Proceedings of the Court of Justice in 1999

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1. The following pages are intended to provide a brief account of the judicial activity of the Court of Justice over the last 12 months.

2. Faced with an ever-increasing number of proceedings, the Court maintained a high level of activity in 1999 and brought 395 cases to a close (420 in 1998 gross figures, that is to say disregarding joinder), delivering 235 judgments (254 in 1998) and making 143 orders (120 in 1998). The number of new cases, however, increased again compared with previous years (543 in 1999 as against 485 in 1998, gross figures), a development which led to a slight deterioration in the time required to deal with cases and an increase in the number of pending cases (from 748 to 896, gross figures).

The distribution of the cases between the Court in plenary session and Chambers of five or three Judges remained constant. Approximately one case in four was disposed of by the full Court, while the remaining judgments and orders were pronounced by Chambers of five Judges (approximately one case in two) or Chambers of three Judges (approximately one case in four).

As in 1998, preliminary reference proceedings were dealt with in about 21 months on average. The average period for consideration of direct actions and appeals, on the other hand, showed a slight increase.

3. There follows a necessarily subjective selection of the Court's case-law during 1999, designed to summarise the major developments. The complete texts of the judgments referred to are available in all the official Community languages on the Court's Internet site: *www.curia.eu.int*.

4. Certain conditions governing the *proceedings* which may be brought before the Community judicature have been clarified in 1999, in particular with regard to actions for annulment, preliminary reference proceedings and appeals against judgments of the Court of First Instance.

4.1. By order in Case C-153/98 P *Guérin Automobiles* v *Commission* [1999] ECR I-1441, the Court declared clearly unfounded an appeal brought against an order of the Court of First Instance which had dismissed an action as manifestly inadmissible on the ground that proceedings were not commenced within the requisite time-limit. In response to the single plea in law put forward in the appeal, the Court held that, in the absence of express provisions of Community law, the Community administration and judicature could not be placed under a general obligation, on the adoption of every decision, to inform individuals of the remedies available or of the conditions under which they could exercise them. The Court pointed out that while, in the majority of the Member States, the administrative authorities were under an obligation to provide this information, it was generally the legislature that created and regulated the obligation; also, before the imposition of such an obligation, the detailed rules governing its application and the consequences of failing to comply with it would have to be established. It should be noted that, following that order, the unsuccessful applicant has brought an action against the 15 Member States before the European Court of Human Rights.

4.2. The issue at the heart of the judgment of 14 September 1999 in Case C-310/97 P *Commission* v *AssiDomän Kraft Products and Others*, not yet reported in the ECR, was that of establishing the effects which a judgment annulling a measure might have for persons not party to those proceedings. The case arose from a Commission decision relating to a proceeding under Article 85 of the EEC Treaty (now Article 81 EC); the decision was addressed to 43 persons and imposed a fine on the majority of them. Following an application brought by 26 of those persons, the Court annulled the decision, and annulled or reduced the fines imposed on the applicants. Subsequently, nine undertakings which had not challenged the decision requested the Commission to review their legal position in the light of that judgment and to reduce the fines which had been imposed on them. The Commission would not accede to their requests, a refusal which was then successfully challenged before the Court of First Instance. It held that the Commission was required, in accordance with Article 176 of the Treaty (now Article 233 EC) and the principle of good administration, to review, in the light of the grounds of the judgment of the Court of Justice, the legality of its original decision in so far as it related to those nine undertakings and to determine on the basis of such an examination whether it was appropriate to repay the fines.

On an appeal brought by the Commission, the Court of Justice refused to endorse the reasoning followed by the Court of First Instance and annulled its judgment. The Court of Justice found that the scope of an annulling judgment is limited in two respects: first, the aspects of a decision which concern persons to whom it is addressed other than the person who brings an action for annulment do not form part of the matter to be tried by the Community judicature; second, the authority *erga omnes* exerted by an annulling judgment cannot entail annulment of a measure not challenged before the Community judicature but alleged to be vitiated by the same illegality, and the authority of a ground of such a judgment therefore cannot apply to the situation of persons who were not parties to the proceedings and with regard to whom the judgment cannot have decided anything whatever. Accordingly, since Article 176 of the Treaty requires the institution which adopted the annulled measure only to take the necessary measures to comply with the judgment annulling it, that provision does not mean that the Commission must, at the request of interested parties, re-examine identical or similar decisions allegedly affected by the same irregularity, addressed to persons other than the applicant. According to the Court, the principle of legal certainty also precludes such an obligation on the part of the institution concerned.

4.3. With regard to proceedings for preliminary rulings, widely differing problems were dealt with in the cases of *Andersson*, *De Haan Beheer*, *Azienda Nazionale Autonoma delle Strade (ANAS)* and *Radiotelevisione Italiana (RAI)*.

Andersson concerned the temporal scope of the Court's jurisdiction to give preliminary rulings (judgment of 15 June 1999 in Case C-321/97 *Andersson* v *Svenska Staten (Swedish State)*, not yet reported in the ECR). The question submitted by the national court related to the interpretation of the Agreement on the European Economic Area ("the EEA Agreement") and was concerned with the potential liability of an EFTA State, in that case Sweden, for damage caused to individuals by the incorrect transposition of a directive referred to in the EEA Agreement. The Court stated that in principle it had jurisdiction to answer a question which was raised before a court or tribunal of one of the Member States and related to the interpretation of an agreement concluded by the Council, such an agreement being, as far as the Community was concerned, an act of one of its institutions. However, the main proceedings were concerned with facts predating Sweden's accession to the European Union and the question submitted thus related to the interpretation of the EEA Agreement not with regard to the Community but as regards its application in the EFTA States. The Court therefore concluded that it had no jurisdiction to give an answer under the EC Treaty, nor had such jurisdiction been conferred on it within the framework of the EEA Agreement. It added that the fact that Sweden subsequently became a Member State of the European Union could not have the effect of attributing to the Court jurisdiction to interpret the EEA Agreement as regards its application to situations which did not come within the Community legal order. The same approach was followed in the judgment of 15 June 1999 in Case C-140/97 *Rechberger* v *Republic of Austria*, not yet reported in the ECR, at paragraph 38.

A noteworthy feature of the judgment in *De Haan Beheer* is that the Court, on a preliminary reference seeking interpretation of Community law on the incurrence and recovery of a customs debt, was led to find that a decision by the Commission which the national court had not even referred to was invalid (judgment of 7 September 1999 in Case C-61/98 *De Haan Beheer* v *Inspecteur der Invoerrechten en Accijnzen te Rotterdam*, not yet reported in the ECR). First, the Court answered in the negative the question whether, in the context of an external transit procedure, national customs authorities are under an obligation to inform a person acting as principal of the likelihood of fraud not involving him himself but liable, if carried out, to cause him to incur a customs debt. It then considered whether, in the event that such information is not provided, the principal could be exonerated from payment of the customs debt arising from the fraud. Under the legislation in force, such exoneration was possible in particular if two cumulative conditions were met, one of which was the existence of a "special situation". The Court noted that the Commission had been requested by the Member State concerned, in the context of the main proceedings and pursuant to the legislation in force, to rule on the question whether there was a "special situation" of that kind and had expressed the view that there was none in that instance. In those circumstances, the Court took the view that, although the national court had made no reference to that decision by the Commission, the existence and, even more so, the content of which were probably unknown to it at the time when it had made its order for reference, it was appropriate, in order to give the national court an answer that would be helpful in resolving the dispute before it, to determine whether the decision was a valid one. Such an approach also appeared to conform to the principle of procedural economy, in that the question whether the Commission decision was lawful had also been raised directly before the Court in another case, which had been stayed pending delivery of the judgment in *De Haan Beheer*. The Court finally declared in *De Haan Beheer* that the Commission decision was invalid.

Finally as regards preliminary reference proceedings, two orders may be noted in which the Court considered whether the Corte dei Conti (Italian Court of Auditors) constituted a "court or tribunal" within

the meaning of Article 234 EC when it was faced with questions of interpretation of Community law in the context of *ex post facto* review procedures as to the legality, propriety and cost effectiveness of the management of certain State authorities (orders of 26 November 1999 in Case C-192/98 *Azienda Nazionale Autonoma delle Strade (ANAS)* and in Case C-440/98 *Radiotelevisione Italiana (RAI)*, both not yet reported in the ECR). It follows from these orders that the ability of a body to refer a question to the Court must be determined in accordance with both structural and functional criteria, so that a body may be treated as a "court or tribunal" within the meaning of Article 234 EC when exercising judicial functions although it cannot be so treated when it exercises other functions, including functions of an administrative nature. On that basis the Court held that, in the case before it, the function of *ex post facto* review exercised by the Corte dei Conti essentially entailed assessing and checking the results of administrative activity, and did not amount to a judicial function. It therefore declared that it lacked jurisdiction to rule on the questions submitted by the Corte dei Conti.

4.4. Ten years after the creation of the Court of First Instance, the scope of the appellate review by the Court of Justice of its decisions was again at the heart of a number of judgments.

An appeal brought by the French Republic (Case C-73/97 P *French Republic* v *Comafrica and Others* [1999] ECR I-185) was the first case where the third paragraph of Article 49 of the EC Statute of the Court of Justice has been relied on. Under that provision the Member States and Community institutions which did not intervene in proceedings before the Court of First Instance may, except in staff cases, bring an appeal against the decision disposing of those proceedings. Apart from that procedural novelty, the case had a further special feature, since France was not challenging the outcome of the case as such, namely the dismissal of an action for annulment brought by some undertakings against a Commission regulation, but was contending that, instead of declaring the action unfounded, the Court of First Instance should have allowed the plea of inadmissibility raised by the Commission. The Court of Justice allowed the appeal, set aside the judgment of the Court of First Instance and, giving final judgment in the case, dismissed the application for annulment lodged by the undertakings as inadmissible.

The first paragraph of Article 41 of the EC Statute of the Court of Justice, which also applies to proceedings before the Court of First Instance, provides that an application for revision of a judgment may be made on discovery of a fact which is of such a nature as to be a decisive factor and which, when the judgment was given, was unknown to the Court and to the party claiming the revision. It follows from the judgments in Case C-2/98 P *de Compte* v *Parliament* [1999] ECR I-1787 and of 8 July 1999 in Case C-5/93 P *DSM* v *Commission*, not yet reported in the ECR, that an appeal may in principle be brought against a decision by which the Court of First Instance dismisses an application for revision as inadmissible. The Court of Justice held that the interpretation of the phrase "fact which is of such a nature as to be a decisive factor and which, when the judgment was given, was unknown to the Court and to the party claiming the revision" and the classification of the facts relied on by the party applying for revision as falling within that phrase were points of law which could be subject to review by the Court of Justice on appeal.

On the other hand, the Court held that an order made by the Court of First Instance in connection with its examination of a case, requiring the Commission to produce copies of certain documents in order for them to placed on the file and brought to the attention of the other party, did not fall within the categories of measures against which an appeal could be brought. It based that conclusion on the wording of the first paragraph of Article 49 of the EC Statute of the Court of Justice (order of 4 October 1999 in Case C-349/99 P *Commission* v *ADT Projekt Gesellschaft der Arbeitsgemeinschaft Deutscher Tierzüchter*, not yet reported in the ECR).

5. As regards *links between Community law and national law*, the past year brought some judicial explanation of, first, the obligations of national courts and, second, the liability of Member States for harm caused to individuals by infringements of Community law.

