly and individually concerned. The EC Council contended that Nashua belonged in the independent importer category.

The Advocate General (AG)³⁵ began his analysis of the issue by noting that the OEM's association, or lack thereof, with the manufacturer was neither sufficient nor a necessary condition to a finding of direct and individual concern.³⁶ In rejecting the EC Council's argument, the AG pursued three primary lines of analysis. First, the AG focused not on whether Nashua was an exporter or importer, but on its status as an OEM selling products manufactured by a company found to be dumping. Given the relationship between Nashua and Ricoh, the AG noted that if Ricoh were directly and individually concerned, as was undisputed, then

33. *Id.* at 42.

34. *Id.* at 20.

35. The Advocate General (AG) is required to offer an impartial opinion to the ECJ prior to the Court handing down its opinion. While the ECJ is not bound by the AG's opinion, these opinions are often persuasive. The AG's opinions tend to provide valuable insight into the Court's reasoning process because they give a more detailed analysis of the legal issues than are normally found in the ECJ's statement of judgment itself. BEBR, *supra* note 3, at 8-9.

36. *Nashua* at 21.

Nashua would be in the same position with regard to the Ricoh-produced products it sold under the Nashua brand. The fact that the weighted dumping margin for Ricoh was calculated with reference to the difference in Ricoh's sales to Nashua versus its sales to other purchasers supported the AG's reasoning.³⁷ Further, Nashua's distinctive livery on the PPCs brought through customs into the Community distinguished the product and its owner. As a result of the product's distinguishing appearance, customs officials would apply duty based on the Nashua brand. The AG concluded that this made Nashua directly and individually concerned with the regulation imposing the duty.³⁸

In his second line of reasoning, the AG recognized the linkage between the admissibility issue and the arguments on the merits of the case. Nashua complained that it should have been treated as the exporter of its own products and therefore a dumping margin should have been calculated for it separate from Ricoh. While not reaching a conclusion on the issue at this point, the AG noted that if this argument had merit, then failure to provide the separate calculation would single out Nashua, making it directly and individually concerned with the regulation.³⁹

Finally, the AG noted that undertakings offered under Regulation 2176/84, such as the one offered by Nashua, were efforts by individual firms to minimize the injury caused by dumping and thus avoid imposition of the duty. Therefore, when the Council ratifies the Commission's rejection of such an undertaking by imposing a definitive duty, the decision is of direct and individual concern to the firm unsuccessfully proposing the undertaking.⁴⁰ The AG therefore considered Nashua to be directly and individually concerned, and advised that its application for annulment was thus admissible.⁴¹

In its judgment, the ECJ agreed with the AG, and found that Nashua was directly and individually concerned. The Court based

37. *Id.* at 23.

38. *Id.*

39. *Id.* at 24.

40. *Id.* at 25.

41. *Nashua* at 25.

its judgment on the fact that in constructing the normal value for the dumped products, the EC Council and EEC Commission (the Institutions) used the costs incurred by Ricoh in its sales to OEMs, as compared to its costs for sales under its own brand.⁴² This normal value was then used to calculate a weighted dumping margin for Ricoh that reflected its sales through its distribution channels. This weighted dumping margin was used to calculate the duty.⁴³ The ECJ noted that, in making these calculations, the Institutions specifically identified the traders involved. As one of those traders, Nashua was directly and individually concerned with the duty imposed on Ricoh.⁴⁴ The Court therefore held that Nashua's complaint was admissible.

The Court then turned to the merits of the case. To support its claim, Nashua made the following five submissions:

- (1) miscalculation of the dumping margin;
- (2) incorrect construction of the normal value of products sold to OEMs;
- (3) miscalculation of the antidumping duty;
- (4) infringement of the principle prohibiting discrimination; and
- (5) illegality of the refusal of its undertaking.⁴⁵

The ECJ rejected each of Nashua's five submissions.

In seeking annulment, Nashua first alleged that the Institutions incorrectly calculated the dumping margin for Ricoh as a whole, including all OEM sales. Nashua further claimed that a separate margin should be calculated for it apart from Ricoh. Nashua supported this argument by characterizing itself as an exporter. This characterization is based on the fact that Nashua purchases the Nashua-branded PPCs in Japan and is solely responsible for its own exporting, sales, and after-sale service. Nashua pointed out that its suggested separate calculation was in line with previous EC

42. *Id.* at 43, ¶ [17].

43. *Id.* at 43, ¶ [18].

44. *Id.* at 43, ¶¶ [19], [20].

45. *Id.* at 44.

Council decisions because the Council had on a number of prior occasions calculated separate margins for exporters of products purchased from a dumping manufacturer.⁴⁶

In responding to Nashua's argument, the EC Council and the ECJ agreed that the appropriateness of a separate margin depended upon the characterization of Nashua as either an importer or an exporter. Only if the Court classified the company as an exporter would a separate margin be possible. In considering this issue, the ECJ had difficulty recognizing a company, such as Nashua, that is not established in the export country as an exporter. The ECJ also distinguished Nashua from other exporters for whom separate margins had been calculated because unlike those exporters, Nashua neither produced PPCs itself nor sold them on the domestic Japanese market.⁴⁷

The ECJ finally rejected Nashua's argument by considering the method for calculating the dumping margin found in EEC Regulation 2176/84. Article 2(13)(a) of the regulation defines the dumping margin as the "amount by which the normal value (of the product) exceeds the export price."⁴⁸ The normal value is the price payable for a like product in the domestic market of the country of origin. The export price is "the price actually paid for the product sold for export to the Community."⁴⁹ Therefore, because Ricoh sold the PPC's to Nashua for export to the Community, the price paid to Ricoh established the export price. It then followed that Ricoh's export price is used to calculate the dumping margin, and the dumping must therefore be attributed to Ricoh.

The ECJ also rejected, on policy grounds, the calculation of a separate dumping margin. The ECJ recognized that calculation of a separate margin resulting in lower duties for OEMs, such as Nashua, would encourage Ricoh to sell more of its products through OEMs. This would lead to an increase in Ricoh's dumping,

46. *Nashua* at 26.

47. *Id.* at 44, ¶ [26].

48. *Id.* at 27.

