INTRODUCTION

This introduction is written as a supplement to the Introduction to the first volume of this work and should be read in conjunction with it. Its purpose is to present the principal points covered in the fifty-five cases contained in this book (covering the period 1994 to 2001) in the same systematic framework as the ninety cases contained in the first volume (covering the period 1962 to 1993). It is not intended as a detailed commentary on the individual cases.[1]

I.

The purpose of the two volumes of this book is to present the basic principles of the legal order of the European Community, as elaborated in the case-law of the European Court of Justice on the basis of the provisions of the EC Treaty, and to show how the Member States have responded to the development of those principles through the case-law of their national courts. As noted in the Introduction to the first volume (p. 2), the relationship between the European Court of Justice and national courts is best described as one of permanent dialogue.

This *judicial* dialogue has continued, during the eight-year period covered by this second volume, against a background of almost continuous *political* deliberations, in conferences and treaty negotiations, involving the governments of the Member States and aimed at amending the provisions of the existing treaties on a range of institutional matters. As soon as the Maastricht Treaty entered into force in November 1993, preparations began for a new inter-governmental conference, culminating in the Amsterdam Treaty which was signed in June 1997 and entered into force in May 1999 after the last ratification was lodged. That treaty opened the way for negotiations for the enlargement of the Community to begin. But certain key institutional reforms, required in the perspective of enlargement, were "left over". Preparations for a new inter-governmental conference began immediately, culminating in the Nice Treaty signed in February 2001. By June 2002 the parliaments of all the Member States except Ireland had adopted the Treaty. A "no" vote in a referendum of the Irish people was followed by a "yes" in a second referendum in October 2002, clearing the way for the final

[1] Commentaries on the national case-law of the various Member States are contained in a number of excellent recently published collections, including: O'Keefe (ed.), *Judicial Review in European Union Law, Liber Amicorum in Honour of Lord Slynn* (Kluwer Law Publishing, 2000); Slaughter, Sweet and Weiler (eds.), *The European Court and National Courts* (Hart Publishing, 1998); *Annual Reports on Monitoring the Application of Community Law* (published by the European Commission) (Report for 2000 published in August 2001); and the ongoing series of review articles on the application of EC Law in individual Member States published in the *Common Market Law Review* (particularly from 1998 onwards).

ratification of the Nice Treaty. Meanwhile negotiations with applicant countries have continued and a further inter-governmental conference, planned for 2004, is being prepared by the Convention on the Future of the European Union, established in December 2001.

The Court of Justice itself has, from time to time, become involved in the debates on proposed treaty amendments. For instance, in 1994 it was called upon by the Council of the European Community to submit an opinion on the possible accession of the Community to the European Convention on Human Rights (*Opinion 2/94*, 1996, p. 45). In 1995 it was asked to submit a report to the Inter-governmental Conference on the revision of the Treaty on European Union. In that report, the Court of Justice stressed that "the success of Community law in embedding itself so thoroughly in the legal life of the Member States is due to its having been perceived, interpreted and applied . . . by the courts and tribunals of all the Member States as a uniform body of rules upon which individuals may rely in their national courts".[2]

Nevertheless, controversy has continued to surround both the role of the Court of Justice in the development of the principles of the Community legal order and the attitude of the courts of the Member States to the status of Community law in national legal systems. That controversy relates, in particular, to the extent of the transfer of sovereignty from the Member States to the Community, the scope of fundamental rights protection within the Community and the relationship between national constitutional courts and the European Court of Justice.[3] These issues, as well as the so-called "unwritten constitutional principles" of supremacy, direct effect and State liability, provide the main subject matter of the judicial decisions contained in this volume.

II. SUPREMACY

The Principle

The three new Member States which joined the European Community in 1995 appear to have rapidly and readily recognized the supremacy of Community law. This was confirmed in Finland by the Supreme Administrative Court in the *VAT Deduction Rights Case* (1996, p. 193), in Sweden by the Supreme Administrative Court in *Lassagard* (1997, p. 428), and in Austria by the Constitutional Court in the *Austrian Tourism Promotion Tax Case* (1998, p. 137). Supremacy in these countries appears to

[2] *Report of the Court of Justice on Certain Aspects of the Application of the Treaty on European Union*, May 1995, p. 2.