5.1. In *Eco Swiss China Time*, a national court to which application had been made for annulment of an arbitration award was uncertain whether it had to grant that application on the ground that the award was contrary to Article 85 of the Treaty (now Article 81 EC). The national court's doubts arose from the fact that, under domestic procedural rules, it could grant such an application only on a limited number of grounds, one of them being inconsistency with public policy, which, according to the applicable national law, was not generally to be invoked on the sole ground that, because of the terms or the enforcement of an arbitration award, effect would not be given to a prohibition laid down by domestic competition law. In its answer, the Court acknowledged that it was in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal

to recognise an award should be possible only in exceptional circumstances. The Court nevertheless held, having regard to the importance of Article 85 for the functioning of the internal market, that if a national court was required by its domestic rules of procedure to grant an application for annulment of an arbitration award where such an application was founded on failure to observe national rules of public policy, it also had to grant such an application where it was founded on failure to comply with the prohibition laid down in Article 85(1). The Court based that conclusion in particular on the finding that arbitrators, unlike national courts and tribunals, were not in a position to request it to give a preliminary ruling on questions of interpretation of Community law. However, it was manifestly in the interest of the Community legal order that, in order to forestall differences of interpretation, every Community provision should be given a uniform interpretation, irrespective of the circumstances in which it was to be applied. On the other hand, the Court did not call into question national rules of procedure according to which an interim arbitration award which was in the nature of a final award and in respect of which no application for annulment had been made within the prescribed time-limit acquired definitive force and could no longer be called into question by a subsequent arbitration award. The time-limit laid down in the case at issue, of three months from the lodging of the award at the registry of the court having jurisdiction in the matter, did not seem excessively short compared with those prescribed in the legal systems of the other Member States (judgment of 1 June 1999 in Case C-126/97 *Eco Swiss China Time* v *Benetton International*, not yet reported in the ECR).

5.2. The judgments delivered in *Konle* and *Rechberger* are noteworthy with regard to Member State liability for harm caused to individuals by infringements of Community law.

Rechberger contains some explanation of the concepts of a "sufficiently serious breach" and a "direct causal link" between that breach and the loss or damage sustained by the injured parties, concepts which constitute two of the three conditions for Member State liability to arise (judgment of 15 June 1999 in Case C-140/97 *Rechberger* v *Austria*, not yet reported in the ECR). A number of private individuals had brought proceedings against the Republic of Austria before an Austrian court, claiming that it should be held liable following the incorrect transposition of Directive 90/314/EEC on package travel, package holidays and package tours, [1] which had prevented them from obtaining the reimbursement of money paid to a travel organiser who became insolvent. More particularly, it was alleged, first, that Austria had restricted the protection provided for by the directive to trips with a departure date of 1 May 1995 or later although it had acceded to the European Union on 1 January of the same year. The Court held that the directive had not been transposed correctly and that such incorrect transposition amounted to a "sufficiently serious" breach of Community law which could give rise to liability on the part of the Member State even where it had implemented all the other provisions of the directive. The Member State enjoyed no margin of discretion as to the entry into force, in its own law, of the contested provision, so that the limitation of protection was manifestly incompatible with the obligations under the directive. The second complaint was that instead of ensuring, in accordance with the directive, that the travel organiser had sufficient security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency, the Republic of Austria had done no more than require, for the coverage of that risk, a contract of insurance or a bank guarantee calculated on the basis of the organiser's past or estimated turnover. The Court held that this likewise amounted to an incorrect transposition of the directive inasmuch as the consumer was not provided with an effective guarantee that the result intended by the directive would be achieved.

In both instances, Austria nevertheless denied liability, arguing that there was no direct causal link between the incorrect transposition of the directive and the loss or damage suffered by consumers if the date and scope of the implementing measures could have contributed to the occurrence of the loss or damage only as a result of a chain of wholly exceptional and unforeseeable events. The Court observed, however, that the national court had well and truly found that there was such a link in the case in point. Furthermore, the very aim of the directive was to arm consumers against the consequences of bankruptcy, whatever its causes. The Court therefore concluded that exceptional and unforeseeable events, in as much as they would not have presented an obstacle to the refund of money paid over or the repatriation of consumers if the guarantee system had been implemented in accordance with the directive, were not such as to exclude the existence of a direct causal link and consequently to preclude the Member State's liability.

In *Konle*, the national court asked whether, in Member States with a federal structure, reparation for damage caused to individuals by national measures taken in breach of Community law had necessarily to be provided by the federal State in order for the obligations of the Member State under Community law

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1 Council Directive of 13 June 1990 (OJ 1990 L 158, p. 59).

to be fulfilled. In its reply, the Court stated that it is for each Member State to ensure that individuals obtain reparation for damage caused to them by non-compliance with Community law, whichever public authority is responsible for the breach and whichever public authority is in principle, under the law of the Member State concerned, responsible for making reparation. On the other hand, Community law does not require Member States to make any change in the distribution of powers and responsibilities between the public bodies which exist in their territory; it is sufficient that the procedural arrangements in the domestic system enable the rights which individuals derive from the Community legal system to be effectively protected without it being more difficult to assert those rights than the rights which they derive from the domestic legal system (judgment of 1 June 1999 in Case C-302/97 *Konle* v *Austria*, not yet reported in the ECR).

6. So far as concerns *links between Community law and international law*, the Court held in its judgment of 23 November 1999 in Case C-149/96 *Portugal* v *Council*, not yet reported in the ECR, that, having regard to their nature and structure, the Agreement establishing the World Trade Organisation and the agreements and memoranda in Annexes 1 to 4 thereto ("the WTO agreements") were not in principle among the rules in whose light the Court was to review the legality of measures adopted by the Community institutions. Although the main purpose of the mechanism for resolving disputes under the WTO agreements was to secure the withdrawal of measures inconsistent with the WTO rules, the mechanism also provided the contracting parties with the possibility of the grant of compensation on an interim or even definitive basis. Consequently, to require the judicial organs to refrain from applying rules of domestic law which were inconsistent with the WTO agreements would have the consequence of depriving the legislative or executive organs of the contracting parties of that possibility afforded by the agreements of entering into negotiated arrangements even on a temporary basis. According to the Court, it followed that the WTO agreements, interpreted in the light of their subject-matter and purpose, did not determine the appropriate legal means of ensuring that they were applied in good faith in the legal order of the contracting parties. The Court noted that the same solution was, moreover, applied by other contracting parties, so that a different attitude at Community level might lead to disuniform application of the WTO rules, by depriving the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners. As to the remainder, the Court established that the Community measure contested in the case was not designed to ensure the implementation in the Community legal order of a particular obligation assumed in the context of the WTO and that it did not make express reference to any specific provisions of the WTO agreements, the only instances where it would be for the Court to review the legality of the Community measure in question in the light of the WTO rules.

7. In the *institutional domain*, it was determination of the legal basis for Community measures which once more gave rise to most of the litigation, this year setting the Community institutions against each other.

Judgment was given in 1999 in three actions for annulment of Council measures brought by the European Parliament on the ground that its prerogatives had been infringed. In the first of those cases, the Parliament contended that a Council decision on the adoption of a multiannual programme to promote the linguistic diversity of the Community in the information society should have had a dual legal basis. It considered that, in addition to Article 130 of the EC Treaty (now Article 157 EC), relating to industry, Article 128 (now, after amendment, Article 151 EC), which is devoted to culture, should have been the legal basis for the decision. In order to assess the merits of the case, the Court checked whether culture was an essential component of the contested decision, in the same way as industry, and could not be dissociated from industry, or whether the "centre of gravity" of the decision was to be found in the industrial aspect of the Community action. As regards the aims pursued by the decision, it found that the beneficiaries directly targeted by the concrete actions envisaged were enterprises, in particular small and medium-sized enterprises, whereas citizens were seen only as beneficiaries of linguistic diversity in general, in the context of the information society. Furthermore, the recitals in the preamble to the decision referring to the cultural aspects of the information society expressed findings or wishes of a general nature which did not allow those aspects to be seen, in themselves, as objectives of the programme. The main and predominant characteristic of the programme appeared in actual fact to be of an industrial nature. As regards the content of the contested decision, the Court stated that the main thrust of the actions covered was to ensure that undertakings did not disappear from the market or have their competitiveness undermined by communications costs caused by linguistic diversity. It therefore concluded overall that the effects on culture were only indirect and incidental as compared with the direct effects sought, which were of an economic nature and did not justify basing the decision on Article 128

of the Treaty as well. It accordingly dismissed the Parliament's application (Case C-42/97 *Parliament* v *Council* [1999] ECR I-869).

By contrast, another application brought by the Parliament was allowed in a judgment delivered two days later (judgment of 25 February 1999 in Joined Cases C-164/97 and C-165/97 *Parliament* v *Council* [1999] ECR I-1139). This judgment concerned two Council regulations on the protection of the Community's forests against atmospheric pollution and against fire which had been adopted on the basis of Article 43 of the EC Treaty (now, after amendment, Article 37 EC). Endorsing the arguments put forward by the applicant, the Court held that, although the measures referred to in the regulations could have certain positive repercussions on the functioning of agriculture, those consequences were incidental to the primary aim of the Community schemes for the protection of forests, which were intended to ensure that the natural heritage represented by forest ecosystems was conserved and turned to account, and did not merely consider their utility to agriculture.

In its judgment of 8 July 1999 in Case C-189/97 *Parliament* v *Council*, not yet reported in the ECR, the Court interpreted for the first time the term "agreements having important budgetary implications for the Community" used in the second subparagraph of Article 228(3) of the Treaty (now, after amendment, the second subparagraph of Article 300(3) EC). In derogation from the normal procedure, which provides only for consultation of the Parliament, agreements of that type may be concluded only if the Parliament's assent is obtained. In its judgment, the Court first of all rejected the approach contended for by the Council, under which the overall budget of the Community was referred to in order to assess whether an agreement had important budgetary implications. It stated that all the appropriations allocated to external operations of the Community traditionally accounted for a marginal fraction of the Community budget, so that the provision at issue might be rendered wholly ineffective if the Council's criterion were applied. The Court also rejected two criteria proposed by the Parliament: first, the share of the expenditure at issue in relation to expenditure of the same kind under the relevant budget heading and, second, the rate of increase in expenditure under the agreement in question in relation to the financial section of the previous agreement. Three other criteria were ultimately adopted by the Court. It found, first, that the fact that expenditure under an agreement was spread over several years was relevant, since relatively modest annual expenditure could, over a number of years, represent a significant budgetary outlay. It then held that comparison of the expenditure under an agreement with the amount of the appropriations designed to finance the Community's external operations enabled that agreement to be set in the context of the budgetary outlay approved by the Community for its external policy, and offered an appropriate means of assessing the financial importance which the agreement actually had. Finally, where a sectoral agreement was involved, that analysis could, in appropriate cases, be complemented by a comparison between the expenditure entailed by the agreement and the whole of the budgetary appropriations for the sector in question, taking the internal and external aspects together. Applying those criteria to the case before it, the Court found that the fisheries agreement with Mauritania (the agreement in issue) had been concluded for five years, which was not a particularly lengthy period, and that while the annual amounts at issue exceeded 5% of expenditure on fisheries, they represented barely more than 1% of the whole of the payment appropriations allocated for external operations of the Community, a proportion which, whilst far from negligible, could scarcely be described as important. It therefore concluded that the agreement did not have important budgetary implications for the Community within the meaning of the second subparagraph of Article 228(3) of the Treaty and dismissed the Parliament's application.

In the final case it was, this time, the Commission which sought the annulment of a Council regulation on mutual assistance between the administrative authorities of the Member States and cooperation between those authorities and the Commission to ensure the correct application of the law on customs and agricultural matters. The regulation's legal basis was Article 43 of the Treaty (now, after amendment, Article 37 EC) and Article 235 of the Treaty (now Article 308 EC). According to the Commission, the Council should have based the regulation on Article 43 together with Article 100a of the Treaty (now, after amendment, Article 95 EC), whose objective is to harmonise the laws of the Member States for the purpose of the establishment and functioning of the internal market. The Commission contended that the regulation was intended to ensure the proper functioning of the customs union and thus of the internal market, and that the protection of the financial interests of the Community within the meaning of Article 209a of the Treaty (now, after amendment, Article 280 EC), hence the fight against fraud, was not an independent objective but followed from the establishment of the customs union. The Court rejected that argument. It stated that the protection of the financial interests of the Community did not follow from the establishment of the customs union, but constituted an independent objective which, under the scheme of the Treaty, was placed in Title II (financial provisions) of Part V relating to the Community institutions and not in Part III on Community policies, which included the customs union and agriculture. The regulation at issue implemented the objective of protecting the financial interest of the Community by laying down, in the context of the customs union and the common agricultural policy, specific rules

additional to the generally applicable legislation. Since Article 209a of the Treaty, in the version applicable when the regulation was adopted, indicated the objective to be attained but did not confer on the Community competence to set up a system of the kind at issue, recourse to Article 235 of the Treaty was justified (judgment of 18 November 1999 in Case C-209/97 *Commission* v *Council*, not yet reported in the ECR).