49. *Id.* at 44, ¶ [24].

thereby expanding the Community injury and defeating the purpose of the duty.⁵⁰

Finally, the Court refused Nashua's suggestion that it follow the method of applying antidumping duties used in the United States. In *Nashua*, the ECJ referred to its prior decision, *Canon v. EC Council*, and stated that the Community need not follow the same course as its trading partners, even a major one such as the United States.⁵¹

Nashua's second submission was that the method adopted by the Institutions for construction of the normal value of products sold to OEMs did not consider the appreciable differences between sales to OEMs and sales under the manufacturer's own brand. "Normal value" is constructed by computing the exporter's production cost, including its selling, administrative and other general expenses, and then adding a reasonable profit margin. The normal value is compared to the export price to determine if dumping is occurring. The Institutions used a 5% profit margin in constructing the normal value instead of the 14.6% used elsewhere. Nashua claimed that this adjustment to profit margin alone failed to reflect the reduced sales, administrative and overhead expenses involved in sales to OEMs as opposed to sales to an ordinary dealer.⁵²

The Court rejected this argument, finding that the Institutions had considered the difference in expenses associated with the different sales methods. However, since there was no way to accurately gauge that difference, the Institutions found that adjustment in the profit margin alone could cover the estimated differences in cost as well. Nashua had given no information to show that the profit margin used was inadequate to cover the alleged differences among all OEMs.⁵³ Since Nashua failed to meet the burden of proof, the Court dismissed this portion of Nashua's complaint.

50. *Id.* at 44-45, ¶¶ [25], [29].

51. *Nashua* at 45, ¶ [30] (citing [1989] 1 Comm. Mkt. L.R. 915, at ¶ [15]).

52. *Id.* at 33.

53. *Id.* at 46, ¶¶ [33], [34].

Nashua's third claim was that the EC Council erred in calculating the antidumping duty on the basis of prices charged by Ricoh's subsidiaries in Europe rather than prices charged by Nashua itself. The ECJ responded by pointing out that Regulation 2176/84 requires that the duty not exceed either the dumping margin or the extent of the injury.⁵⁴ This standard gives the EC Council wide discretion in choosing the method for calculating the duty. This calculation may be different than the method used to calculate the margin.⁵⁵ The court also noted that the antidumping duty represents a comprehensive approach to address the cumulative injury caused by a representative percentage of all exports to the Community dumped by Japanese companies (in this case seventy percent).⁵⁶ Since Nashua failed to show that this approach had the effect of making the duty significantly different from what it would have been had the OEM prices been used for calculation, the Court rejected this submission.⁵⁷

Nashua's fourth claim was discrimination. The company alleged that although on its face the duty was applied uniformly to all Ricoh products, in absolute terms, Nashua paid a higher duty than Ricoh's related subsidiaries. This claim is based on the fact that Nashua's profit margin was sixteen percent compared with forty-two percent for Ricoh's subsidiaries. The ECJ rejected this argument saying that the difference in treatment is a product of Ricoh's pricing policies. Further, the Court noted that the purpose of the duty is to remove the injury to the Community, not to assure all importers the same profit margin.⁵⁸

Nashua's final claim was that the EEC Commission had illegally refused to consider the undertaking offered by Nashua, and the EC Council's imposition of the definitive antidumping duty had confirmed that refusal.⁵⁹ The ECJ rejected this claim, noting that both Article 7 of the GATT Anti-Dumping Code and Regulation

54. *Id.* at 46, ¶ [36].

55. *Id.*

56. *Nashua*, at 46, ¶ [37].

57. *Id.* at 46, ¶ [38].

58. *Id.* at 47, ¶¶ [40], [41].

59. *Id.* at 47, ¶ [43].

2176/84 provided for acceptance of undertakings from exporters only.⁶⁰ The ECJ justified this conclusion by noting that acceptance of undertakings from importers would encourage them to continue to import products at dumped prices. The Court also noted that the large number of importers involved would make monitoring compliance with the undertakings an extremely difficult task.⁶¹

In summary, the ECJ rejected each of Nashua's claims. As a result, Nashua remained subject to the duty imposed on all Ricoh products. Calculation of that duty was based on a weighted dumping margin which took into account all Ricoh produced products, regardless of the channel of distribution used for the sale of those products.

2. Gestetner Holdings plc v. EC Council and EEC Commission

The second of the antidumping cases relating to OEMs heard by the ECJ in 1990 also arose from the imposition of antidumping duties on PPCs imported from Japan. Gestetner, a British company, purchased all its brand name PPCs from Mita, a Japanese manufacturer. Mita would first ship the products to warehouses in Japan designated by Gestetner's agent. A delivery note for each consignment was then presented to Mita Japan, which sent the note to Mita Europe. Mita Europe then invoiced Gestetner, and drew payment from a letter of credit established by Gestetner.⁶² As a result of the imposition of antidumping duties on Mita, Gestetner was also subject to such duties. Gestetner filed suit in the ECJ seeking annulment of the regulation imposing duties on PPCs imported from Japan. In the alternative, Gestetner sought annulment of the regulation insofar as it imposed duties on PPCs manufactured by Mita.

Before turning to the merits of the case, the ECJ addressed the admissibility of Gestetner's complaint. The ECJ found Gestetner's

60. *Id.* at 47, ¶ [45].

61. *Nashua* at 48, ¶ [46].

62. *Gestetner Holdings plc v. EC Council and EEC Commission*, [1990] 1 Comm. Mkt. L.R. 820, 828 (Mar. 14, 1990).

principle claim, annulment of the entire regulation imposing the antidumping duty on PPCs from Japan, to be inadmissible. The Court based its conclusion on the reasoning that:

a regulation imposing different anti-dumping duties on a series of traders is of direct concern to any one of them only in respect of those provisions which impose on that trader a specific anti-dumping duty and determine the amount thereof, and not in respect of those provisions which impose anti-dumping duties on other undertakings.⁶³

On the other hand, the Court considered Gestetner's alternate claim, annulment of the regulation insofar as it imposes a duty on Mita PPCs, appropriate under the above quoted criteria. Using the same reasoning found in *Nashua*, the ECJ found the alternate claim admissible.⁶⁴

On the merits of the case, Gestetner set forth five submissions, as follows:

- (1) Miscalculation of the export price;
- (2) incorrect comparison of the normal value and the export price;
- (3) incorrect definition of Community industry;
- (4) incorrect assessment of the interests of the Community; and
- (5) inadequate reasons for rejection of the undertaking offered by Gestetner.

Under its first claim, Gestetner argued that the export price, on which the dumping margin was calculated, was incorrectly constructed. The Council determined the export price as the amount which is paid when the imported product is first sold to an independent buyer.⁶⁵ This standard led the Council to use the price invoiced by Mita Europe to Gestetner, with a deduction of

63. *Id.* at 842, ¶ [12].

64. *Id.* at 844.

65. *Id.* at 828.

five percent for the role played by Mita Europe.⁶⁶ Gestetner argued that since it was completely independent of Mita, the price paid to Mita was the export price, and therefore no adjustments should be made for the role played by Mita Europe.⁶⁷ This adjustment is important because the comparison of normal value with the export price determines the dumping margin. If the higher, unadjusted export price advocated by Gestetner had been used, the dumping margin would have been less.