[3] For detailed consideration of these matters see, *inter alia*, Slaughter, Sweet and Weiler, *The European Court and National Courts*, pt 2 and De Witte, Direct Effect, Supremacy and the Nature of the Community Legal Order, in Craig and De Burca, *The Evolution of EU Law* (Oxford University Press, 1999).

have been recognized on the basis of the jurisprudence of the European Court of Justice (*Costa* v. *ENEL*, 1964, Volume 1, p. 50) in the absence of specific constitutional provisions regulating the status of EC law in national law. The position is discussed in Notes concerning Austria (p. 144), Finland (p. 193) and Sweden (p. 435).

With regard to the old Member States, in Belgium the *Conseil d'Etat* in *Orfinger* (1996, p. 162) aligned itself with the position of the Court of Cassation in the *Le Ski Case* (1971, Volume 1, p. 245) and based recognition of the inherent supremacy of EC law on the settled jurisprudence of the European Court of Justice. The Luxembourg Court of Appeal took a similar position in the *Teixeira Case* (1997, p. 395). In Ireland too, supremacy is now routinely recognized by the Supreme Court without any need being felt to refer to any constitutional provision (see *Meagher*, 1993, p. 308 and *Nathan*, 1996, p. 352).[4] On the other hand, in France it appears that the courts continue to base recognition of supremacy on Article 55 of the Constitution[5] and the *Conseil d'Etat* expressly referred to this provision in *Association of Patients for Alternative Medicine* (1999, p. 229). In Greece, however, the Council of State has cast doubt on the scope of its acceptance of the principle of the supremacy of Community law in a series of decisions including *Diamantopoulos* (1997-8, p. 286) and *Katsarou* (1998, p. 300).[6]

The potential for conflict between the requirements of the principle of supremacy of Community law and national constitutional provisions continues to be a major issue in cases before national courts and this is examined in section V below.

Consequences for National Courts

In a significant number of important decisions since 1993, the consequences of the supremacy of Community law, where a conflict actually arose with the provisions of national law, have been elucidated by the courts. The European Court of Justice confirmed in *Ministero delle Finanze* v. *IN.CO.GE.'90* (1998, p. 85) that its *Simmenthal* judgment (1978, Volume 1, p. 73) required national courts immediately to disapply rules of national law incompatible with Community law, although this did not require the national courts to treat conflicting rules of national law as void *ab initio*, as if they had never existed.

The duty of national courts immediately to disapply conflicting national provisions in such circumstances has been upheld in decisions

[4] For discussion of these and other Irish judgments see Finlay and Hyland, Duties of Co-operation of National Courts and the Community Institutions under Article 10 EC, *Irish Journal of European Law* 2000, p. 267.

[5] See Dutheil de la Rochère, The Attitude of French Courts towards ECJ Caselaw, in O'Keefe, *Judicial Review in European Union Law*.

[6] For criticism of these decisions see articles by Maganaris: EL Rev 1998, p. 179; 1999, p. 426 and 2000, p. 200.

in France by the Court of Cassation in *United Distillers* (1995, p. 195), in Italy by the Court of Cassation in *Talamucci* (1998, p. 388) and in Luxembourg by the Court of Appeal in *Soares Teixeira* (1997, p. 395). In the United Kingdom, in the *Equal Opportunities Commission Case* (1994, p. 437) the English House of Lords held that judicial review proceedings were available in order to challenge provisions of national legislation as incompatible with Community law and the appropriate remedy was a declaration to that effect.[7] In Austria, however, it appears from the *Austrian Tourism Promotion Tax Case* (1998, p. 137) that the Constitutional Court considers that it is entitled to postpone examination of the possible incompatibility of national provisions with EC law until the conclusion of constitutional review proceedings. Such a position is incompatible with the *Simmenthal* judgment of the Court of Justice (Note, Volume 1 p. 73).