8. In the field of the *free movement of goods*, the judgments in *Kortas* and in *Colim* v *Bigg's Continent Noord* are to be noted, together with case-law specific to the movement of medicinal and plant protection products.

Like the case of *Commission* v *Council* referred to above, *Kortas* raised questions of interpretation of Article 100a of the Treaty, in particular Article 100a(4). That provision laid down a derogation procedure for Member States which, after the adoption of a harmonisation measure by the Council, deemed it necessary to apply national provisions on grounds of major needs referred to in Article 36 of the Treaty (now, after amendment, Article 30 EC) or national provisions relating to protection of the environment or the working environment. It is clear from the judgment, first, that a directive can have direct effect where its legal basis is Article 100a of the Treaty, notwithstanding the existence of that derogation procedure. According to the Court, the general potential of a directive to have direct effect is wholly unrelated to its legal basis, depending instead on its intrinsic characteristics, that is to say on whether its provisions are unconditional and sufficiently precise. The national court also asked the Court whether the direct effect of a directive, where the deadline for its transposition into national law had expired, was affected by the existence of a notification made by a Member State pursuant to Article 100a(4), seeking confirmation of provisions of national law derogating from the directive. The Court replied in the negative, stating that measures for the harmonisation of Member State legislation which was such as to hinder intra-Community trade would be rendered ineffective if Member States retained the right unilaterally to apply national rules derogating from those measures. It therefore answered that a Member State was not authorised to apply the national provisions notified by it under Article 100a(4) until after it had obtained a decision from the Commission confirming them, even where the Commission was unreasonably slow in coming to a decision. The Court noted in that regard that Article 100a(4), as worded prior to the Treaty of Amsterdam, was silent as to the time within which the Commission had to adopt a position on the national rules notified to it. The Court declared however, for the sake of completeness, that the fact that there was no time-limit could not absolve the Commission from the obligation to act with all due diligence in discharging its responsibilities, since implementation of the notification scheme provided for by the Treaty required the Commission and the Member States to cooperate in good faith (judgment of 1 June 1999 in Case C-319/97 *Kortas*, not yet reported in the ECR).

The case of *Colim* v *Bigg's Continent Noord* which concerned Directive 83/189/EEC, [2] as amended by Directive 88/182/EEC, [3] continues a long series of cases on the Community legislation laying down a procedure for the provision of information in the field of technical standards and regulations. In the main proceedings, the national court was uncertain whether national legislation requiring labelling particulars, instructions for use and guarantee certificates for products to be given in the language or languages of the area where the products were placed on the market should have been notified as a technical regulation. In its judgment, the Court held that it was necessary to distinguish between the obligation to convey certain information about a product to consumers, which is carried out by affixing particulars to the product or adding documents to it such as instructions for use and the guarantee certificate, and the obligation to give that information in a specified language. The latter did not constitute a technical regulation but an ancillary rule necessary in order for the information to be effectively communicated. The judgment also contains some clarification regarding the limits on the ability of the Member States, even where the language requirements applicable to information appearing on imported products are not fully harmonised, to require that information to be given in specific languages (judgment of 3 June 1999 in Case C-33/97 *Colim* v *Bigg's Continent Noord*, not yet reported in the ECR).

9. The *movement of medicinal products and plant protection products* within the Community, and therefore the related case-law, present very specific features inasmuch as a marketing authorisation issued by the appropriate national authorities is in principle required before such products may be marketed in

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2 Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1983 L 109, p. 8).

3 Council Directive 88/182/EEC of 22 March 1988 amending Directive 83/189 (OJ 1988 L 81, p. 75).

each Member State. The parent legislation is set out in Directive 65/65/EEC for proprietary medicinal products [4] and in Directive 91/414/EEC for plant protection products. [5]

9.1. First, it was the interpretation of Directive 65/65 that was raised by the questions referred to the Court for a preliminary ruling in *Upjohn* and *Rhône-Poulenc*. In the first of those two cases, the Court held that Directive 65/65 and, more generally, Community law did not require the Member States, in the context of procedures for the judicial review of national decisions revoking authorisations to market proprietary medicinal products, to give the competent national courts and tribunals the power to substitute their assessment of the facts and, in particular, of the scientific evidence relied on in support of the revocation decision for the assessment made by the national authorities competent to revoke such authorisations. In justifying that ruling, the Court referred by analogy to the restricted nature of the judicial review conducted by the Community judicature with regard to decisions of the Community authorities adopted on the basis of complex assessments (Case C-120/97 *Upjohn* v *The Licensing Authority established by the Medicines Act 1968 and Others* [1999] ECR I-223).

Rhône-Poulenc continued the line of case-law formed by Case 104/75 *De Peijper* [1976] ECR 613 and Case C-201/94 *Smith & Nephew and Primecrown* [1996] ECR I-5819. That case-law had facilitated the free movement of medicinal products within the Community by exempting imports from one Member State to another from the onerous procedure laid down by Directive 65/65 where the medicinal product in question was already covered by a marketing authorisation in the first Member State and was being imported as a parallel import of a product which was itself already covered by a marketing authorisation in the Member State of importation. In *Rhône-Poulenc* the medicinal product at issue was the subject of a marketing authorisation which had ceased to have effect in the Member State of importation, where a new version of that product was covered by a marketing authorisation. It was disputed in that State that the simplified procedure applicable to parallel imports could be used for the old version. In its judgment, the Court stated that none of the three grounds put forward by the holder of the marketing authorisation in the State of importation enabled the possibility of parallel importation to be ruled out in absolute terms. First, it was pointed out to the Court that the two versions of the medicinal product were not manufactured according to the same formulation, given that the version covered by a marketing authorisation in the State of importation was manufactured using different excipients and by a different manufacturing process. In that regard, the Court held that it was for the competent authorities of the Member State of importation to ensure that the medicinal product imported as a parallel product, even if not identical in all respects to that already authorised by them, had the same active ingredient and the same therapeutic effect and did not pose a problem of quality, efficacy or safety. Second, it was asserted that the drug monitoring ("pharmacovigilance") system would not work in the Member State of importation because the holder of the marketing authorisation in that State was not obliged to submit information regularly in relation to the product imported in parallel. The Court found, however, that drug monitoring could be ensured in particular through cooperation with the authorities of the other Member States. Finally, it was claimed that the particular benefit for public health which was provided by the new version, as compared with the old version, of the medicinal product could not be achieved if the old and new versions were both available on the market of the State of importation at the same time. The Court met that third objection by stating that, even if the argument were well founded, it did not follow that, in circumstances such as those of the main case, the national authorities were compelled to require parallel importers to follow the procedure laid down in Directive 65/65 if they took the view that, in normal conditions of use, the medicinal product imported as a parallel import did not pose a risk as to quality, efficacy or safety (judgment of 16 December 1999 in Case C-94/98 *The Queen* v *The Licensing Authority established by the Medicines Act 1968 ex parte Rhône-Poulenc Rorer and Another*, not yet reported in the ECR).

9.2. In Case C-100/96 *The Queen* v *Ministry of Agriculture, Fisheries and Food ex parte British Agrochemicals Association* [1999] ECR I-1499, the Court held first of all that the case-law laid down in *Smith & Nephew and Primecrown*, cited above, relating to parallel imports of medicinal products, could be applied, *mutatis mutandis*, to the placing of plant protection products on the market, given the similarities of the two bodies of legislation. It then held that that case-law applied to a plant protection product imported from a State belonging to the European Economic Area in which it was already covered by a marketing authorisation granted in accordance with Directive 91/414. As regards the importation

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4 Council Directive 65/65/EEC of 26 January 1965 on the approximation of provisions laid down by law, regulation or administrative action relating to proprietary medicinal products (OJ, English Special Edition 1965-1966, p. 20).

5 Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market (OJ 1991 L 230, p. 1).

of plant protection products from third countries, on the other hand, the conditions which had led, in the decision in *Smith & Nephew and Primecrown*, to the non-applicability of the provisions of the directive concerning the procedure for the grant of marketing authorisation were not fulfilled and such a product therefore could not benefit from a marketing authorisation already granted in the Member State of importation for a product considered to be identical.

10. Of the numerous judgments delivered in 1999 relating to the *agricultural and fisheries sectors*, most concerned questions which were rather technical and of relatively limited importance. One judgment to note, however, is that of 5 October 1999 in Case C-179/95 *Spain* v *Council*, not yet reported in the ECR, which settled a dispute between the two parties in the field of Community fisheries policy. Spain challenged a number of Community provisions which, in the context of the system for the exchange of fishing quotas allocated to certain Member States, allowed anchovy fishing quotas to be transferred from the zone of allocation to an adjacent zone. Those provisions resulted, as regards the latter zone, in an increase in the total allowable catch ("TAC") for anchovies compared with the TAC set initially. Spain contended, first, that there had been a failure to take account of the objectives of the common fisheries policy. The Court had regard to the discretion which the Council enjoys when fixing TACs and distributing fishing quotas among Member States, and noted that when the Council fixed the initial TAC it did so by way of precaution and not on the basis of proven scientific data; the Court found that, in those circumstances, the increase in anchovy fishing quotas at issue could not be considered to be vitiated by manifest error or misuse of power or clearly to exceed the bounds of the discretion enjoyed by the Council unless there were sufficient grounds for believing that it had disturbed the biological equilibrium of those resources, a fact which had not been established in the case before the Court. Spain also claimed that the principle of relative stability had been infringed since a new anchovy quota had been allocated in the zone at issue to a country, namely Portugal, which had never had a quota there, in flagrant breach of the obligation to preserve the percentage shares laid down for each of the two Member States between whom the stock had been divided, namely Spain and France. That line of argument was likewise not accepted by the Court. It found that the principle of relative stability did not preclude exchanges between Member States and that the exchange in dispute was the result of two regulations issued by the Council of which the first had been adopted on the same legal basis as the regulation on which Spain relied. As regards the conditions in which that exchange had been authorised, the Court noted first of all that there was no increase in fishing quotas in the two zones taken together, secondly, that the exchange did not adversely affect, in the zone to which quota could be transferred taken by itself, the fishing quota allocated to Member States not privy to the exchange and, finally, that the exchange in question had not been shown to jeopardise resources in the zones concerned or, therefore, to have an adverse effect on the rights of Member States to quotas there. The action was therefore dismissed.

11. The judgments delivered in 1999 concerning *freedom of movement for persons* within the European Union reflect the increasingly varied facets of that principle, be they professional regulation, checks at internal frontiers, social security or tax.

11.1. In order to facilitate freedom of movement for workers within the Community, the Community legislature has adopted directives laying down general systems for the recognition of diplomas and professional education and training. Those provisions apply in the case of "regulated" professions, that is to say whenever the conditions for taking up or pursuing a professional activity are directly or indirectly governed by legal provisions. In *Fernández de Bobadilla* the Court had to consider whether a profession governed by a collective agreement entered into by management and labour could be considered to be "regulated" within the meaning of the directives referred to above. The Court gave the answer that, in order not to impair the effectiveness of those directives, such a profession could be considered to be "regulated" where a collective agreement governed in a general way the right to take it up or pursue it, particularly if that was the result of a single administrative policy laid down at national level or even if the terms of an agreement entered into by a public body and its staff representatives were common to other collective agreements entered into on an individual basis by other public bodies of the same kind. In the judgment, the Court also stated, with regard to non-regulated professions, that where a Member State did not have a general procedure for official recognition of diplomas issued in the other Member States which was consistent with Community law, it was for the public body seeking to fill a post itself to investigate whether the diploma obtained by the candidate in another Member State, together, where appropriate, with practical experience, was to be regarded as equivalent to the qualification required (judgment of 8 July 1999 in Case C-234/97 *Fernández de Bobadilla* v *Museo Nacional del Prado and Others*, not yet reported in the ECR).