In analyzing the problem, the AG noted that Mita Europe did not actually purchase the products and then resell them to Gestetner. Instead, the AG concluded that Mita Europe acted as the agent of Mita Japan. In view of Mita Europe's role as an agent, its costs were considered part of Mita Japan's direct selling expenses. Article 2(10)(c) of EEC Regulation 2176/84 requires that the Institutions consider such selling expenses when making allowances for the difference in selling costs between domestic and export sales.⁶⁸

The ECJ found that the price should be constructed in accordance with Article 2(8)(b) of Regulation 2176/84. This Article requires that the export price take as its basis the price at which the imported product is first resold to an independent buyer.⁶⁹ In this case, the export price would be the price invoiced by Mita Europe to Gestetner, with a deduction to account for the role played by Mita Europe in those sales.⁷⁰ Since Gestetner had not challenged the five percent amount used by the Council for that adjustment, the ECJ found the export price determined to be correct and dismissed this portion of Gestetner's complaint.

Gestetner next claimed that the calculation by the Institutions of the dumping margin was incorrect because the comparison of normal value of the product and its export price was not performed at the "same level of trade." Gestetner alleged that adequate allowances were not made to the normal value of the product to

66. *Id.*

67. *Gestetner* at 827-28.

68. *Id.* at 830.

69. *Id.* at 845, ¶ [29].

70. *Id.* at 845, ¶ [34].

reflect the different cost and profit margins associated with sales to OEMs versus sales of the manufacturer's own brand name products. It claimed that this violated Regulation 2176/84, Articles (9) and (10).⁷¹

The Court rejected Gestetner's argument because the Institutions adjusted the normal value by considering the difference in costs and profits between OEM sales and sales through other distribution channels. The ECJ explained that the Institutions made an adjustment to profit margin⁷² to assure price comparisons at the same level of trade. The Court considered adjustment in this single factor as adequate in the absence of a more precise way to calculate the difference in both costs and profit margins between OEM and other sales. Like *Nashua*, Gestetner failed to show any further need for adjustment, and the Court dismissed its complaint.⁷³

Gestetner's third claim alleged that the Institutions incorrectly defined the term "Community Industry." In order to determine the existence of an injury within the Community sufficient to justify imposition of duties, the "Community Industry" must necessarily be defined.⁷⁴ The error alleged by Gestetner was that the Institutions had improperly included four Community producers⁷⁵ whose links with Japanese exporters had, in fact, contributed to the Community injury resulting from the dumping of Japanese PPCs. The ECJ responded that Article 4(5)⁷⁶ affords the Council broad

71. EEC Reg. 2176/84, *supra* note 15, at arts. 9, 10.

72. The profit margin used for OEM sales was 5% while for other sales it was 14.6%. This difference was designed to reflect the reduced selling costs born by the manufacturer in the case of OEM sales. *See generally supra* notes 24-61 and accompanying text (discussing *Nashua*).

73. *Gestetner* at 846, ¶ [39].

74. EEC Reg. 2176/84, *supra* note 15, at art. 4.

75. The companies named were Rank Xerox, Tetras, Olivetti, and Oce.

76. In Article 4(5), "Community Industry" refers to:

the Community producers as a whole of the like product or to those of them whose collective output of the products constitutes a major proportion of the total Community production of those products except that:

--when producers are related to the exporters or importers or are themselves importers of the allegedly dumped . . . product the term "Community Industry" may be interpreted as referring to the rest of the producers;

Gestetner at 847, ¶ [42].

discretion to apply "Community Industry" to individual companies, and that such application must be done on a case-by-case basis.⁷⁷ The ECJ also held that the EC Council's determination would be overturned only if manifest error had been shown. Gestetner had not shown such error, and the ECJ therefore dismissed this issue.⁷⁸

Gestetner's fourth submission criticized the E. C. Council for imposing antidumping duties in this case. Gestetner argued that such duties should be imposed only "where the facts as finally established show that. . . the interests of the Community call for Community intervention."⁷⁹ Here, Gestetner claimed that the EC Council failed to consider the impact of the duty on competition, prices, and ultimately, the consumer. In rejecting this claim, the AG noted that the decision to impose duties requires a balance of complex, and often competing, economic factors considered in both the long and short run.⁸⁰ Because of the complexity of this assessment, the AG noted that the ECJ has consistently held that reversal would occur only when the EC Council had manifestly erred in appraisal of facts or rules of procedure or had clearly abused its power.⁸¹ The AG determined that the EC Council committed no such error.⁸²

In this case, the ECJ found that the EC Council had properly considered the interests of all parties concerned, and had adequately taken account of the competitive markets and potential price increases that would flow from imposition of the duty. The ECJ therefore affirmed the EC Council's conclusion that the benefits of the antidumping duty outweighed the burden of higher prices to consumers, and further indicated that the preservation of competition and opportunity for Community producers outweighed the concerns of consumers.⁸³ The ECJ also noted that the

77. *Gestetner* at 847, ¶ [43].

78. *Id.* at 850, ¶ [61].

79. *Id.* at 837 (citing EEC Reg. 2176/84 at art. 12(1)).

80. *Id.* at 837.

81. *Id.* (citing Case 255/84, *Nachi Fujikoshi v. EC Council*, at ¶ [21]).

82. *Gestetner* at 838.

83. *Id.* at 850, ¶ [64].

imposition of antidumping duties in this case was necessary to preserve the existence of an independent Community photocopier industry which would retain jobs and encourage technological development in this industry.⁸⁴

Finally, Gestetner appealed the EC Council's rejection of the undertaking it had submitted, wherein it offered to raise its prices. Referring to the *Nashua* case, the AG reiterated his stand that undertakings could not be accepted from importers such as Gestetner. They were not a well-defined group, and once an undertaking had been accepted from one, it would be necessary to do so for all. This procedure would present an unworkable administrative burden.⁸⁵ The ECJ agreed with the AG, resting its conclusion on both Article 7 of the GATT Anti-Dumping Code,⁸⁶ which provides for acceptance of undertakings from exporters only, and on Article 10 of Regulation 2176/84, which allows for undertakings to be accepted from importers only in exceptional circumstances.⁸⁷

The AG also pointed out that, as a matter of policy, the undertaking proposed by Gestetner should not be allowed. Instead of eliminating the injury to the Community, this proposal would only allow Gestetner a larger profit without offering any incentive to buy from Community producers.⁸⁸ Such an undertaking would only help Community distributors, not the intended beneficiaries, the Community producers.⁸⁹

In summary, the ECJ rejected each of Gestetner's claims, using much the same reasoning that it applied in *Nashua*. Gestetner remained subject to antidumping duties imposed on all Mita products, and because it could not clearly be classified as an exporter, it was denied the opportunity to submit an undertaking in an effort to mitigate those duties.