III. DIRECT EFFECT

The Principle

Acceptance of the principle of direct effect has not posed any discernible problems for the courts of the new Member States which joined the Community in 1995.[8] In both the new and the old Member States, direct effect of treaty provisions satisfying the conditions laid down by the Court of Justice has routinely been accepted by national courts as, for instance, by the Austrian Constitutional Court in the *Adria-Wien Pipeline Case* (1999, p. 146), the Luxembourg Court of Appeal in *Soares Teixeira* (1997, p. 395) and the Spanish Constitutional Court in the *Moroccan Seaman Case* (1995, p. 419).

Directives

The jurisprudence of the Court of Justice on the conditions for the direct effect of directives has continued to provoke interesting judgments in the national courts. In *Faccini Dori* (1994, p. 19) the Court of Justice confirmed and clarified the reasons for its refusal to grant so-called horizontal direct effect to non-implemented directives in relations between individuals. The importance of the issue was reflected in the fact that the Court invited all the Member States to submit their observations on the matter. The Court followed the view of nearly all the Member States

[7] For discussion of the significance of this decision for the enforcement of the principle of supremacy in British courts see Chalmers, The Application of Community Law in the United Kingdom, 1994-98, CML Rev 2000, p. 83 at pp. 87-9.

[8] See Bernitz, Sweden's Implementation and Application of European Law, CML Rev 2001, p. 903 at p. 927; Fisher and Lengauer, The Adaptation of the Austrian Legal System to EU Membership, CML Rev 2000, p. 763 at p. 774; Jaaskinen, The Application of Community Law in Finland, CML Rev 1999, p. 407 at p. 420.

as well as the European Commission, albeit against the view of several distinguished Advocates-General, and upheld the approach which it had followed since the *Marshall* judgment (1986, Volume 1, p. 136).[9] Nevertheless, the Italian Court of Cassation subsequently found an ingenious method (based on general principles of equity) to circumvent the lack of direct effect of the directive at issue in *Recreb* (1996, p. 381).[10]

The direct effect of directives in so-called vertical relations has been successfully relied upon by individuals against the State, in Austria before the Constitutional Court in the *Tyrolean Provincial Allocation Office Case* (1996, p. 135), in France before the *Conseil d'Etat* in *Revert et Badelon* (1996, p. 207), in Ireland before the High Court in *Tate and Robinson* (1995, p. 328) and in the United Kingdom before the English Court of Appeal in the *National Union of Teachers Case* (1996, p. 457). On the other hand, in Portugal the Supreme Administrative Court refused to allow a public interest group to rely on an environmental protection directive against the State in the *League for Environmental Protection Case* (1995, p. 407). In France, in *SA Lilly* the *Conseil d'Etat* held that it would be unconscionable to allow the State itself to rely on an unimplemented directive against individuals (1995, p. 198).

However, national courts have sometimes been reluctant to make a reference to the Court of Justice for a preliminary ruling even though the precise requirements of the directive might have been open to doubt (see, for instance, the judgment in the United Kingdom of the English House of Lords in the *Three Rivers District Council Case* (2000, p. 627)). This problem is discussed further below, at p. 15.

Interpretation of National Law

The lack of direct effect of directives in relations between individuals has continued to be ameliorated by the requirement (confirmed by the Court of Justice in *Faccini Dori* (1994, p. 19) that national courts when applying national law, whether adopted either before or after the directive in question, must interpret the law, as far as possible, in the light of the purpose and wording of the directive. Accordingly, it has been held that national legislation introduced to implement directives must be interpreted in accordance with the directive concerned: in Austria by the Constitutional Court in the *Natural Mineral Water Case* (1995, p. 133), in Belgium by the Court of Arbitration in the *Fédération Belge Case* (1997, p. 168) and in Italy by the Constitutional Court in *Messaggero Servizi* (1995, p. 378).

[9] For discussion of the issues see, *inter alia*, Arnull, *The European Union and its Court of Justice* (Oxford University Press, 1999), pp. 137 ff.

[10] See Adinolfi, The Judicial Application of Community Law in Italy (1981-97), CML Rev 1998, p. 1313 at pp. 1332-3.