11.2. The case of *Wijsenbeek* arose from the refusal, contrary to Netherlands law, of Mr Wijsenbeek to present his passport and establish his Netherlands nationality when entering the Netherlands at Rotterdam airport following a flight from Strasbourg. In the resulting criminal proceedings, Mr Wijsenbeek relied, in his defence, on the second paragraph of Article 7a and Article 8a of the EC Treaty (now, after amendment, Articles 14 EC and 18 EC). In answer to the national court's questions, the Court ruled that, as Community law stood at the time of the events in question, neither Article 7a nor Article 8a of the Treaty precluded a Member State from requiring a person, whether or not a citizen of the European Union, under threat of criminal penalties, to establish his nationality upon his entry into the territory of that Member State by an internal frontier of the Community, provided that the penalties applicable were comparable to those which applied to similar national infringements and were not disproportionate. The Court considered that, in order for an obligation to abolish controls of persons at the internal frontiers of the Community to exist, there had to be harmonisation of the laws of the Member States governing the crossing of the external borders of the Community, immigration, the grant of visas, asylum and the exchange of information on those questions (judgment of 21 September 1999 in Case C-378/97 *Wijsenbeek,* not yet reported in the ECR).

11.3. With regard to tax and social security, whether in relation to contributions or benefits, the Court sought to remove unjustified obstacles to freedom of movement for persons (*Terhoeve* with regard to social security contributions), while accepting that obstacles resulting directly from the absence of harmonisation of national laws cannot be avoided (*Gschwind* with regard to income tax and *Nijhuis* relating to a social security benefit).

Under the detailed Netherlands rules at issue in *Terhoeve* governing the calculation of social security contributions, a worker who had transferred his residence in the course of a year from one Member State to another in order to take up employment there was liable to be subject to greater contributions than those which would have been payable, in similar circumstances, by a worker who had continued to reside throughout the year in the Member State in question, without the first worker also being entitled to additional social benefits. The Court held that to be an obstacle to freedom of movement which could not be justified either by the fact that it stemmed from legislation whose objective was to simplify and coordinate the levying of income tax and social security contributions, or by difficulties of a technical nature preventing other methods of collection, or else by the fact that, in certain circumstances, other advantages relating to income tax could offset, or indeed outweigh, the disadvantage as to social contributions. With regard to the consequences which the national court had to draw where national legislation was incompatible with Community law in that way, the Court stated that the worker concerned was entitled to have his social security contributions set at the same level as that of the contributions which would be payable by a worker who continued to reside in the same Member State, since those arrangements, for want of the correct application of Community law, remained the only valid point of reference (Case C-18/95 *Terhoeve* v *Inspecteur van de Belastingdienst Particulieren/Ondernemingen Buitenland* [1999] ECR I-345).

By contrast, the German and Netherlands legislation at issue in *Gschwind* and *Nijhuis* was not held to be incompatible with the principle of freedom of movement for persons.

It will be remembered that, in Case C-279/93 *Schumacker* [1995] ECR I-225 and Case C-80/94 *Wielockx* [1995] ECR I-2493, the Court had interpreted Article 48 of the Treaty (now, after amendment, Article 39 EC) as meaning that a Community national who gained his main income and almost all of his family income in a Member State other than his State of residence was discriminated against if his personal and family circumstances were not taken into account for income tax purposes in the first State. Following those judgments, the German legislature provided that, where a Community national had neither permanent residence nor usual abode in Germany, he and his spouse could nevertheless under certain conditions be treated as being subject to tax in Germany on their total income and, on that basis, be entitled to the tax concessions accorded to residents to take account of their personal and family circumstances. In *Gschwind*, the Court held that the conditions laid down for that purpose by the German legislature are compatible with the Treaty, namely that at least 90% of the total income of the non-resident married couple must be subject to tax in Germany or, if that percentage is not reached, that their income from foreign sources not subject to German tax must not be above a certain ceiling. The Court considered that, where those conditions are not satisfied, the State of residence is in a position to take into account the taxpayers' personal and family circumstances, since the tax base is sufficient there to enable that to be done (judgment of 14 September 1999 in Case C-391/97 *Gschwind* v *Finanzamt Aachen-Außenstadt*, not yet reported in the ECR).

Nijhuis concerned the entitlement of a Netherlands civil servant to a Netherlands invalidity pension in respect of the period before the entry into force of Regulation (EC) No 1606/98, [6] which, subject to certain derogating provisions, extended the basic legislation concerning social security for workers moving within the Community, namely Regulation (EEC) No 1408/71 [7] and Regulation (EEC) No 574/72, [8] to special schemes for civil servants. While those basic regulations were not directly applicable in the case before it, the national court inquired whether Articles 48 and 51 of the Treaty (now, after amendment, Articles 39 EC and 42 EC) nevertheless obliged it to apply them by analogy in order to grant invalidity benefit to a worker who had suffered an incapacity for work arising in another Member State. If they were not applied by analogy, Mr Nijhuis would be in a less favourable position than if he had not exercised his right as a worker to move freely but had worked only in the Netherlands. The Court held that, having regard to the wide discretion enjoyed by the Council, making such an application by analogy mandatory could be envisaged only if it were possible to overcome the negative consequences of the national legislation for workers who had exercised their right of free movement without having recourse to Community coordination measures. Since measures of that kind appeared essential in the case before it, the Court answered the question submitted in the negative (Case C-360/97 *Nijhuis* v *Bestuur van het Landelijk Instituut Sociale Verzekeringen* [1999] ECR I-1919).

12. *Freedom to provide services* within the Community was also the subject of significant judgments in 1999. The cases to be noted in particular are: *Calfa*; *Läärä* and *Questore di Verona* v *Zenatti*; *Eurowings*; and *Arblade and Leloup*.

12.1. Mrs Calfa, an Italian national who had been charged with possession for personal use, and with use, of prohibited drugs while staying as a tourist in Crete, appealed on a point of law against the decision of the criminal court ordering her to be expelled for life from Greece. The Court, when asked for a preliminary ruling, examined whether such a penalty was compatible with the Community rules on the freedom to provide services, Mrs Calfa being regarded as a recipient of tourist services. In its judgment, the Court concluded that there was clearly an obstacle to that freedom, and that the obstacle could not be justified by the public policy exception relied on by Greece. The national legislation provided for automatic expulsion following a criminal conviction, without any account being taken of the personal conduct of the offender or of the danger which that person represented for the requirements of public policy, contrary to Directive 64/221/EEC on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy [9] (Case C-348/96 *Calfa* [1999] ECR I-11).

12.2. The judgments delivered in *Läärä* and *Questore di Verona* v *Zenatti* fall very much within the same line of case-law as Case C-275/92 *Schindler* [1994] ECR I-1039. In accordance with that case-law, Community law does not preclude prohibitions relating to the organisation of lotteries, even though they constitute obstacles to the freedom to provide services, given the social-policy concerns and the concern to prevent fraud which justify them. The Court thus refused to find fault either with Finnish legislation which grants to a single public body exclusive rights to operate slot machines, in view of the public interest objectives justifying that legislation (judgment of 21 September 1999 in Case C-124/97 *Läärä* v *Kihlakunnansyyttäjä (Jyväskylä)*, not yet reported in the ECR), or with Italian legislation which reserves to certain bodies the right to take bets on sporting events (judgment of 21 October 1999 in Case C-67/98 *Questore di Verona* v *Zenatti*, not yet reported in the ECR). The Court held in particular that the fact that the games or gambling in issue were not totally prohibited was not enough to show that the national legislation was not in reality intended to achieve the public-interest objectives at which it was purportedly aimed. In *Läärä*, the Court gave a very direct ruling, stating that, since it enabled the public-interest objectives pursued to be achieved more easily, a decision to grant an exclusive operating right to the licensed public body rather than to regulate the activities of various operators authorised to run such games within the framework of rules of a non-exclusive nature did not appear disproportionate having regard to the aim pursued. In *Zenatti*, by contrast, it stated that it was for the national court to verify

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6 Council Regulation (EC) No 1606/98 of 29 June 1998 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 with a view to extending them to cover special schemes for civil servants (OJ 1998 L 209, p. 1).

7 Council Regulation of 14 June 1971 (OJ, English Special Edition 1971 (II), p. 416).

8 Council Regulation of 21 March 1972 (OJ, English Special Edition 1972 (I), p. 159).

9 Council Directive of 25 February 1964 (OJ, English Special Edition 1963-1964, p. 117).

whether, having regard to the specific rules governing its application, the Italian legislation was genuinely directed to realising the objectives which were capable of justifying it and whether the restrictions which it imposed did not appear disproportionate in the light of those objectives.

12.3. The case of *Eurowings* concerned German legislation relating to business tax on capital and earnings and raised once again the issue of the freedom of action available to the Member States with regard to tax in the absence of Community harmonisation. Under German law, when lessees lease goods from a lessor established in another Member State the taxable amount for calculation of the tax which they are required to pay is, in the majority of cases, larger and therefore their treatment for tax purposes less favourable than if they were to lease such goods from a lessor established in Germany. The Court pointed out first of all that the lessee, as the recipient of leasing services, could rely on the individual rights conferred on it by Article 59 of the Treaty (now, after amendment, Article 49 EC). It then found that the legislation at issue gave rise to a difference of treatment based on the place of establishment of the provider of services, which was prohibited by Article 59. However, Germany invoked the principle of coherency of the tax system, essentially contending that the advantage in favour of a lessee who dealt with a lessor established in Germany was counterbalanced by the fact that that lessor was himself subject to the tax at issue. The Court rejected that line of argument, since the link in question was merely indirect; indeed, the holder of a German lease was generally exempt solely as a result of the fact that the lessor himself was liable to the tax at issue, while the latter had a number of means of avoiding actually paying the tax. Nor did the Court accept that the fact that a lessor established in another Member State was subject there to lower taxation could justify a compensatory tax arrangement, because such an approach would prejudice the very foundations of the single market (judgment of 26 October 1999 in Case C-294/97 *Eurowings Luftverkehrs* v *Finanzamt Dortmund-Unna*, not yet reported in the ECR).

12.4. Last, the Court was asked about the limits imposed by Community law on the freedom of the Member States to regulate the social protection of persons working on their territory. In the main proceedings it was necessary to establish whether social obligations imposed by Belgian law, breach of which was punishable by penalties under Belgian public-order legislation, could be applied in respect of workers of an undertaking set up in another Member State who were temporarily deployed in Belgium in order to perform a contract (judgment of 23 November 1999 in Joined Cases C-369/96 and C-376/96 *Arblade and Leloup*, not yet reported in the ECR).

The Court stated first of all that the fact that national rules were categorised as public-order legislation did not mean that they were exempt from compliance with the provisions of the Treaty, as otherwise the primacy and uniform application of Community law would be undermined. It then considered in turn whether the requirements imposed by the Belgian legislation had a restrictive effect on freedom to provide services, and, if so, whether, in the sector under consideration, such restrictions were justified by overriding reasons relating to the public interest. If they were, it established whether that interest was already protected by the rules of the Member State in which the service provider was established and whether the same result could be achieved by less restrictive rules. The Court thus acknowledged that provisions guaranteeing a minimum wage were justified but, in order for their infringement to justify the criminal prosecution of an employer established in another Member State, they had to be sufficiently precise and accessible for them not to render it impossible or excessively difficult in practice for such an employer to determine the obligations with which he was required to comply. On the other hand, the obligation to pay employer's contributions to the "timbres-intempéries" (bad weather stamps) and "timbres-fidélité" (loyalty stamps) schemes could be justified only if, first, the contributions payable gave rise to a social advantage for the workers concerned and, second, those workers did not enjoy in the State of establishment, by virtue of the contributions already paid by the employer in that State, protection which was essentially similar to that afforded by the rules of the Member State in which the services were provided. As regards obligations to draw up certain documents and to keep them in certain places and for a certain time, their compatibility with the Treaty essentially depended on whether they were necessary in order to enable effective review of compliance with the national legislation and on whether comparable obligations might exist in the State in which the undertaking was established.

