A – Proceedings of the Court of Justice 2003

by Mr V. Skouris, President of the Court of Justice

1. This part of the annual report provides a survey of the activity of the Court of Justice of the European Communities in 2003. Apart from a brief statistical appraisal (section 2), it presents the main developments in the case-law, arranged as follows:

jurisdiction of the Court and procedure (section 3); general principles and constitutional and institutional cases (section 4); free movement of goods (section 5); common agricultural policy (section 6); freedom of movement for workers (section 7); freedom to provide services (section 8); freedom of establishment (section 9); free movement of capital (section 10); transport policy (section 11); competition rules (section 12); trade protection measures (section 13); trade mark law (section 14); harmonisation of laws (section 15); public procurement (section 16); social law (section 17); environmental law (section 18); justice and home affairs (section 19); external relations (section 20); Brussels Convention (section 21).

This selection covers only 90 of the 455 judgments and orders pronounced by the Court during 2003 and refers only to their essential points. Nor does it include the Opinions of the Advocates General, which are of undeniable importance for a detailed understanding of the issues at stake in certain cases but would increase the length of a report which must necessarily be brief. The full texts of all judgments, opinions and orders of the Court, as well as of the Opinions of the Advocates General, are available in all the official Community languages on the Court's internet site (www.curia.eu.int) and on the Europa site (www.europa.eu.int/eur-lex). In order to avoid any confusion and to assist the reader, this report refers, unless otherwise indicated, to the numbering of the articles of the Treaty on European Union and the EC Treaty established by the Treaty of Amsterdam.

2. As regards statistics, the Court brought 455 cases to a close in 2003 (net figure, that is to say, taking account of joinder). Of those, 308 cases were dealt with by judgments and 147 cases gave rise to orders. These figures show a slight decrease compared with the previous year (466 cases brought to a close). In 2003, 561 new cases arrived at the Court (477 in 2002, gross figures). At the end of 2003, there were 974 cases pending (gross figure) compared with 907 at the end of 2002.

The upward trend in the duration of proceedings did not change this year. References for preliminary rulings and direct actions took approximately 25 months, as compared with 24 months in 2002. The average time taken to deal with appeals was 28 months, compared with 19 months in 2002.

In 2003 the Court made differing degrees of use of the various instruments at its disposal to expedite its treatment of certain cases (priority treatment, the accelerated or expedited procedure, and the simplified procedure). For the second time, the Court made use of the expedited or accelerated procedure, as provided for in Articles 62a and 104a of the Rules of Procedure, this time in an appeal (Case C-39/03 P *Commission* v *Artegodan and Others* [2003] ECR I-7887). Since this instrument allows for the omission of certain stages in the proceedings, it was possible to give judgment within six months of the case being brought. Use of the expedited or accelerated procedure was sought in seven other cases, but the requirement of exceptional urgency laid down in the Rules of Procedure was not satisfied.

Also, the Court made frequent use of the simplified procedure provided for in Article 104(3) of the Rules of Procedure for answering certain questions referred to it for a preliminary ruling. Eleven orders were made on the basis of that provision.

As regards the distribution of cases between the full Court (in all its formations) and Chambers of Judges, the former disposed of almost 25% of the cases brought to a close in 2003, while Chambers of five Judges and Chambers of three Judges disposed of 55% and 20% of the cases respectively.

For further information with regard to the statistics for the 2003 judicial year, the reader is referred to Chapter IV of this report.

3. In the areas of the *jurisdiction* of the Court and *procedure*, two cases concerning references for preliminary rulings (3.1) and one relating to review of the legality of measures (3.2) are of interest.

3.1. In Case C-318/00 *Bacardi-Martini and Cellier des Dauphins* [2003] ECR I-905, the Court held inadmissible a question referred to it to enable the referring court to decide whether the legislation of another Member State is in accordance with Community law. In reaching that conclusion, the Court observed that, when such a question is before it, the Court must display special vigilance and "must be informed in some detail of [the referring court's] reasons for considering that an answer to the questions is necessary to enable it to give judgment" (paragraph 46). The Court pointed out, inter alia, that where the national court has confined itself to repeating the argument of one of the parties, without indicating whether and to what extent it considers that a reply to the question is necessary to enable it to give judgment, and, as a result, the Court does not have the material before it to show that it is necessary to rule on the question referred, that question is inadmissible.