IV. ENFORCEMENT IN NATIONAL COURTS

Fundamental to the development of the principles of direct effect and supremacy by the Court of Justice has been its insistence that there must be uniformity in both the interpretation (see *Van Gend en Loos*, 1963, Volume 1, p. 44) and application (see *Simmenthal*, 1978, Volume 1, p. 100) of Community law in all the Member States. By contrast, the rules governing procedures for the enforcement in the Member States of rights recognized by Community law and remedies for their infringement have continued to be characterized by a lack of uniformity and the Court of Justice has limited itself to the imposition and continuing refinement of a general requirement that remedies should satisfy the principle of effectiveness.[11]

This principle has led the Court of Justice to develop, *inter alia*, rules concerning the availability of judicial review (*Johnston*, 1986, Volume 1, Note, p. 460) and interim relief (*Factortame*, 1990, Volume 1, p. 823). Subsequently, the Court of Justice took the bold step of establishing the principle that Member States could be liable in damages to individuals for breaches of Community law for which they were responsible. The basis of this liability was that it was indispensable for the full effectiveness of Community law and consequently inherent in the EC Treaty (*Francovich*, 1991, Volume 1, p. 188). This judgment has been followed by a series of further judgments of the Court. First, the Court established the conditions under which Member States could incur liability and further explained the basis of that liability in the EC Treaty, applying it to the case of action by a national legislature in breach of Community treaty provisions (*Brasserie du Pêcheur* and *Factortame*, 1996, p. 474). Subsequently, the Court clarified the application of the conditions for establishing liability in a range of different situations, including the failure to transpose a directive into national law (*Dillenkofer*, 1996, Note, p. 588), the incorrect transposition of a directive into national law (*British Telecommunications*, 1996, Note, p. 588) and unlawful administrative action by the State (*Hedley Lomas*, 1996, Note, p. 588).[12]

The impact of these judgments of the Court of Justice in requiring modification of national laws, so as to provide for a damages remedy against the State in the appropriate circumstances, has already been considerable and continues.[13] Applying the conditions elaborated by the

[11] See, for instance, the excellent general accounts by Arnull, *The European Union and its Court of Justice*, chapter 5; Craig and De Burca, *EU Law* (Oxford University Press, 1998), chapter 5; and Tridimas, *The General Principles of EC Law* (Oxford University Press, 1998), chapter 8.

[12] For commentary on the above judgments see Casenote by Oliver, CML Rev 1997, p. 635 and Waelbroeck, Treaty Violations and Liability of Member States, in Heukels and McDonnell (eds.), *The Action for Damages in Community Law* (TMC Asser Institute, 1997), chapter 17. For a discussion of more recent developments in the case-law of the Court of Justice see Tridimas, Liability for Breach of Community Law: Growing Up and Mellowing Down?, CML Rev 2001, p. 301.

[13] See Van Gerven, Bridging the Unbridgeable: Community and National Tort Laws after *Francovich* and *Brasserie*, ICLQ 1996, p. 507; Barav, State Liability in Damages for Breach of

Court of Justice, the Supreme Court in Germany whilst recognizing that a claim in damages against the State would be possible, held that there was no liability to pay damages in the circumstances of the case (*Brasserie du Pêcheur*, 1996, p. 588) but the House of Lords in the United Kingdom held that damages were payable (*Factortame*, 1999, p. 596). In another case, *Three Rivers District Council*, the House of Lords rejected a claim for damages, holding that no breach of Community law had been established on the facts of that case (2000, p. 627).

In France, little adaptation was required to allow a remedy in damages against the State to be recognized for breach of Community law and this was confirmed by the Court of Cassation in *United Distillers* (1995, p. 195) and by the *Conseil d'Etat* in *Dangeville* (1996, p. 207). In Italy, the Court of Cassation initially only recognized a limited right for individuals to claim damages against the State for breach of Community law (*Mariotti*, 1995, p. 371) but subsequently the Court of Cassation appears to have expanded the scope of State liability so as to allow for full *Francovich*-type liability (1999, Note, p. 377).

These cases should be distinguished from decisions of national courts allowing individuals to recover adequate and effective compensation against the State under the terms of Community directives implemented in national laws and giving individuals the right to claim compensation in the event of infringement of their provisions, based on principles well established in the jurisprudence of the Court of Justice (*Von Colson*, 1984, Volume 1, Note, p. 187; *Marshall*, 1993, Volume 1, Note, p. 165).