13. With regard to *freedom of establishment*, the most important cases concluded in 1999 centred on questions of tax. While confirming that direct taxation fell within the competence of the Member States, the Court none the less declared incompatible with Article 52 of the EC Treaty (now, after amendment, Article 43 EC) provisions governing the taxation of companies in force in Greece, Germany and Sweden in so far as they involved differences in treatment between companies incorporated under national law and branches or agencies of companies set up in other Member States when the two categories were in objectively comparable situations.

13.1. First, the Court found fault with Greek tax legislation under which companies having their seat in another Member State and carrying on business in Greece through a permanent establishment situated there could not benefit from a lower rate of tax on profits, when that possibility was accorded to companies having their seat in Greece and there was no objective difference in the situation between those two categories of companies which could justify such a difference in treatment (Case C-311/97 *Royal Bank of Scotland* v *Elliniko Dimosio (Greek State)* [1999] ECR I-2651). The Court held in particular that, while it was true that companies having their seat in Greece were taxed there on the basis of their world-wide income whereas companies carrying on business in that State through a permanent establishment were subject to tax there only on the basis of profits which the permanent establishment earned there, that circumstance was not such as to prevent the two categories of companies from being considered, all other things being equal, to be in a comparable situation as regards the method of determining the taxable base.

13.2. In *Saint-Gobain*, the Court considered the tax position of a permanent establishment in Germany of a company limited by shares which has its seat in another Member State and holds shares in companies established in other States (judgment of 21 September 1999 in Case C-307/97 *Saint-Gobain* v *Finanzamt Aachen-Innenstadt*, not yet reported in the ECR). It held that it was incompatible with the Treaty for such an establishment not to enjoy, on the same conditions as those applicable to companies limited by shares having their seat in Germany, certain concessions in relation to the taxation of those foreign shareholdings and of the related dividends. In so far as that difference in treatment resulted in part from bilateral treaties concluded with non-member countries, the Court observed that the Member States were free to conclude such bilateral treaties in order to eliminate double taxation, but the national treatment principle required them to grant to permanent establishments of Community companies the advantages provided for by those treaties on the same conditions as those which applied to resident companies.

13.3. The same approach led the Court to find contrary to the Treaty Swedish legislation which involved a difference of treatment between various types of intra-group transfers on the basis of the criterion of the subsidiaries' seat and thereby constituted an obstacle for Swedish companies wishing to form subsidiaries in other Member States (judgment of 18 November 1999 in Case C-200/98 *X and Y* v *Riksskatteverket*, not yet reported in the ECR).

13.4. In a further case concerning taxation, the Court held that Article 52 of the EC Treaty (now, after amendment, Article 43 EC) and Article 58 of the EC Treaty (now Article 48 EC) precluded French legislation under which undertakings established in France and exploiting proprietary medicinal products there were charged a special levy on their pre-tax turnover in certain of those products and were allowed to deduct from the amount payable only expenditure incurred on research carried out in France, when it applied to Community undertakings operating in that State through a secondary place of business (judgment of 8 July 1999 in Case C-254/97 *Baxter and Others* v *Premier Ministre and Others*, not yet reported in the ECR). Although there certainly existed French undertakings which incurred research expenditure outside France and foreign undertakings which incurred such expenditure within France, it remained the case that the tax allowance in question seemed likely to work more particularly to the detriment of undertakings having their principal place of business in other Member States and operating in France through secondary places of business. It was, typically, those undertakings which, in most cases, had developed their research activity outside France.

13.5. The final case relates to the limits which may be placed on an undertaking on the ground that it would use the right of establishment to circumvent the law of a Member State (Case C-212/97 *Centros* v *Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459). Here, Danish nationals resident in Denmark formed in the United Kingdom a company which did not trade in the United Kingdom. The Danish authorities opposed the registration of a branch of that company in Denmark in their view, the undertaking was in fact seeking to circumvent national rules concerning, in particular, the paying up of a minimum capital. The Court held that a practice of that kind constituted an obstacle to freedom of establishment and that the fact that a national of a Member State who wished to set up a company chose to form it in the Member State whose rules of company law seemed to him the least restrictive and to set up branches in other Member States could not, in itself, constitute an abuse of the right of establishment. Nor did that obstacle fulfil the necessary conditions for it to be justified as an imperative requirement in the public interest that protected creditors. First of all, the practice at issue was not such as to attain the objective of protecting creditors which it purported to pursue since, if the company concerned had conducted business in the United Kingdom its branch would have been registered in Denmark, even though Danish creditors might have been equally exposed to risk. Secondly, creditors were on notice as to the company's nationality and could refer to certain rules of Community law which protected them. Finally, it was possible to adopt measures which were less restrictive or which interfered less with fundamental freedoms. While observing that there was nothing to preclude the Member State concerned

from adopting any appropriate measure for preventing or penalising fraud, either in relation to the company itself, or in relation to its members where it had been established that they were in fact attempting to evade their obligations towards creditors established on the territory of the State in question, the Court concluded that the refusal to register the company was contrary to the Treaty.

14. All of the most important cases on the *free movement of capital* decided in 1999 arose from questions referred for a preliminary ruling by Austrian courts.

14.1. A court asked whether Austrian legislation which required a mortgage securing a debt payable in the currency of another Member State to be registered in the national currency was compatible with Article 73b of the Treaty (now Article 56 EC). The Court provided some explanation of the terms "movements of capital" and "payments", stating first of all that the nomenclature in respect of movements of capital annexed to Directive 88/361/EEC [10] still had the same indicative value, for the purposes of defining the notion of capital movements, as it did before the entry into force of Article 73b et seq. of the EC Treaty, subject to the qualification, contained in the introduction to the nomenclature, that the list set out therein was not exhaustive. In the case before the Court, it followed that the mortgage was covered by Article 73b of the Treaty. Next, the Court stated that the requirement at issue constituted a restriction on the movement of capital since its effect was to weaken the link between the debt to be secured, payable in the currency of another Member State, and the mortgage, whose value could, as a result of subsequent currency exchange fluctuations, come to be lower than that of the debt to be secured. This could only reduce the effectiveness of such a security, and thus its attractiveness. Consequently, the legislation was liable to dissuade the parties concerned from denominating a debt in the currency of another Member State. Furthermore, it could well cause the contracting parties to incur additional costs, by requiring them, purely for the purposes of registering the mortgage, to value the debt in the national currency and, as the case may be, formally to record that currency conversion. Finally, the legislation could not be justified by an imperative requirement in the public interest on the ground that it was designed to ensure the foreseeability and transparency of the mortgage system, since it enabled lower-ranking creditors to establish the precise amount of prior-ranking debts, and thus to assess the value of the security offered to them, only at the price of a lack of security for creditors whose debts were denominated in foreign currencies (Case C-222/97 *Trummer and Mayer* [1999] ECR I-1661).

14.2. *Konle*, cited above, was mainly concerned with the ability of public authorities, in that case the *Land* of Tyrol, systematically to require an administrative authorisation prior to the acquisition of land, with an obligation for the acquirer to show that the acquisition would not be used to create a secondary residence. The Court stated that, to the extent that a Member State could justify the system by relying on a town and country planning objective, the restrictive measure inherent in such a requirement could be accepted only if it were not applied in a discriminatory manner and if the same result could not be achieved by other less restrictive procedures. The Court considered that not to be so in the case before it, in particular since the available documents revealed the intention of using the means of assessment offered by the authorisation procedure in order to subject applications from foreigners, including Community nationals, to a more thorough check than applications from Austrian nationals.

14.3. Finally, in *Sandoz*, a case relating to the taxation of a loan contracted by a resident borrower with a non-resident lender, the issue raised was whether a stamp duty charged on legal transactions was compatible with the free movement of capital. The Court found that there was an obstacle to the movement of capital, but that it was necessary in order to prevent infringements of national tax law and regulations, as provided for in Article 73d(1)(b) of the Treaty (now Article 58(1)(b) EC). The national legislation applied, irrespective of the nationality of the contracting parties or of the place where the loan was contracted, to all natural and legal persons resident in Austria who entered into a contract for a loan, and its main objective was to ensure equal tax treatment. On the other hand, the Court found that the legislation was contrary to the Treaty in so far as, in the case of loans contracted without being set down in a written instrument, a loan contracted in Austria was not subject to the duty at issue whereas, if it was contracted outside Austria, duty was payable by virtue of the existence of the loan being recorded by an entry in the borrower's books and records of account (judgment of 14 October 1999 in Case C-439/97 *Sandoz* v *Finanzlandesdirektion für Wien, Niederösterreich und Burgenland*, not yet reported in the ECR).

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10 Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5).

15. As in previous years, the bulk of the cases which the Court had to decide concerning the law on *competition between undertakings* arose either from references by national courts for preliminary rulings or from appeals brought against decisions of the Court of First Instance.

15.1. As regards appeal proceedings, the case of *Ufex and Others* v *Commission* is to be noted, as are the judgments which finally disposed of the "polypropylene" cases. In those judgments, the Court confirmed almost without exception the assessments of the Court of First Instance (judgments of 8 July 1999 in Case C-49/92 P *Commission* v *Anic Partecipazioni*, Case C-51/92 P *Hercules Chemicals* v *Commission*, Case C-199/92 P *Hüls* v *Commission*, Case C-200/92 P *ICI* v *Commission*, Case C-227/92 P *Hoechst* v *Commission*, Case C-234/92 P *Shell International Chemical Company* v *Commission*, Case C-235/92 P *Montecatini* v *Commission* and Case C-245/92 P *Chemie Linz* v *Commission*, all not yet reported in the ECR).

The polypropylene appeals raised, first, fundamental questions relating to the concept of "non-existence" of a Community act and to the possibility of the Court of First Instance being obliged to grant a request made by a party for the oral procedure to be reopened. In response to the applicants' contentions that the Commission decision was non-existent, the Court recalled that acts of the Community institutions are in principle presumed to be lawful and accordingly produce legal effects, even if they are tainted by irregularities, until such time as they are annulled or withdrawn. However, by way of exception to that principle, acts tainted by an irregularity whose gravity is so obvious that it cannot be tolerated by the Community legal order must be treated as having no legal effect, even provisional, that is to say they must be regarded as legally non-existent. The purpose of this exception is to maintain a balance between two fundamental, but sometimes conflicting, requirements with which a legal order must comply, namely stability of legal relations and respect for legality. According to the Court, it is self-evident from the gravity of the consequences attaching to a finding that an act of a Community institution is non-existent that, for reasons of legal certainty, such a finding is reserved for quite extreme situations. As regards reopening of the oral procedure, the Court stated that the Court of First Instance is not obliged to accede to a request to that effect unless the party concerned relies on facts which may have a decisive influence on the outcome of the case and which it could not put forward before the close of the oral procedure. According to the Court, indications of a general nature relating to an alleged practice of the Commission that emerged from a judgment delivered in other cases or from statements made on the occasion of other proceedings do not amount to such facts. The Court also made it clear that the Court of First Instance was not obliged to order that the oral procedure be reopened on the ground of an alleged duty to raise of its own motion issues concerning the regularity of the procedure by which the contested decision was adopted, since any such obligation could exist only on the basis of the factual evidence adduced before the Court of First Instance.