The Court had an opportunity in Case C-300/01 *Salzmann* [2003] ECR I-4899 to clarify its case-law on the admissibility of a reference for a preliminary ruling where the circumstances of the dispute in the main proceedings are confined to a single Member State. The Court pointed out to begin with that the referring court was seeking an

interpretation of Community law for the purpose of determining the scope of rules of national law which refer to it. The Court cited its own case-law in that connection, according to which, first, it is for the national courts alone to determine, having regard to the particular features of each case, both the need to refer a question for a preliminary ruling and the relevance of such a question (Case C-448/98 *Guimont* [2000] ECR I-10663, paragraph 22, and Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch* [2002] ECR I-2157, paragraph 25), and, second, it is only in the exceptional case, where it is quite obvious that the interpretation of Community law sought bears no relation to the facts or the purpose of the main action, that the Court refrains from giving a ruling (Case C-302/97 *Konle* [1999] ECR I-3099, paragraph 33, and Case C-281/98 *Angonese* [2000] ECR I-4139, paragraph 18). However, the Court pointed out that a situation where national law requires that a national be allowed to enjoy the same rights as those which nationals of other Member States would derive from Community law in the same situation does not correspond to such an exceptional case. Moreover, the Court held that "where, in relation to purely internal situations, domestic legislation adopts solutions which are consistent with those adopted in Community law in order, in particular, to avoid discrimination against foreign nationals, it is clearly in the Community interest that, in order to forestall future differences of interpretation, provisions or concepts taken from Community law should be interpreted uniformly, irrespective of the circumstances in which they are to apply" (paragraph 34).

3.2. In judgments delivered on 30 September 2003 in Case C-93/02 P *Biret International* v *Council* (not yet published in the ECR) and Case C-94/02 P *Biret et Cie* v *Council* (not yet published in the ECR), the Court ruled in two appeals against judgments of the Court of First Instance [1] in litigation over prohibitions on imports into the Community of beef and veal from farm animals to which certain substances with hormonal action had been administered.

After outlining its case-law on the conditions under which non-contractual liability on the part of the Community arises (Case C-104/97 P *Atlanta* v *Commission and Council* [1999] ECR I-6983, paragraph 65), the Court stated that, given their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions. According to the Court, it is only where the Community has intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements, that it is for the Court to review the legality of the Community measure in question in the light of the WTO rules.

[1] Case T-174/00 *Biret International* v *Council* [2002] ECR II-17, and Case T-210/00 *Biret & Cie* v *Council* [2002] ECR II-47.

Moreover, noting that the Community has been granted a period for compliance with its obligations in relation to the WTO, the Court pointed out that, for the period prior to expiry of that period, the Community Courts cannot, in any event, carry out a review of the legality of the Community measures in question, particularly not in the context of an action for damages under Article 235 EC, without rendering ineffective the grant of such a period for compliance with the recommendations or decisions of the WTO's dispute settlement body.

4. Of the cases concerning the *general principles of Community law* and those with *constitutional* or *institutional* implications, those relating to fundamental rights (4.1), citizenship of the European Union (4.2), the comitology procedure (4.3), the validity of the OLAF Regulation and its scope (4.4), the right of access of the public to documents (4.5), the scope of interim measures ordered by the national courts (4.6) and the legal basis for two decisions concluding international agreements (4.7) should be noted. Two cases concerning non-contractual liability of the European Community (4.8) and the Member States (4.9) respectively are also of interest.

4.1. Joined Cases C-20/00 and C-64/00 *Booker Aquaculture and Hydro Seafood GSP* [2003] ECR I-7446 concerned the compatibility of Directive 93/53 [2] and certain national measures adopted in implementation of it with the fundamental principle of respect for private property. Neither the directive nor the contested national measures contain any provision concerning compensation for owners affected by a decision on the destruction and slaughter of fish affected by a disease in List I of Annex A to Directive 91/67. [3]

The Court stated, first, that the absence of provisions on compensation for owners whose fish have been destroyed or slaughtered cannot affect the validity of Directive 93/53. The Court recalled that fundamental rights are not absolute rights but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights, in particular in the context of a common organisation of the markets, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights (Case 5/88 *Wachauf* [1989] ECR 2609, paragraph 18; Case C-177/90 *Kühn* [1992] ECR I-35, paragraph 16, and Case C-22/94 *Irish Farmers' Association and Others* [1997] ECR I-1809, paragraph 27). In that regard, the

2 Council Directive 93/53/EC of 24 June 1993 introducing minimum Community measures for the control of certain fish diseases (OJ 1993 L 175, p. 23).