84. *Id.* at 850, ¶ [64].

85. *Id.* at 840.

86. [1980] 1 Com. L. Eur. 7.

87. *Gestetner* at 851, ¶ [70].

88. *Id.* at 839.

89. *Id.* at 840.

The ECJ's decisions in *Nashua* and *Gestetner* provide valuable information to OEMs about the effect of any antidumping duties imposed on their suppliers. These decisions make it clear that an OEM that is not established in the country of export has little chance of successfully attaining a calculation of the dumping margin separate from its supplier. While the Court may consider the prices charged by the OEM in calculating a weighted dumping margin for the manufacturer/supplier, the OEM is likely to be subjected to the whole of that weighted calculation and not simply to the portion attributable to the OEM alone.

The export price used to calculate the dumping margin is the price of the product sold for export to the OEM or the first independent buyer, not its resale price to the Community buyer. In the absence of clear information about such export prices, the Institutions will construct the price by considering the cost to the producer, including the costs of selling, plus a reasonable profit margin. Although the costs associated with sales to OEMs may significantly differ from the costs of sales to domestic buyers, adjustments for such differences are likely to be included in a single adjustment of profit margin. To change this method of calculation, the OEM has the burden of proof to show with particularity, the cost differences associated with the specific circumstances of its purchases from the manufacturer.

The Institutions will not consider undertakings offered by an OEM to avoid the antidumping duty imposed because of its manufacturer's dumping practices. The ECJ in *Nashua* and *Gestetner* confirmed the traditional practice of rejecting undertakings from importers. The nature of OEMs as neither purely importer or exporter was irrelevant to the ECJ. OEMs represent a large group of companies, not easily identifiable in the application of duties, and acceptance of an undertaking from one of them would impose unworkable administrative and monitoring tasks on the Institutions.

Finally, the ECJ's focus in determining the proper application of antidumping duties clearly revolves around the protection of Community industries and the preservation of competition in a climate which will allow these industries to flourish. While this

determination requires an examination of complex economic issues, the public interest of keeping prices low for the consumer is of only secondary interest to the ECJ in this evaluation.

III. ABUSE OF DOMINANT POSITION

An important case decided by the ECJ in 1990 involving abuse of a dominant position was *Tetra Pak Rausing SA v. Commission of the European Communities*.⁹⁰ This was a case of first impression in which the ECJ interpreted Articles 85 and 86 of the EEC Treaty to determine whether they conflicted, and if so, which provision would predominate.

Tetra Pak, a Swiss company, controlled approximately ninety percent of the Community market in aseptic packaging and fifty percent of the Community market in fresh milk packaging. This dominant position was further enhanced when Tetra Pak purchased the Liquepak Group, holder of an exclusive patent for a sterilization technique for the packaging of liquid foods.⁹¹ After the acquisition, Elopak, a Norwegian company, brought a complaint alleging that Tetra Pak violated Article 85⁹² and Article 86.⁹³

90. Case T-51/89 (not yet reported, copy on file at the office of THE TRANSNATIONAL LAWYER).

91. *Id.* at Advocate General's Opinion.

92. Article 85 states:

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

By virtue of its exclusive license, Liquipak held a block exemption under Article 85(3) of the EEC Treaty. This exemption allowed the company to engage in certain practices which would otherwise be seen as restricting or distorting competition, and therefore in violation of the Treaty provisions. The purpose of such an exemption is to encourage the transfer and development of "know how." Therefore, when Tetra Pak acquired Liquipak, Tetra Pak also acquired the benefit of the exemption. According to the petitioner, this acquisition should not allow Tetra Pak to elude the provisions of Article 86 which were designed to prevent the distortion of competition by a company in a dominant position.⁹⁴ Tetra Pak, by virtue of its ninety percent market share in aseptic packaging and fifty percent market share in milk packaging clearly dominated the market in aseptic packaging. The key question,

-
- any agreement or category of agreements between undertakings;
 - any decision or category of decisions by associations of undertakings;
 - any concerted practice or category of concerted practices;
 - which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
 - (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
 - (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Treaty, *supra* note 1, at art. 85.

93. Article 86 states:

- Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:
- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
 - (b) limiting production, markets or technical development to the prejudice of consumers;
 - (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
 - (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Treaty, *supra* note 1, at art. 86.

94. "Dominant position" is defined as a monopoly within a sector of the economy. LASOK & BRIDGE, *supra* note 4, at 437-38.

therefore, was whether Article 86 could be applied to a company holding an Article 85 exemption.⁹⁵

Beginning its analysis, the Court noted that both Articles have as their primary objective the preservation of undistorted competition. The ECJ noted, however, that the two Articles have different applications. Article 85 applies to agreements between companies, decisions of associations, or concerted practices. Article 86 affects the unilateral acts of one or more companies. As a result, although their goals are the same, the Court approaches these two Articles from different levels.⁹⁶

The ECJ found that the presence of an exemption under Article 85 does not stop the inquiry as to violation of Article 86. That inquiry focuses on the circumstances of the acquisition and the effect it has on competition in the market. The ECJ held that an abuse of Article 86 would exist whenever the undertaking held by the dominant company had such influence on the market that its presence weakened competition. In the Court's view, Article 86 would prohibit such an undertaking from hindering the maintenance of existing competition or the growth of such competition by using methods outside the normal competitive practices of commercial operators.⁹⁷ In defining the relevant inquiry in this way, the ECJ noted that the fact that a dominant company had acquired the exemption was not in and of itself controlling. Rather, the effect of that acquisition on the market was key in determining whether a violation of Article 86 existed. Applying this standard to the case, the Court found that because Tetra Pak's acquisition precluded any competition in the relevant market, Article 86 had indeed been violated.⁹⁸

Tetra Pak argued that the ECJ's interpretation of these Articles rendered application of Article 86 unpredictable, and thereby

95. *Tetra Pak* at "Conclusions of the parties."

96. *Id.* (citing Case 6/72, *Europemballage and Continental Can v. EEC Commission* [1973] E. Comm. Ct. L. Rep. 215, ¶ [25]).

97. *Id.* at "Schematic analysis of Articles 85 and 86 of the Treaty and of secondary legislation."