The polypropylene judgments also clarify certain matters relating to the conditions for applying Article 85 of the Treaty (now Article 81 EC). With regard to the concept of a concerted practice which refers to a form of coordination between undertakings that, without having been taken to a stage where an agreement properly so-called has been concluded, knowingly substitutes for the risks of competition practical cooperation between the undertakings the Court stated first that, like an agreement, a concerted practice falls under Article 85 where it has as its object the prevention, restriction or distortion of competition even in the absence of anti-competitive effects on the market. It also stated that while the concept of a concerted practice implies, besides undertakings' concerting with each other, subsequent conduct on the market, and a relationship of cause and effect between the two, the presumption must none the less be subject to proof to the contrary, which the businesses concerned must adduce that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors for the purposes of determining their conduct on that market. Second, the Court stated in relation to application of the rule of reason, which certain appellants relied on, that even if that rule does have a place in the context of Article 85(1) of the Treaty, in no event may it exclude application of that provision in the case of a restrictive arrangement involving producers accounting for almost all the Community market and concerning price targets, production limits and sharing out of the market. Third, certain appellants contended that the finding that the meetings in which they had taken part were unlawful amounted to a violation of the freedoms of expression, of peaceful assembly and of association. The Court, while acknowledging that those freedoms are protected in the Community legal order, rejected the plea since the meetings in question had not been held to be contrary to Article 85 *per se*, but only inasmuch as their purpose was anti-competitive. Fourth, the Court held that although a situation of necessity might allow conduct which would otherwise infringe Article 85 of the Treaty to be considered justified, such a situation can never result from the mere requirement to avoid financial loss. Fifth, the Court accepted that the presumption of innocence applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments. However, where it is established that an undertaking

has taken part in meetings between undertakings of a manifestly anti-competitive nature, the view may be taken that it is for the undertaking to provide another explanation of the tenor of those meetings, without that amounting to an undue reversal of the burden of proof or to the setting aside of the presumption of innocence.

Certain appellants also challenged the refusal to apply the limitation period in their favour because their conduct had allegedly been continuous over a number of years. The Court stated that, although the concept of a continuous infringement has different meanings in the legal orders of the Member States, it in any event comprises a pattern of unlawful conduct implementing a single infringement, united by a common subjective element. On that basis it held that the Court of First Instance had been right in holding that the activities which formed part of schemes and pursued a single purpose constituted a continuous infringement of the provisions of Article 85(1) of the Treaty, so that the five-year limitation period laid down by the legislation could not begin to run until the day on which the infringement ceased. Finally, with regard to the administrative proceedings, one appellant complained that the Court of First Instance had not drawn any consequences from the Commission's refusal to grant it access to the replies of the other producers to the statements of objections (*Hercules Chemicals* v *Commission*). The Court of Justice approved the approach followed by the Court of First Instance, which had not ruled on the lawfulness of such a refusal but had established that, even in the absence of the refusal, the proceedings would not have had a different outcome. According to the Court of Justice, such an approach is not tantamount to conferring rights of defence only on the innocent, because the undertaking concerned does not have to show that, if it had had access to the replies in question, the Commission decision would have been different in content, but only that it would have been able to use those documents for its defence.

Other important points may be found in the judgment in *Commission* v *Anic Partecipazioni*, cited above. First, the Court acknowledged that, given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, responsibility for committing the infringements of Article 85 of the Treaty was personal in nature. However, the mere fact that an undertaking takes part in such an infringement in ways particular to it does not suffice to exclude its responsibility for the entire infringement, including conduct put into effect by other participating undertakings but sharing the same anti-competitive object or effect. On the contrary, the undertaking may be regarded as responsible for the entire infringement, throughout the whole period of its participation in it, where it is established that it was aware of the offending conduct of the other participants or that it could reasonably have foreseen that conduct and that it was prepared to take the risk. Second, the Court held with regard to the burden of proving infringements that the Court of First Instance was entitled to find, without unduly reversing the burden of proof, that since the Commission had been able to establish that an undertaking had participated in the meetings at which price initiatives had been decided on, planned and monitored, it was for the undertaking to adduce evidence that it had not subscribed to those initiatives. Third, the Court held that patterns of conduct by several undertakings may be a manifestation of a single infringement, corresponding partly to an agreement and partly to a concerted practice. Finally, the Court allowed the Commission's appeal in this case after observing that the Court of First Instance could not, without contradicting itself, on the one hand accept the view that there was a single infringement, responsibility for which could be attributed globally to every undertaking, and, on the other hand, partially annul the decision on the ground that it had not been proved that the undertaking had participated in some of the activities forming part of that single infringement.

15.2. In Case C-119/97 P *Ufex and Others* v *Commission* [1999] ECR I-1341, the Court was given the opportunity to clarify the extent to which the Commission may reject complaints relating to Article 86 of the Treaty (now Article 82 EC) for lack of a sufficient Community interest. The appellants challenged the statements of the Court of First Instance according to which the Commission was entitled, when assessing the Community interest, to take into account relevant factors other than those listed by the Court of First Instance in the case of *Automec II*. The Court rejected that plea, after stating that, in view of the fact that the assessment of the Community interest raised by a complaint depended on the circumstances of each case, the number of criteria of assessment the Commission could refer to should not be limited and, conversely, it should not be required to have recourse exclusively to certain criteria. On the other hand, the Court found fault with the statements of the Court of First Instance to the effect that establishing that infringements had taken place in the past was not covered by the functions conferred on the Commission by the Treaty and that the Commission might therefore lawfully decide that it was not appropriate to pursue a complaint regarding practices which had since ceased. The Court of Justice acknowledged that, in order to perform effectively its task of implementing competition policy, the Commission was entitled to give differing degrees of priority to the complaints brought before it, but the discretion which it had for that purpose was not unlimited. In particular, it could not regard as excluded in principle from its purview certain situations which came under the task entrusted to it by the Treaty, but had to assess in each case how serious the alleged interferences with competition were and how

persistent their consequences were. According to the Court, the Commission remained competent if anti-competitive effects continued after the practices which caused them had ceased. In deciding to discontinue consideration of a complaint against such practices on the ground of lack of Community interest, the Commission therefore could not rely solely on the fact that practices alleged to be contrary to the Treaty had ceased, without having ascertained that anti-competitive effects no longer continued and, if appropriate, that the seriousness of the alleged interferences with competition or the persistence of their consequences had not been such as to give the complaint a Community interest.

15.3. On 21 September 1999 the Court gave judgment in three cases concerning the application of the competition rules to conditions governing the affiliation of undertakings to sectoral pension funds (Case C-67/96 *Albany International* v *Stichting Bedrijfspensioenfonds Textielindustrie*, Joined Cases C-115/97, C-116/97 and C-117/97 *Brentjens' Handelsonderneming* v *Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* and Case C-219/97 *Maatschappij Drijvende Bokken* v *Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven*, all not yet reported in the ECR). The disputes before three Netherlands courts arose from the refusal of certain undertakings to pay their contributions to sectoral pensions funds to which they had been required to affiliate.

The Court ruled, first, that a decision taken by organisations representing employers and workers in a given sector, in the context of a collective agreement, to set up in that sector a single pension fund responsible for managing a supplementary pension scheme and to request the public authorities to make affiliation to that fund compulsory for all workers in that sector did not fall within the scope of Article 85 of the Treaty. In reaching that conclusion, the Court relied in particular on the social provisions of the EC Treaty and stated that while it was beyond question that certain restrictions of competition were inherent in collective agreements between organisations representing employers and workers, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment. According to the Court, it therefore followed from an interpretation of the provisions of the Treaty as a whole which was both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives had to be regarded, because of their nature and purpose, as falling outside the scope of Article 85(1) of the Treaty. That was so in the case of agreements which were concluded in the form of collective agreements, following collective negotiations between organisations representing employers and workers, and sought generally to guarantee a certain level of pension for all workers in the sector, thus contributing directly to improving one of their working conditions, namely their remuneration. It also followed from that conclusion that a decision by the public authorities to make affiliation to such sectoral pension funds compulsory at the request of organisations representing employers and workers in a given sector likewise could not be regarded as requiring or favouring the adoption of agreements, decisions or concerted practices contrary to Article 85 or reinforcing their effects.

On the other hand, the Court held that such pension funds were undertakings within the meaning of Article 85 et seq. of the Treaty inasmuch as they engaged in an economic activity in competition with insurance companies. The funds themselves determined the amount of the contributions and benefits and operated in accordance with the principle of capitalisation, the amount of the benefits provided depended on the financial results of the investments made by them, and in certain circumstances they could or had to grant exemption from affiliation to undertakings insured by other means.

Finally, the Court ruled that such a fund could be regarded as occupying a dominant position within the meaning of Article 86 of the Treaty (now Article 82 EC), but that its exclusive right to manage supplementary pensions in a given sector and the resultant restriction of competition could be justified under Article 90(2) of the Treaty (now Article 86(2) EC) as necessary for the performance of the particular social task of general interest with which it had been charged. The Member States could not be precluded, when determining what services of general economic interest to entrust to certain undertakings, from taking account of objectives pertaining to their national policy, and the Netherlands supplementary pension scheme fulfilled an essential social function in the pensions system of that State. The Court also established that the removal of the exclusive right conferred on such funds might make it impossible for them to perform the tasks of general economic interest entrusted to them under economically acceptable conditions and threaten their financial equilibrium.

15.4. In Joined Cases C-215/96 and C-216/96 *Bagnasco and Others* v *BPN and Carige* [1999] ECR I-135, the Court was asked to consider the compatibility with Article 85(1) of the EC Treaty of standard bank conditions which the Associazione Bancaria Italiana (Italian Banking Association) imposed on its members with regard to the conclusion of contracts for current-account credit facilities and for the provision of general guarantees. A particular feature of this case is that the Commission had already

examined those standard bank conditions in the light of Article 85 and had found that they were not capable of appreciably affecting trade between Member States.

The conditions, first, allowed banks, in contracts for current-account credit facilities, to change the interest rate at any time by reason of changes on the money market, and to do so by means of a notice displayed on their premises or in such manner as they considered most appropriate. The Court found that, since any variation of the interest rate depended on objective factors, such a concerted practice was not covered by the prohibition under Article 85 inasmuch as it could not have an appreciable restrictive effect on competition. As regards the conditions which imposed certain clauses relating to the provision of general guarantees the Court, relying in particular on the findings made previously by the Commission, held that they were not, taken as a whole, liable to affect trade between Member States. Nor did the application of those two sets of conditions constitute abuse of a dominant position within the meaning of Article 86 of the Treaty.

16. In the field of *supervision of State aid*, the Court dismissed an action for annulment brought by the French Republic against a decision by the Commission (judgment of 5 October 1999 in Case C-251/97 *France* v *Commission*, not yet reported in the ECR). France argued that the contested national measures, namely graduated reductions of employers' social security contributions for undertakings in certain manufacturing sectors, were not caught by Article 92(1) of the Treaty (now Article 87(1) EC), since the advantage conferred was only the quid pro quo of exceptional additional costs which the undertakings had agreed to assume as a result of the negotiation of collective agreements and that, in any event, taking account of those additional costs, the contested measures were revealed to be financially neutral. The Court did not accept that line of argument. It pointed out first of all that the costs arose from collective agreements concluded between employers and trade unions which undertakings were bound to observe, and were included, by their nature, in the budgets of undertakings. It also found that those agreements were liable to generate gains in competitiveness for undertakings, so that it was impossible to evaluate with the required accuracy their final cost for undertakings.

17. While the Court's judgments in the field of *indirect taxation* are generally technical in nature and relatively limited in their scope, two cases concluded in 1999 are worth noting.

17.1. First, in the field of value added tax (VAT), the judgment of 7 September 1999 in Case C-216/97 *Gregg* v *Commissioners of Customs & Excise*, not yet reported in the ECR, expressly departs from the Court's earlier ruling in Case C-453/93 *Bulthuis-Griffioen* v *Inspecteur der Omzetbelasting* [1995] ECR I-2341. *Gregg* concerned the scope of the exemptions for certain activities in the public interest, provided for by Article 13A(1) of Directive 77/388/EEC. [11] The national court essentially asked whether the use of the words "establishments" and "organisations" in that provision meant that only legal persons could be covered by those exemptions, to the exclusion of natural persons running a business. The Court replied in the negative, stating that its interpretation was consistent with the principle of fiscal neutrality which was inherent in the common system of VAT and in compliance with which the exemptions provided for in Article 13 of the Directive 77/338 had to be applied.