V. NATIONAL CONSTITUTIONS[14]

The Constitutional Framework for Community Membership

The new Member States which joined the European Community in 1995 had recourse to varied constitutional devices to provide the legal basis for membership. In Austria membership was possible on the basis of Article 9(2) of the Constitution, which provides for the transfer of sovereign rights to international organizations. In addition, various constitutional amendments were approved, in particular Articles 23a to 23e, providing the framework for the exercise of executive and legislative powers in relation to the European Community and the European Union (see Note, p. 144). In Sweden, a specific constitutional amendment was enacted to Chapter 5, Article 10, of the Instrument of Government,

Community Law in the National Courts, in Heukels and McDonnell, *The Action for Damages in Community Law*, chapter 20; and Vaughan, Rights and Remedies in EC Law: A View from the Trenches, Durham University Law Lecture, November 2001.

[14] For an excellent survey of this subject see Wouters, National Constitutions and the European Union, *Legal Issues of Economic Integration* 2000, p. 25.

providing for the transfer of powers to the European Community (see Note, p. 435). In Finland it was possible to derogate from the Constitution without amending it, through the enactment of an Exception Act, and this procedure was followed (see Note, p. 193).

The constitutional framework for membership of the Community has continued to be the subject of important judicial proceedings before the courts of the old Member States, although there does not appear, as yet, to have been any case involving a fundamental constitutional challenge before the courts of the new Member States.

Judicial Decisions on the Maastricht, Amsterdam and other Community Treaties

In **Belgium**, individuals able to justify an interest or the courts are empowered by Article 107 of the Constitution to refer questions for preliminary rulings by the Court of Arbitration on the constitutionality of laws covered by certain provisions of the Constitution. In the *European School Case* (1994, p. 155), a landmark decision on the scope of its jurisdiction, the Court of Arbitration held that laws giving assent to international treaties (and consequently EC treaties) were also covered by this procedure. No rule of international law gave the power to States to conclude treaties which were contrary to their constitutions. Accordingly, any law giving assent to a treaty could be the subject of constitutional review. In this case the Court of Arbitration, at the instance of parents seeking to avoid the payment of school fees, reviewed a law giving assent to the Statute of the European School and concluded that it did not violate the constitutional right to free education.

In proceedings in **Denmark**, various private individuals sought a declaration against the Danish Prime Minister that the procedure followed for implementing amendments to the EC treaty introduced in the Maastricht Treaty was unconstitutional. According to Danish case-law, such proceedings could only be brought by persons able to establish a legal interest but the Supreme Court held in *Carlsen and Others* v. *Rasmussen* (1996-8, p. 174) that the proceedings were admissible because of the vital and general importance of Danish accession to the amended EC Treaty for the population as a whole. The applicants argued that Article 20(1) of the Danish Constitution authorized the transfer of powers to international organizations only "to such an extent as shall be authorized by statute" and that this condition had not been complied with. In a thorough and wide-ranging judgment on the merits, the Supreme Court (1998, p. 185) dismissed the application. In its judgment, in a manner somewhat comparable in significance to the judgment of the German Federal Constitutional Court in the *Maastricht Treaty Constitutionality Case* (Volume 1, 1993, p. 526), the Supreme Court carefully analysed the scope of the constitutional requirement for the specific attribution of powers and concluded, in particular, that neither the powers of the Community

under Article 235 of the EC Treaty, nor the broad competence claimed by the Court of Justice in its case-law on the basis of Article 164 of the Treaty, violated this requirement.[15]

In **France**, pursuant to their powers under Article 54 of the Constitution, the President and Prime Minister jointly referred to the Constitutional Council the question of whether the authorization to ratify the Amsterdam Treaty of 1997, which amended the EC Treaty and the Treaty of European Union, contained any clauses contrary to the Constitution and could therefore only be ratified after a constitutional amendment. Examining the Amsterdam Treaty in the light of the principles contained in the Constitution, the Constitutional Council concluded in *Re Treaty of Amsterdam* (1997, p. 219) that, despite the insertion of Article 88 into the Constitution at the time of the ratification of the Maastricht Treaty, a further constitutional amendment was required to provide expressly for the transfer of certain additional powers necessitated by the Amsterdam Treaty.[16] The necessary constitutional amendments were subsequently enacted (Note, p. 225).