98. *Protection of Competition by Prevention of Abuse of Dominant Position*, *London Times*, Sept. 13, 1990, at Features §.

violated the policy of uniform application of the law.⁹⁹ In rejecting this argument, the ECJ noted that national courts, in applying Community law, can insure uniform application by referring questions of interpretation of these Articles to the ECJ for preliminary rulings. Further, the Court noted that a company in a dominant position has “a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market,”¹⁰⁰ and therefore cannot rely on “alleged unpredictability of the application of Article 86 in order to escape the prohibition there laid down.”¹⁰¹

The Court’s analysis in *Tetra Pak* reinforces the concept that both Article 85 and Article 86 of the EEC Treaty seek to protect competition within the Community. Article 85, however, also attempts to temper that protection in ways which promote innovation and transfer of “know-how.”

In applying these two provisions under circumstances which would seemingly make them contradictory, the Court is careful to distinguish the different levels they affect. The distinction drawn by the ECJ is that Article 85 deals with agreements between two or more parties, while Article 86 addresses unilateral acts of a single party. The process of acquisition, therefore, is particularly vulnerable to the prohibitions of Article 86. Acquisitions must therefore be analyzed in terms of their possibility for taking a company in a dominant position into the range of the Article’s prohibitions. In particular, the acquiring company must focus on the circumstances of the acquisition and its potential for distorting competition within the Community. Should such distortion be found, the prohibitions of Article 86 become controlling, and no reliance on the exemptions offered by Article 85 will allow dominant companies to escape their effect.

99. *Tetra Pak* at “Conclusions of the Parties.”

100. *Id.* (citing Case 322/81, *Michelin v. EEC Commission* [1983] E. Comm. Ct. L. Rep. 3461).

101. *Id.*

IV. SOCIAL POLICY BEFORE THE ECJ IN 1990

In addition to purely economic provisions, the EEC Treaty addresses certain social problems based “upon the need to promote improved working conditions and an improved standard of living for workers.”¹⁰² While recognizing that social services and employee benefits are primarily issues of domestic concern, the Treaty nonetheless attempts to encourage harmonization of this social policy among the Member States. A factor in improving the standard of living for workers and harmonization of social policy is the facilitation of free movement of labor throughout the Community by assuring workers an “adequate level of protection whether at home or in another Member State.”¹⁰³

One of the more prominent EEC social policies affecting workers is a requirement that both men and women enjoy equal employment opportunities. This equal opportunity requirement, which is embodied in Article 119 of the EEC Treaty, and clarified in a number of Council Directives,¹⁰⁴ gave rise to two cases before the ECJ in 1990, *Barber v. Guardian Royal Exchange Assurance Group*¹⁰⁵ and *Foster and Others v. British Gas plc*.¹⁰⁶

A. Barber v. Guardian Royal Exchange Assurance Group

In the *Barber* case, the ECJ considered a claim of sex discrimination based on the pension plan of the Guardian Royal Exchange Assurance Group of Great Britain. The petitioner, Mr. Barber, had been employed by Car & G Co. since 1948. This company was later taken over by Guardian Royal Exchange Assurance Group. Mr. Barber worked in its claims office in

102. Treaty, at art. 117.

103. LASOK & BRIDGE, *supra* note 4, at 465.

104. See Council Directive 75/117, [1975] O.J. Eur. Com. (No. L 45/19), (1979) 1 Com. L. Eur. 29; Council Directive 76/207, [1976] O.J. Eur. Com. (No. L 39/40), (1979) 1 Com. L. Eur. 34; Council Directive 79/7, [1979] O.J. Eur. Com. (No. L 6/24), (1979) 1 Com. L. Eur. 42; Council Directive 86/378, [1986] O.J. Eur. Com. (No. L 255/40), (1987) 1 Com. L. Eur. 170.

105. [1990] 2 Comm. Mkt. L.R. 513.

106. [1990] 2 Comm. Mkt. L.R. 833.

Sheffield from 1970 until 1980 when the office was closed and Mr. Barber was dismissed for redundancy (lay-off).¹⁰⁷

The Guardian pension plan was funded solely by employer contributions and was a "contracted out scheme."¹⁰⁸ Under the plan, the pensionable age for men and women varied, with the age set at sixty-two for men and fifty-seven for women. In the event of redundancy, employees received immediate pension benefits if they had attained the age of fifty-five for men or fifty for women.¹⁰⁹

Mr. Barber was dismissed as redundant at age fifty-two. As the severance terms of his employment contract required, Mr. Barber received a cash payment, statutory redundancy pay, and an ex gratia payment. He also received a deferred pension, to begin when he reached the age of sixty-two.¹¹⁰ If Barber had been a woman of fifty-two, he would have been entitled to full pension benefits. Considering this payment system to be discriminatory, Mr. Barber brought an action before the Industrial Tribunal in Britain claiming unlawful discrimination based on sex. After Mr. Barber's claim was dismissed by that tribunal, he followed the appeal process, leading eventually to the Court of Appeal.¹¹¹ That Court sought a preliminary ruling from the ECJ to determine if redundancy benefits, including a private pension, were subject to the Community laws requiring equal pay for men and women.

Article 119 of the EEC Treaty requires each Member State to "ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work."¹¹² The ECJ began its analysis by determining whether the

107. Barber v. Guardian Royal Exchange Assurance Group, [1990] 2 Comm. Mkt. L.R. 513, 518.

108. A "contracted out scheme" is one which substitutes for the earnings related portion of a state pension scheme, allowing those covered by it to reduce their contributions to the national scheme, "corresponding to the basic flat-rate pension payable under the national scheme to all workers regardless of their earnings." *Id.* at 524, ¶ 17.

109. *Id.* at 518-19.

110. *Id.* at 519.

111. *Id.* at 519-20.

112. Article 119 states:

Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

term “pay” in Article 119 included redundancy and pension benefits. Addressing first the redundancy pay, the ECJ found that whether required by statute or employment agreement, redundancy payments did fall within Article 119. In reaching this conclusion, the AG explained that “the crux of the matter is the existence of an unseverable causal connection between the employment and the benefit.”¹¹³ Such a connection is found when an “employer makes a payment out of his own funds to workers which he himself employs . . . on account of their work”¹¹⁴ In this case, the employer made the redundancy payment on the basis of the severance scheme laid out in the employee’s handbook, with amounts paid determined by the duration of the employee’s tenure with the company.¹¹⁵ The ECJ found that the payments thereby satisfied the “causal connection between the employment and the benefit” and were “pay” within the meaning of Article 119.¹¹⁶

In considering whether the pension benefits were “pay” under Article 119, the ECJ differentiated between statutory pension plans and private pension plans. Referring to its decision in *Defrenne I*,¹¹⁷ the Court noted that statutory pensions are not within Article 119 because they are determined by social policy, not by the employment relationship between employer and employee. On the other hand, private pensions, such as Guardian’s, were an integral part of the employment agreement entered into by employer and employee. Even though Guardian’s plan was a “contracted out scheme,” which by definition substituted for a portion of the state

For the purpose of this Article, “pay” means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.

Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

(b) that pay for work at time rates shall be the same for the same job.

Treaty, *supra* note 1, at art. 119.

113. *Barber* at 523.

114. *Id.*

115. *Id.* at 519.

116. *Id.* at 553, ¶¶ [13], [14].

117. *Id.* at 525 (citing Case 80/70, *Defrenne v. Belgium*: [1971] E. Comm. Ct. L. Rep. 445, [1974] 1 Comm. Mkt. L.R. 494, ¶¶ 7, 9).

social security scheme, the ECJ viewed it as different than a statutory scheme. The Court found determinative that the plan was fully funded by employer contributions and was established not by statute, but by the company's severance terms which were contractual in nature.¹¹⁸ The ECJ concluded, therefore, that the Guardian pension plan benefits were connected to the employment relationship and thus were "pay" under Article 119.

The ECJ then considered if the scheme used by the Guardian plan violated Article 119 in view of the fact that its differing treatment of men and women followed the national statutory pension scheme. In deciding the issue, the ECJ noted that Article 119 prohibited pay discrimination as between men and women regardless of the system which established the inequality.¹¹⁹ On that basis, the fact that Guardian's scheme followed the national statutory scheme had no effect in the application of Article 119.¹²⁰

In concluding that Article 119 prohibited pension plans, such as Guardian's, the ECJ noted that Article 119 required equality at each level of remuneration. It was insufficient to satisfy Article 119, said the Court, to base the "equal pay" analysis on a comprehensive assessment of all consideration paid. Such an analysis would not provide sufficient clarity to allow national courts to effectively review and assure compliance with Article 119.¹²¹

The ECJ concluded by stating that Article 119 prohibits the use of differing age conditions according to gender with regard to receipt of pension and severance benefits. The ECJ continued by saying that only those proceedings already pending before the National or Community Courts or filed after the date of this judgment could rely on the decision.¹²² The ECJ declined to make the judgment retroactive in recognition of the serious

118. *Barber* at 555, ¶ [25].

119. *Id.* at 556, ¶ [32].

120. *Id.*

121. *Id.* at 557, ¶ [34].

122. *Id.* at 559, ¶ [45].

financial consequences to pension and benefit programs that would result.¹²³

*B. Foster and Others v. British Gas plc.*¹²⁴

The British House of Lords brought the case of *Foster and Others v. British Gas plc.* to the ECJ seeking a preliminary ruling on the application of Council Directive 76/207¹²⁵ which mandates equal treatment in employment for men and women. The petitioners in the underlying action were female employees of the British Gas Corporation (BGC) who were required to retire on reaching the age of sixty. These retirements occurred between December 27, 1985, and July 22, 1986. During that period of time, the BGC's mandatory retirement age for men was sixty-five and sixty for women.¹²⁶

At the time of the petitioners' retirements, the BGC was a nationalized gas corporation with a monopoly on the gas supply to homes and businesses in Great Britain.¹²⁷ The BGC was therefore subject to the supervision of the Secretary of State and was required to report on its activities to the Secretary, who then passed those reports to the Houses of Parliament. The Secretary could give general directions to the BGC for the performance of its functions in the national interest, and the BGC was obligated to comply with those directions. The Secretary of State had the authority to require that the BGC pay over funds to him or allocate funds for specialized purposes, and again, BGC was obligated to comply. The BGC was not, however, considered an agent of the Secretary of State, nor were its employees in the Crown's employment for purposes of British law.¹²⁸

In analyzing the question presented by the House of Lords, the ECJ first determined whether the Directive 76/207 applied as

123. *Barber* at 559, ¶ [44].

124. [1990] 2 Comm. Mkt. L.R. 833.

125. [1976] O.J. Eur. Com. (No. L 39/40), (1979) 1 Com. L. Eur. 42.

126. *Foster* at 836.

127. *Id.* at 837.

128. *Id.* at 838.

against the BGC. The ECJ began by noting that a Council Directive may be enforced by individuals as against Member States, but may not be used to impose obligations on an individual in the absence of national legislation implementing the Directive.¹²⁹ Since no such legislation exists in Britain, the first issue the Court had to decide was whether the BGC should be classified as part of "the State" or as an "individual."

The ECJ noted that before analyzing the issue in the case, it had to determine jurisdiction. The Court found that because the issue involved interpretation of a provision of Community law, the ECJ's jurisdiction was proper. Once the ECJ gave its interpretation of the relevant Community law, the national courts were then responsible for determining whether a given party before them fell within categories defined by the ECJ.¹³⁰

The ECJ determined that the term "State" should be broadly construed for purposes of applying the Directive, citing its decision in *Marshall v. Southampton and South West-Hampshire Area Health Authority*.¹³¹ In *Marshall* the ECJ decided that "State" must be taken broadly, as including all the organs of the State. In matters of employment . . . this means all the employees of such organs and not just the central civil service."¹³² The ECJ found that such a broad interpretation of the term was appropriate to ensure that no Member State, or any public body charged with functions by that State, would be able to derive advantage from the Member State's failure to comply with Community law.

Returning to the facts of this case, the ECJ decided that since the British government had failed to pass national legislation to

129. *Id.* at 846, ¶ [16].

130. *Id.* at 856, ¶ [15].

131. *Foster* at 840 (citing Case 152/84, *Marshall v. Southampton and South West-Hampshire Area Health Auth.*, [1986] E. Comm. Ct. L. Rep. 723, [1986] 1 Comm. Mkt. L.R. 688). In *Marshall*, an individual was allowed to apply the provisions of a Directive against a local health authority. Although the local authority was in no way responsible for the failure of the relevant Member State to implement the Directive through national law, the ECJ nevertheless found that the local authority acted as an agent of the Ministry of Health. Because this Ministry clearly fell within the definition of the "State," it could not escape the provisions of the Directive by acting through its agent, the local authority. The ECJ noted the necessity of this broad interpretation in order to prevent the State from taking advantage of its own failure to implement the Directive as required.

132. *Id.*

implement Directive 76/207 within the required time frame,¹³³ it was necessary to apply the Directive broadly to any State body. Such an application prevents the Member State from deriving an advantage from its own failure to comply with the Directive. Based on the need for broad interpretation, the ECJ concluded that any “body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control [of] the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals”¹³⁴ is included in the term “State” for purposes of applying a Council Directive. Having thus defined the term “State” for purposes of applying the Directive, the ECJ left the national courts to determine if BGC fell within that definition.