17.2. The second case related to the interpretation of Directive 69/335/EEC concerning indirect taxes on the raising of capital, [12] as amended by Directive 85/303/EEC. [13] In a dispute before the Supremo Tribunal Administrativo (Supreme Administrative Court) of Portugal, the issue was raised as to whether Portuguese legislation relating to a charge for the notarial certification of deeds recording an increase in a company's share capital and a change in its name and registered office was compatible with the directive. The Court found, first, that charges constituted taxes for the purposes of the directive where they were collected for drawing up notarially attested acts recording a transaction covered by the directive under a system where notaries were employed by the State and the charges in question were paid in part to that State for the financing of its official business. It then stated that a tax in the form of a charge collected for drawing up a notarially attested act recording a change in a company's name and registered office should be regarded as having the same characteristics as capital duty in so far as it was calculated

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11 Sixth Council Directive of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1).

12 Council Directive of 17 July 1969 (OJ, English Special Edition 1969 (II), p. 412).

13 Council Directive of 10 June 1985 amending Directive 69/335 (OJ 1985 L 156, p. 23).

by reference to the company's share capital. Otherwise it would be possible for Member States, while refraining from imposing taxes on the raising of capital as such, to tax that capital whenever the company amended its articles of association, thereby enabling the objective pursued by the directive to be circumvented. Thus, where such a charge amounted to a tax for the purposes of the directive, it was in principle prohibited under the directive and that prohibition could be relied on by individuals in proceedings before their national courts. Finally, the charge at issue could not fall within the derogation for duties paid by way of fees or dues since its amount increased in direct proportion to the capital raised and without any upper limit (judgment of 29 September 1999 in Case C-56/98 *Modelo* v *Director-Geral dos Registos e Notariado*, not yet reported in the ECR).

18. The Court delivered 10 judgments in 1999 in the field of *public procurement*, most in response to questions posed by national courts concerning the interpretation of Community directives.

18.1. In the case of *Alcatel Austria*, the national court was uncertain whether Austrian legislation was compatible with Directive 89/665/EEC, which regulates procedures for reviewing the award of public supply and public works contracts [14] and, if it was not, whether that directive could directly overcome the inadequacies of national law (judgment of 28 October 1999 in Case C-81/98 *Alcatel Austria and Others* v *Bundesministerium für Wissenschaft und Verkehr*, not yet reported in the ECR). In accordance with Austrian law as it applied at the time of this case, the contracting authority's decision as to whom to award the contract was one taken internally; there was no public notification of the decision and it was not open to challenge. It followed that a bidder who had participated in a tender procedure could not have that decision annulled, and was entitled only to claim damages once the contract consequent upon the award decision had been concluded.

In its judgment, the Court found first of all that a system of that kind was not compatible with the Community directive since it might lead to the systematic removal of the most important decision of the contracting authority, that is to say the award of the contract, from the purview of the measures envisaged in Article 2(1)(a) and (b) of Directive 89/665, namely the adoption of interim measures by way of interlocutory procedures and the setting aside of decisions. The Member States were required to ensure that the contracting authority's decision prior to the conclusion of the contract was in all cases open to review in a procedure whereby an applicant could have that decision set aside if the relevant conditions were met. Secondly, faced with that Austrian system in which there was no administrative law measure that the persons concerned might acquire knowledge of and that might, following an application, be set aside, the Court held that Community law could not be interpreted as meaning that the review body set up by the Austrian legislature could hear the applications covered by Article 2(1)(a) and (b) of the directive. It pointed out, however, that in such circumstances, those concerned could seek compensation, under the appropriate procedures in national law, for the damage suffered by reason of the failure to transpose a directive within the prescribed period.

18.2. In *Teckal*, the national court was uncertain whether a local authority had to follow the tendering procedures for public contracts provided for by Directive 93/36/EEC [15] where it entrusted the supply of products to a consortium of which it was a member. In its judgment, the Court of Justice noted first of all that, under the legislation governing public contracts in respect of products, whether the supplier is or is not itself a contracting authority is not conclusive. It then stated that a public contract exists where the contract is for valuable consideration and concluded in writing, and that it is therefore necessary to determine whether there has been an agreement between two separate persons. In that regard, in accordance with Article 1(a) of Directive 93/36, it is, in principle, sufficient if the contract was concluded between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority. The directive can be inapplicable only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities (judgment of 18 November 1999 in Case C-107/98 *Teckal* v *Comune di Viano and Another*, not yet reported in the ECR).

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14 Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33).

15 Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1).

19. The increasing importance of *intellectual property* in the functioning of the economy is reflected in the development of the litigation to which it gives rise. As in previous years, the Court considered time and again the First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, [16] in particular Article 3 (grounds for refusal of registration or invalidity), Article 5 (rights conferred by a trade mark), Article 6 (limitation of the effects of a trade mark) and Article 7 (exhaustion of the rights conferred by a trade mark).

19.1. In Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee* v *Boots- und Segelzubehör Walter Huber and Another* [1999] ECR I-2779, the Court provided substantial clarification as to the circumstances in which Article 3(1)(c) of the directive precludes registration of a trade mark consisting exclusively of a geographical name. In particular, it follows from the judgment that the registration of geographical names as trade marks is not prohibited solely where the names designate places which are, in the mind of the relevant class of persons, currently associated with the category of goods in question, but also in the case of geographical names which are liable to be used in future by the undertakings concerned as an indication of the geographical origin of that category of goods. The Court also defined the scope of the derogation, laid down in the first sentence of Article 3(3) of the directive, for trademarks which have acquired a distinctive character. It stated that a trade mark acquires distinctive character following the use which has been made of it where the mark has come to identify the product in respect of which registration is applied for as originating from a particular undertaking and thus to distinguish that product from goods of other undertakings.

19.2. Article 5(1) of the directive defines the extent of the rights conferred by a trade mark while, under Article 5(2), a trade mark having a reputation may enjoy protection extending to products or services which are not similar to those for which the trade mark is registered.

Article 5(1) provides in particular that the proprietor is to be entitled to prevent all third parties not having his consent from using in the course of trade any sign where, because of its identity with, or similarity to, the trade mark and the identity or similarity of the goods or services covered by the trade mark and the sign, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association between the sign and the trade mark. The Court stated in its judgment of 22 June 1999 in Case C-342/97 *Lloyd Schuhfabrik Meyer* v *Klijsen Handel*, not yet reported in the ECR, that it was possible that mere aural similarity between trade marks could create a likelihood of confusion of that kind. The more similar the goods or services covered and the more distinctive the earlier mark, the greater would be the likelihood of confusion. In this connection, the Court provided certain indications additional to those contained in the judgment in *Windsurfing Chiemsee*, cited above to assist national courts in determining the distinctive character of a trade mark.

As regards protection extending to non-similar products or services, provided for in Article 5(2), the Court stated in *General Motors* that, in order for a registered trade mark to enjoy such protection as a mark having a reputation, it had to be known by a significant part of the public concerned by the products or services which it covered. In examining whether that condition was fulfilled, the national court had to take into consideration all the relevant facts of the case, in particular the market share held by the trade mark, the intensity, geographical extent and duration of its use, and the size of the investment made by the undertaking in promoting it. Territorially, it was sufficient for the reputation to exist in a substantial part of the Member State or, in the case of trade marks registered at the Benelux Trade Mark Office, in a substantial part of the Benelux territory, which part could consist of a part of one of the Benelux countries (judgment of 14 September 1999 in Case C-375/97 *General Motors* v *Yplon*, not yet reported in the ECR).

19.3. Rights conferred by a trade mark in accordance with Article 5 are subject to the limitations in Articles 6 and 7. These provisions, which are respectively concerned with the limitation of the effects of a trade mark and exhaustion of the rights conferred by a trade mark, were dealt with in the cases of *BMW*, *Sebago* and *Pharmacia & Upjohn*.

The questions submitted in *BMW* concerned a situation in which the BMW mark had been used to inform the public that the advertiser carried out the repair and maintenance of BMW cars or that he had specialised, or was a specialist, in the sale or repair and maintenance of such cars.

As regards sales activities, the Court stated that it was contrary to Article 7 of the directive for the proprietor of the BMW mark to prohibit the use of its mark by another person for the purpose of

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16 First Council Directive of 21 December 1988 (OJ 1989 L 40, p. 1).

informing the public that he had specialised or was a specialist in the sale of second-hand BMW cars, provided that the advertising concerned cars which had been put on the Community market under that mark by the proprietor or with its consent and that the way in which the mark was used in that advertising did not constitute a legitimate reason, within the meaning of Article 7(2), for the proprietor's opposition. The Court made it clear that, if there was no risk that the public would be led to believe that there was a commercial connection between the reseller and the trade mark proprietor, the mere fact that the reseller derived an advantage from using the trade mark in that advertisements for the sale of goods covered by the mark, which were in other respects honest and fair, lent an aura of quality to his own business did not constitute a legitimate reason within the meaning of Article 7(2). The same limits applied *mutatis mutandis* this time by virtue of Article 6 of the directive if the trade mark proprietor intended to prohibit a third party from using the mark for the purpose of informing the public of the repair and maintenance of goods covered by it (Case C-63/97 *BMW* v *Deenik* [1999] ECR I-905).

In *Sebago*, a further case on Article 7(1) of the directive and the exhaustion of rights conferred by a trade mark, the Court stated that, for there to be consent within the meaning of that provision, such consent had to relate to each individual item of the product in respect of which exhaustion was pleaded. The proprietor could therefore continue to prohibit the use of the mark in pursuance of the right conferred on him by the directive as regards individual items of the product which had been put on the market in the Community (or in the EEA following the entry into force of the EEA Agreement) without his consent (judgment of 1 July 1999 in Case C-173/98 *Sebago and Another* v *GB-Unic*, not yet reported in the ECR).

While technically relating to the interpretation of Article 36 of the Treaty (now Article 30 EC), the judgment in *Pharmacia & Upjohn* was also concerned with the concept of exhaustion of the rights conferred by a trade mark, referred to in Article 7 of the directive. This case involved defining the conditions in which a parallel importer was entitled to replace the original trade mark used by the proprietor in the Member State of export by the trade mark which the proprietor used in the Member State of import. The Court held that the parallel importer was not required to prove an intention on the part of the proprietor of the trade marks to partition the markets, but the replacement of the trade mark had to be objectively necessary if the proprietor were to be precluded from opposing it. This condition of necessity was satisfied if, in a specific case, the prohibition imposed on the importer against replacing the trade mark hindered effective access to the markets of the importing Member State, for example if a rule for the protection of consumers prohibited the use in that State of the trade mark used in the exporting Member State on the ground that it was liable to mislead consumers. In contrast, the condition of necessity would not be satisfied if replacement of the trade mark were explicable solely by the parallel importer's attempt to secure a commercial advantage (judgment of 12 October 1999 in Case C-379/97 *Pharmacia & Upjohn* v *Paranova*, not yet reported in the ECR).

20. The Court also annulled the measure by which the Commission had registered the name "Feta" as a protected designation of origin pursuant to Regulation (EEC) No 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs [17] (Joined Cases C-289/96, C-293/96 and C-299/96 *Denmark and Others* v *Commission* [1999] ECR I-1541). The Court found that, in deciding that the name "Feta" did not constitute a generic name within the meaning of Article 3 of Regulation No 2081/92 and could therefore be registered, the Commission had wrongly minimised the importance to be attached to the situation existing in the Member States other than the State of origin and considered their national legislation to be entirely irrelevant.

21. The principle of *equality between men and women*, which is laid down in numerous provisions of Community law, prohibits discrimination on grounds of sex. However, there are often difficulties in proving such discrimination, as the Court's recent case-law shows.

21.1. Where a measure adopted by a Member State is not based directly on sex, it is necessary to establish that it has disparate effect as between men and women to such a degree as to amount to discrimination. The national court must verify whether the statistics available indicate that a considerably smaller percentage of women than men is able to fulfil the requirement imposed by the measure. If that is the case, there is in principle indirect sex discrimination (Case C-167/97 *Regina* v *Secretary of State for Employment ex parte Seymour-Smith and Perez* [1999] ECR I-623).