In **Germany** a constitutional complaint was lodged under Article 93 of the Basic Law against the manner in which seats in the European Parliament were allocated by the Treaty on the Accession of the new Member States in 1994. The complaint contested the approval by the *Bundestag* (Federal Parliament) of the Act of Accession. The Federal Constitutional Court, in the *European Parliament Unequal Representation Case* (1995, p. 253), declined to rule on the complaint, holding that it had no prospect of success. European Parliamentary elections could not be judged by the same constitutional criteria as those applicable to German parliamentary elections. Subsequently, four German university professors lodged constitutional complaints against the participation of Germany in the third stage of European monetary union. The Federal Constitutional Court had ruled in the *Maastricht Treaty Constitutionality Case* (1993, Volume 1, p. 526) that German participation in the monetary union was permitted by Articles 23 and 88(2) of the Basic Law. But the complainants argued that Germany had failed to ensure that the strict economic convergence criteria laid down in the Maastricht Treaty were applied, so that their democratic and property rights under Articles 38 and 14 of the Basic Law had been violated. Without ruling on whether the complaints were admissible, the Federal Constitutional Court in the *European Monetary Union Constitutionality Case* (1998, p. 258) dismissed the complaints as manifestly unfounded since

[15] For discussion of the significance of the judgment of the Danish Supreme Court see, *inter alia*, Hoegh, The Danish Maastricht Judgment, EL Rev 1999, p. 80; Rasmussen, Confrontation or Peaceful Co-existence, The Danish Maastricht Ratification Judgment, in O'Keefe, *Judicial Review in European Union Law*, p. 377.

[16] See Boyron, The French Constitution and the Treaty of Amsterdam, *Maastricht Journal of European and Comparative Law* 1999, p. 169 and Monthaan, Amending the Amended French Constitution, EL Rev 2000, p. 592.

the criteria at issue left scope for economic and political forecasting and assessment, which was the responsibility of the Federal Government and parliament, so that individuals had no right to obtain constitutional review.

In the **United Kingdom** a petition for judicial review in *Monckton* v. *Lord Advocate* to the Scottish Court of Session (1994, p. 655) sought a declaration that the payment of money out of the consolidated fund to defray administrative costs arising from the EC Agreement on Social Policy (annexed to the Maastricht Treaty, 1992) was unlawful because the Protocol on Social Policy provided for an "opt-out" for the United Kingdom from participation in the operation of the Agreement. The petition was dismissed on the ground that the administrative costs at issue comprised expenditure properly payable out of the Community budget, to which the United Kingdom was authorized to contribute by the European Communities Act 1972.

The Issue of Sovereignty

The extent to which membership of the European Community involves significant limitation of the sovereignty of the Member States has continued to provoke important pronouncements by the courts and a considerable amount of academic comment.[17] In its famous statement in *Costa* v. *ENEL* (1964, Volume 1, p. 67) the Court of Justice insisted that the transfer of powers from the Member States carried with it a permanent limitation of their sovereign rights. In its judgment in *Commission* v. *Luxembourg* (1996, p. 72) the Court of Justice recognized, however, that the preservation of the Member States' national identities was a legitimate aim respected by the Community legal order and acknowledged by Article F(1) (now 6(3)) of the Treaty on European Union. Nevertheless, such an interest, even where it was constitutionally protected, could not justify the reservation of certain educational posts to nationals contrary to the EC Treaty since respect for national identity could effectively be safeguarded in other ways.[18]

National courts, however, continue to insist that they retain the right of constitutional control over the scope of transfers of sovereign rights to the Community, in accordance with the constitutional principle of the limited specific attribution of powers: Germany, Constitutional Court, *Maastricht Treaty Constitutionality Case* (1993, Volume 1, pp. 556-7);

[17] See, for instance, De Witte, Sovereignty and European Integration, in Slaughter, Sweet and Weiler, *The European Court and National Courts*, p. 277 and Wouters, *Legal Issues of European Integration* 2000, pp. 37-40.

[18] For discussion of the significance of this judgment, see Wouters, *Legal Issues of European Integration* 2000, at pp. 40 and 54.