The parties in the underlying case had agreed that if BGC fell within the definition of “State” for purposes of applying Directive 76/207, then under Article 5(1) of that Directive,¹³⁵ its pension policy was unlawful.¹³⁶ Believing that BGC did, indeed, fall within the definition of “State,” the AG turned briefly to the question of damages. The AG noted that because Community law did not directly address the question of damages,¹³⁷ they must be determined in accordance with the national law of the Member State. The AG did, however, find that the ECJ’s decision in *Van Colson* provided the national courts with guidance on the damages issue to the effect that “compensation must in any event be

133. Art. 9, Council Directive 76/207, [1979] O.J. Eur. Com. (No. L 34/40). Article 9 passed on February 9, 1976 requires that “Member States shall put into force the laws, regulations and administrative provisions necessary in order to comply with this Directive within 30 months of its notification. . . *Id.*

134. *Foster* at 857, ¶ [20].

135. Article 5(1), Council Directive 76/207 states:

Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.

136. *Foster* at 837, ¶ 2.

137. *Id.* at 852-53, ¶ 23.

adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation."¹³⁸

In summary, the ECJ broadly construed the term "State" for purposes of defining those entities against whom Community Directives apply. However, the court left to national courts to decide whether a particular organization fit within the parameters set out in the ECJ's definition.

The ECJ's decisions in the *Barber* and *Foster* cases demonstrate its policy of broad interpretation of Community law governing equal employment opportunity. This policy is seen in the ECJ's interpretation of the term "pay" in Article 119 as including all forms of compensation that arise from the employment relationship, and its interpretation of the term "State" for purposes of applying Council Directives, as including any body under the control of the State with special powers beyond those possessed by individuals. This policy of broad interpretation, therefore, should provide national courts with guidance in their efforts to apply Community law, and thereby hasten the process of standardization of law throughout the EEC in the area of social policy.

V. HARMONIZATION OF LAWS

In joining the European Economic Community, Member States delegate a portion of their lawmaking power to the Community, and agree to abide by the Community laws.¹³⁹ In implementing Community law, however, conflicts with national laws do arise. To meet the objectives of the EEC, therefore, the ECJ must make decisions which bring the laws of the Member States into harmony with each other and with the Community as a whole. This is a continuing process and is an important category of the ECJ's decisions in 1990.

138. *Id.* at 853 (citing Case (14/83), *Van Colson and Kamman v. Land Nordrhein-Estfalen*, [1984] E. Comm. Ct. L. Rep. 1891, [1986] 2 Comm. Mkt. L.R. 430, ¶ 28).

139. LASOK & BRIDGE, *supra* note 4, at 290.

A. Regina v. Secretary of State for Transport ex parte Factortame Ltd. and Others¹⁴⁰

Regina v. Secretary of State for Transport ex parte Factortame Ltd. and Others illustrates the problem of harmonizing national and Community laws. This case arose as a result of changes made in 1988 to the statutory system for registering fishing vessels in Britain. This system was amended to prevent “quota hopping,” whereby vessels flying the British flag but having no actual connection with the United Kingdom plundered British fishing quotas.¹⁴¹ A group of Spanish companies which had been operating ninety-five fishing vessels registered in the United Kingdom sought judicial review of this amendment and challenged whether it was compatible with Community law.¹⁴² The Spanish companies also sought interim relief until such time as a final judgment was given on their underlying application for judicial review.¹⁴³

In considering the application for interim relief, the British House of Lords noted that national law prohibited the granting of an injunction against the Crown.¹⁴⁴ However, the House of Lords did note that the petitioners in the underlying action would suffer irreparable damage if the interim relief were not granted and they were eventually successful in the underlying case.¹⁴⁵ This fact was especially significant because British law does not provide for the recovery of losses incurred during proceedings to establish a legal right.¹⁴⁶ The House of Lords, therefore, sought a preliminary ruling on whether Community law required the granting of the interim relief requested even though national law prohibited such relief.¹⁴⁷

140. [1990] 3 Comm. Mkt. L.R. 867.

141. *Id.* at 891, ¶ [4].

142. *Id.* at 891, ¶ [3].

143. *Id.* at 893, ¶ [10].

144. *Id.* at 893, ¶ [13].

145. *Regina v. Secretary of State for Transport* at 893, ¶ [13].

146. *Id.* at 875, ¶ [8].

147. *Id.* at 894, ¶ [15].

The AG noted that the need for interim relief results from the fact that there are often two different points in time that mark the course of a law: The point where the law comes into existence and the point when the legal right it confers is definitively established through the judicial process. The AG clarified, however, that once the legal right is definitively established, it applies retroactively to the time the law was passed.¹⁴⁸ The purpose of interim protection, therefore, is to avoid irreparable damage by assuring that the time needed to judicially define the right will not have the effect of depriving the right of substance by eliminating the possibility of exercising it.¹⁴⁹ Interim protections, therefore, were viewed as appropriate whenever the duration of judicial proceedings might nullify the effectiveness of the right granted under those proceedings.

The AG stated that acts of Parliament or the Community are presumed to be valid until such time as a final judicial review declares them otherwise. When such acts conflict, however, the courts must consider whether the nature of the right claimed and commonly assumed to exist is such that interim protection must be granted. In making such a determination, the courts should consider whether the claim appears to make out a valid *prima facie* case and whether one or the other of the interests in question may be prejudiced pending the final outcome of the underlying case.¹⁵⁰

After laying out these criteria for granting of interim relief, the AG turned to the facts of the case. He noted that the petitioners in the underlying case based their claim on certain Treaty provisions, which if found applicable, would override the conflicting national law under the concept of the supremacy of Community law over that of the Member States. This supremacy of Community law also “precludes the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions.”¹⁵¹ By failing to allow interim suspension of a

148. *Id.* at 879, ¶¶ [16], [17].

149. *Id.* at 880, ¶ [18].

150. *Regina v. Secretary of State for Transport* at 883, ¶ [22].

151. *Id.* at 876 (citing *Simmenthal spa v. Ministero delle Finanze I*, Case 35/76, [1976] E. Comm. Ct. L. Rep. 1871, [1977] 2 Comm. Mkt. L.R. 1 at ¶ [17]).

national law which may be in conflict with Community law, the AG claimed that the courts of the United Kingdom violated the accepted concept of the supremacy of Community law.