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17 Council Regulation of 14 July 1992 (OJ 1992 L 208, p. 1).

It may be that a difference in treatment, whether direct or indirect, is justified by objective factors unrelated to any discrimination on grounds of sex. In that case, it is for the Member State, as the author of the allegedly discriminatory rule, to show that the rule reflects a legitimate aim of its social policy, that that aim is unrelated to any discrimination based on sex, and that it could reasonably consider that the means chosen were suitable for attaining that aim (*Seymour-Smith and Perez*, cited above).

It may also be that male and female workers are in different situations, so that the difference in treatment does not constitute discrimination.

The Court thus held that the principle of equal pay does not preclude the making of a lump-sum payment exclusively to female workers who take maternity leave where that payment is designed to offset the occupational disadvantages which arise for those workers as a result of their being away from work (judgment of 16 September 1999 in Case C-218/98 *Abdoulaye and Others* v *Régie Nationale des Usines Renault*, not yet reported in the ECR).

Similarly, where national legislation grants a termination payment to workers who end their employment relationship prematurely in order to take care of their children owing to a lack of child-care facilities for them, Community law does not preclude that payment being lower than that received, for the same actual period of employment, by workers who give notice of resignation for an important reason related to working conditions in the undertaking or to the employer's conduct. Those payments cannot be compared with one another since the situations covered are different in substance and origin (judgment of 14 September 1999 in Case C-249/97 *Gruber* v *Silhouette International Schmied*, not yet reported in the ECR).

Following similar lines, even if there is a difference in pay between male and female workers, there is no discrimination on grounds of sex if those two categories of workers do not carry out the same work. In this connection, the Court held that work is not the same where the same activities are performed over a considerable length of time by persons the basis of whose qualification to exercise their profession is different (Case C-309/97 *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse* v *Wiener Gebietskrankenkasse* [1999] ECR I-2865).

21.2. Remaining in the field of equal treatment for men and women, Article 2(2) of Directive 76/207/EEC [18] provides that the directive is to be without prejudice to the right of Member States to exclude from its field of application those occupational activities and, where appropriate, the training leading to such activities, for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor. In its judgment of 26 October 1999 in Case C-273/97 *Sirdar* v *The Army Board*, not yet reported in the ECR, the Court held that the exclusion of women from service in special combat units such as the British Royal Marines may be justified under that provision by reason of the nature of the activities in question and the context in which they are carried out. The competent authorities were entitled, in the exercise of their discretion as to whether to maintain the exclusion in question in the light of social developments, and subject to their not abusing the principle of proportionality, to come to the view that the specific conditions for deployment of those assault units and in particular the rule of interoperability — that is to say the need for every Marine, irrespective of his specialisation, to be capable of fighting in a commando unit — justified their composition remaining exclusively male.

22. With regard to *environmental protection*, the conservation of wild birds within the framework of Directive 79/409/EEC, [19] relating to special protection areas, was again the subject of judgments in Treaty infringement proceedings. Those judgments confirmed the most important elements of the relevant case-law, in particular so far as concerns the obligation on the Member States to identify special protection areas and to provide for a legal status for their protection which is binding (judgments in Case C-166/97 *Commission* v *France* [1999] ECR I-1719 and of 25 November 1999 in Case C-96/98 *Commission* v *France*, not yet reported in the ECR). The Court noted that the Poitevin Marsh is of a very high ornithological value for numerous species, including species in danger of extinction or vulnerable to changes in their habitat, and that the Seine estuary is a particularly important ecosystem as a migration staging post, wintering area and breeding ground for a large number of species. In each case, the Court

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18 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40).

19 Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1).

found that the legal status conferred on those areas for their protection was insufficient having regard to the requirements laid down by Article 4(1) and (2) of the directive.

23. Numerous cases relating to the interpretation of the *Brussels Convention* (Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters) were completed in 1999. Most of them concerned issues of jurisdiction, which is dealt with in Title II of the Convention.

23.1. Jurisdiction in contractual matters is governed by Article 5(1) of the Convention. That provision lays down, by way of exception to the general rule that the courts of the Contracting State in which the defendant is domiciled have jurisdiction, that in matters relating to a contract a defendant domiciled in a Contracting State may be sued in another Contracting State, in the courts for the "place of performance of the obligation in question". In accordance with settled case-law, that expression must not be given an independent interpretation but is to be interpreted by reference to the law which governs the obligation in question according to the conflict rules of the court seised. The Court confirmed that solution when the French Cour de Cassation (Court of Cassation) raised the issue again (judgment of 28 September 1999 in Case C-440/97 *GIE Groupe Concorde and Others* v *The Master of the vessel Suhadiwarno Panjan and Others*, not yet reported in the ECR). The Cour de Cassation had suggested in its order for reference that it would be preferable for national courts to determine the place of performance of the obligation by seeking to establish, having regard to the nature of the relationship creating the obligation and the circumstances of the case, the place where performance actually took place or should have taken place, without having to refer to the law which, under the rules on conflict of laws, governs the obligation at issue. The Court rejected that approach, after stating in particular that some of the questions which might arise in the context of the alternative approach suggested, such as identification of the contractual obligation forming the basis of proceedings, as well as of the principal obligation where there were several obligations, could hardly be resolved without reference to the applicable law.

In a further case concerning Article 5(1) of the Convention, the Court ruled that a court did not have jurisdiction to hear the whole of an action founded on two obligations of equal rank arising from the same contract when, according to the conflict rules of the State where that court was situated, one of those obligations was to be performed in that State and the other in another Contracting State (judgment of 5 October 1990 in Case C-420/97 *Leathertex Divisione Sintetici* v *Bodetex*, not yet reported in the ECR). In order to reach that conclusion the Court first ruled out all the grounds which could have justified centralising jurisdiction: (i) the contract at issue in the main proceedings was not a contract of employment, a circumstance which would have justified centralising jurisdiction at the place of performance of the obligation which characterised the contract; (ii) since Article 22 of the Convention, relating to the handling of related actions, is not a provision which confers jurisdiction, it does not enable a court before which a case is pending to be accorded jurisdiction to try a related case; and (iii) in the case of obligations of equal rank, the principle that jurisdiction is determined by the main obligation cannot be applied.

23.2 In Case C-99/96 *Mietz* v *Intership Yachting Sneek* [1999] ECR I-2227, the Court provided some clarification of the words "contract for the sale of goods on instalment credit terms" in Article 13, first paragraph, point 1, of the Convention. According to the judgment, this provision is intended to protect the purchaser only where the vendor has granted him credit, that is to say, where the vendor has transferred to the purchaser possession of the goods in question before the purchaser has paid the full price. In such a case, first, the purchaser may, when the contract is concluded, be misled as to the real amount which he owes, and second, he will bear the risk of loss of those goods while remaining obliged to pay any outstanding instalments.

In the same judgment, the Court confirmed the interpretation of Article 24 of the Convention (provisional, including protective, measures) which it had adopted in Case C-391/95 *Van Uden* v *Deco-Line* [1998] ECR I-7091. According to the judgment, where the court hearing an application for provisional or protective measures has jurisdiction as to the substance of a case in accordance with Articles 2 and 5 to 18 of the Convention it may order such measures without that jurisdiction being subject to certain conditions and without any need to have recourse to Article 24 of the Convention. By contrast, a judgment delivered solely by virtue of the jurisdiction provided for under Article 24 and ordering interim payment of a contractual consideration does not constitute a provisional measure within the meaning of Article 24 unless, first, repayment to the defendant of the sum awarded is guaranteed if the plaintiff is unsuccessful as regards the substance of his claim and, second, the measure ordered relates only to specific assets of the defendant located or to be located within the confines of the territorial jurisdiction

of the court to which application is made. A provisional decision which appears not to satisfy those two conditions cannot be the subject of an enforcement order under Title III of the Convention.

The Court also clarified the form in which parties could, in international trade or commerce, indicate their consent to a jurisdiction clause for the purposes of the third case mentioned in the second sentence of the first paragraph of Article 17 of the Convention (Case C-159/97 *Castelletti* v *Hugo Trumpy* [1999] ECR I-1597).

24. With regard to the *EEC-Turkey Association Agreement*, in Case C-262/96 *Sürül* v *Bundesanstalt für Arbeit* [1999] ECR I-2685 the Court, after re-opening the oral procedure in order to examine the effect of Article 9 of that agreement, delivered a judgment of great importance, by according for the first time direct effect to the principle of non-discrimination on grounds of nationality laid down in Article 3(1) of Decision No 3/80 on the application of the social security schemes of the Member States of the European Communities to Turkish workers and members of their families. [20] The Court found first of all that no problems of a technical nature were liable to arise on application of that provision and that it was unnecessary to have recourse to additional coordinating measures for its application in practice. Therefore, the reasoning which had led the Court, in Case C-277/94 *Taflan-Met and Others* v *Bestuur van de Sociale Verzekeringsbank* [1996] ECR I-4085, to hold that Articles 12 and 13 of Decision No 3/80 did not have direct effect did not apply to Article 3(1). The Court then stated that Article 3(1) laid down in clear, precise and unconditional terms a prohibition of discrimination, based on nationality, against persons residing in the territory of any Member State to whom the provisions of Decision No 3/80 were applicable. Consideration of the purpose and the nature of the agreement of which Article 3(1) formed part did not contradict the finding that that principle of non-discrimination was capable of directly governing the situation of individuals. However, having regard to the fact that this was the first time that the Court had been called on to interpret Article 3(1) and that the judgment in *Taflan-Met and Others*, cited above, may well have created a situation of uncertainty, the Court limited the temporal effect of its judgment.

25. A number of cases concluded in 1999 concerned the *overseas countries and territories* ("the OCTs") associated with the Community under Part Four of the EC Treaty and Decision 91/482/EEC. [21] While acknowledging the special regime applicable to that association, the Court made it clear that trade between the OCTs and the Community does not necessarily benefit from a regime identical to that governing trade between Member States. Trade between Member States is transacted within the framework of the internal market, as distinct from trade between OCTs and the Community, which is governed by the imports regime. The Council may accordingly provide, for example, that provisions laying down health rules for imports of certain products from third countries apply to the placing on the Community market of such products from OCTs (judgment of 21 September 1999 in Case C-106/97 *Dutch Antillian Dairy Industry and Another* v *Rijksdienst voor de keuring van Vee en Vlees*, not yet reported in the ECR). The Council is also entitled, with a view to reconciling the principles of the association of the OCTs with the Community and those of the common agricultural policy, to adopt protective measures restricting exceptionally, partially and temporarily the freedom to import agricultural products from the OCTs (Case C-390/95 P *Antillean Rice Mills and Others* v *Commission* [1999] ECR I-769). Similarly, the entry into a Member State of goods coming from the OCTs must in principle be categorised as entry into the Community and not as an intra-Community transaction for the purposes of the Sixth Directive on VAT (Case C-181/97 *van der Kooy* v *Staatssecretaris van Financiën* [1999] ECR I-483).

26. With regard to the *status of officials and other members of staff of the European Communities*, the Court held that the Protocol on the Privileges and Immunities of the European Communities of 8 April 1965 does not preclude Belgian tax legislation under which Community officials whose income is exempt from tax in Belgium are excluded from entitlement to marital allowance. The allowance, a tax relief allowed only to households with a single income and to those with two incomes the second of which is below a given amount, can thus be refused to households in which one spouse is an official or other member of staff of the European Communities where his salary exceeds that amount (judgment of 14

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20 Decision of the Association Council of 19 September 1980 (OJ 1983 C 110, p. 60).

21 Council Decision 91/482/EEC of 25 July 1991 on the association of the overseas countries and territories with the European Economic Community (OJ 1991 L 263, p. 1).

October 1999 in Case C-229/98 *Vander Zwalmen and Massart* v *Belgian State*, not yet reported in the ECR).