The AG also noted that the domestic prohibition on injunctions against the Crown could not control because the national court is bound “to apply Community law either through the means provided for under the national legal system or, failing that, ‘of its own motion.’”¹⁵² Since the national courts have power to permanently override domestic laws that violate Community law, the AG reasoned that they must also have power to provide for interim suspension of such domestic laws pending the final judicial decision on their compatibility with Community law.¹⁵³

The ECJ therefore found that British courts could not rely on domestic law as their only obstacle to the granting of interim relief to safeguard the rights potentially granted under Community law. If the rights claimed meet the criteria discussed above, the national courts must grant an interim suspension on enforcement of the new national law pending final judicial determination of the underlying case. In stating the rule of the case, the ECJ held that “Community law must be interpreted as meaning that a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule.”¹⁵⁴ This rule preserves the supremacy of Community law over national law and, in a case such as this, assures that national procedures do not deny the exercise of rights granted under Community law.

B. *Re a State Shareholding in Synthetic Fibres: EEC Commission v. Belgium*¹⁵⁵

Synthetic Fibres arose as the result of a proposal by the Kingdom of Belgium to provide a subsidy in the form of an equity

152. *Id.* at 877, ¶ 14 (citing *Simmenthal*, ¶ [24]).

153. *Id.* at 885, ¶ [24].

154. *Id.* at 896.

155. [1990] 2 Comm. Mkt. L.R. 393.

shareholding to a company manufacturing synthetic fibres. The Court found that this subsidy violated the EEC Treaty and an injunction was issued after the first of two subsidy payments had been made. While agreeing to abide by the injunction, Belgium nonetheless issued the second subsidy payment, and, after being ordered to rescind the action, failed to do so.¹⁵⁶

The EEC Commission petitioned the ECJ for a finding that Belgium had failed to fulfill its obligation under the EEC Treaty because it did not comply with Commission Decision 84/111.¹⁵⁷ That Decision required that Belgium's proposed aid to a company manufacturing synthetic fibres be abolished¹⁵⁸ and that Belgium notify the Commission within two months of notification of the Decision (December 29, 1983) of the measures it had taken to comply with the Decision.¹⁵⁹ Noting that the obligation to cancel the subsidy was the only method for rectifying the unlawful situation prohibited by the Commission's decision, the AG stated that the Commission's application could be denied only if Belgium showed that it was absolutely impossible to comply with the Decision within the period allowed.¹⁶⁰

Belgium claimed that failure to comply in a timely manner resulted from the regionalization of the country and the resulting organizational changes which delayed compliance with the order.¹⁶¹ In response, the ECJ relied on its settled case law and stated that "a member-state cannot plead measures, practices or circumstances of its internal legal system to justify failure to fulfil obligations and comply with time limits laid down in Community legislation."¹⁶² The Court therefore found that Belgium breached its Community obligations.¹⁶³

156. *Id.* at 396.

157. Comm'n Decision 84/111, [1984] O.J. Eur. Com. (No. L 62/18).

158. *Id.* at art. 1.

159. *Id.* at art. 2.

160. *Re a State Shareholding in Synthetic Fibres: EEC Commission v. Belgium*, [1990] 2 Comm. Mkt. L.R. 393 at 395.

161. *Id.* at 398, ¶ [7].

162. *Id.* at 398, ¶ [8].

163. *Id.* at 398, ¶ [9].

C. *Ministere Public v. Guy Blanguernon*¹⁶⁴

Ministere Public v. Guy Blanguernon demonstrates the ECJ's position on harmonization of laws among the Member States. The defendant in the case was the finance director of a French company who had failed to file his company's annual accounts in compliance with Council Directive 78/660.¹⁶⁵ The defendant asserted that he failed to comply with the Directive because other Member States had not yet passed the required national legislation to implement the Directive in their own nations. The defendant claimed, therefore, that his compliance was not yet required because it would disadvantage his company by publicizing its account information while its competitors in other Member States were not yet required to do so.¹⁶⁶

The ECJ rejected the defendant's arguments, stating that "under the legal system laid down by the Treaty the implementation of Community law by member-States cannot be subject to a condition of reciprocity."¹⁶⁷ The ECJ therefore concluded that the defendant was obliged to follow the legislation adopted by France intending to implement the Directive.¹⁶⁸

These cases demonstrate the ECJ's strict views on the harmonization of the domestic laws of the Member States with those of the Community. When doubt about the application of an allegedly conflicting domestic law exists, as in *Regina v. Secretary of State for Transport*, the ECJ is likely to require interim measures that will protect the application of Community law until the conflicts can be judicially resolved. In situations in which Community law is in effect, the Court's decisions will strictly enforce those laws unless the Member State can show that compliance within the time frame involved is impossible.¹⁶⁹

164. *Ministere Public v. Guy Blanguernon*, [1990] 2 Comm. Mkt. L.R. 340.

165. [1978] O.J. Eur. Com. (No. L 222/11), [1978] 1 Com. L. Eur. 223.

166. *Guy Blanguernon* at 344, ¶ [4].

167. *Id.* at 345, ¶ [7].

168. *Id.* at 347.

169. *Re a State Shareholding in Synthetic Fibres: EEC Commission v. Belgium*, [1990] 2 Comm. Mkt. L.R. 393.

Once the Member States pass domestic laws to implement Community Directives, those laws will be enforced even though such enforcement results in different treatment of businesses in differing Member States.¹⁷⁰ While this policy attempts to bring Community Directives into effect as soon as possible, it may actually delay passage of appropriate domestic laws. Community Directives generally include a designated period of time in which Member States must adopt domestic legislation to implement the Directive. By waiting until the end of that time period to pass the implementing legislation, a Member State may escape the provisions of the Directive in full effect in those other States that have conscientiously adopted the required legislation in a more timely manner. The ECJ's decisions, however, recognize this problem and address it by declaring void any domestic law which is in contradiction to the laws of the Community.

VI. CONCLUSION

This review of 1990 decisions handed down by the European Court of Justice demonstrates the broad range of the Court's subject matter jurisdiction. Not only did the ECJ adjudicate economic issues that form the core of the EEC Treaty, it also considered issues of social policy and harmonization of laws which must necessarily be considered to attain the ambitious goals of the EEC.

The ECJ's decisions in 1990 provide important direction to both businesses operating in Europe and to the Member States themselves. The Court's antidumping cases show a strong protective attitude with regard to Community industry; clarify how antidumping duties will be applied to OEMs; and provide OEMs with a clearer picture of the EEC policies that affect their pricing and import plans. The ECJ's decisions on equal opportunity in employment clarify the EEC's provisions on this matter, and will provide the framework for reform of Member States' policies regarding retirement benefits and equal opportunity in general.

170. *Ministere Public v. Guy Blanguernon*, [1990] 2 Comm. Mkt. L.R. 340.

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The issue of harmonization of laws between the Member States and the EEC creates a thread underlying each of the ECJ's decisions. It is likely that this function will remain one of the ECJ's most important in order to achieve the EEC Treaty's objectives of free movement of goods, services, and workers and free development of undistorted competition.

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