3 Council Directive 91/67/EEC of 28 January 1991 concerning the animal health conditions governing the placing on the market of aquaculture animals and products (OJ 1991 L 46, p. 1).

Court pointed out that Directive 93/53 fulfils a double function of enabling the taking of control measures as soon as the presence, on a farm, of a disease is suspected and preventing the spread of the disease, so that the measures which that directive imposes are in conformity with objectives of general interest pursued by the Community. Further, those measures, which are emergency measures, do not deprive farm owners of the use of their fish farms, but, as they enable owners to restock the affected farms as soon as possible, enable them to continue to carry on their activities there. Accordingly, the Court concluded that the minimum measures laid down by the directive do not constitute, in the absence of compensation for affected owners, a disproportionate and intolerable interference impairing the very substance of the right to property.

Second, as regards the measures taken by the United Kingdom in implementation of the directive, the Court cited its case-law according to which "the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules. Consequently, Member States must, as far as possible, apply those rules in accordance with those requirements" (paragraph 88) (see *Wachauf*, cited above, paragraph 19, and Case C-2/92 *Bostock* [1994] ECR I-955, paragraph 16). In the light of the objectives pursued by the directive, the Court held that those measures are not incompatible with the fundamental right to property.

In Joined cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others* [2003] ECR I-4989, the Court interpreted Directive 95/46 [4] in relation to the obligation of public bodies subject to control by the Rechnungshof (Austrian Court of Audit) to communicate to it the salaries and pensions exceeding a certain level paid by them to their employees and pensioners together with the names of the recipients, for the purpose of drawing up an annual report to be made available to the general public.

According to the Court, the provisions of Directive 95/46, in so far as they govern the processing of personal data liable to infringe fundamental freedoms, in particular the right to privacy, must necessarily be interpreted in the light of fundamental rights, which form an integral part of the general principles of law whose observance the Court ensures. In that regard, the Court interpreted the directive in the light of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which, while stating the principle that the public authorities must not interfere with the right to respect for private life, accepts that such an interference is possible where it is in accordance with the law and pursues one or more of the legitimate aims

[4] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31).

specified in Article 8(2), and is "necessary in a democratic society" for achieving that aim or aims.

In accordance with those principles, the Court held that "the collection of data by name relating to an individual's professional income, with a view to communicating it to third parties, falls within the scope of Article 8 of the [ECHR]" (paragraph 73) and that "... the communication of that data to third parties, in the present case a public authority, infringes the right of the persons concerned to respect for private life, whatever the subsequent use of the information thus communicated, and constitutes an interference within the meaning of Article 8 of the [ECHR]" (paragraph 74). In particular, the Court made the point that such interference may be justified only in so far as the wide disclosure not merely of amounts of annual income above a certain threshold but also of the names of the recipients of that income is both necessary for and appropriate to the aim of keeping salaries within reasonable limits, that being a matter for the national courts to examine.

Finally, the Court concluded that, if the national legislation at issue is incompatible with Article 8 of the ECHR, that legislation is also incapable of satisfying the requirements of Directive 95/46, whereas if the national courts were to consider that the provision at issue is both necessary for and appropriate to the public interest objective being pursued, they would then still have to ascertain whether, by not expressly providing for disclosure of the names of the persons concerned in relation to the income received, it complies with the requirement of foreseeability laid down by the case-law of the European Court of Human Rights. In that regard, the Court pointed out that the provisions of the directive at issue are sufficiently precise to be relied on by individuals before the national courts to oust the application of rules of national law which are contrary to those provisions.

4.2. In Case C-148/02 *Garcia Avello* (judgment of 2 October 2003, not yet published in the ECR), the Court gave a preliminary ruling on the interpretation of the provisions of the EC Treaty relating to citizenship of the Union and the principle of non-discrimination in relation to Belgian legislation which, in the case of persons with more than one nationality, including Belgian, gives precedence to the latter. In this case, the national administration had given the applicant's sons a surname in accordance with Belgian legislation as they had dual Belgian and Spanish nationality.

First, the Court outlined its case-law (see, inter alia, Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 82), according to which citizenship of the Union "is destined to be the fundamental status of nationals of the Member States" (paragraph 22) and "enables nationals of the Member States who find themselves in the same situation to enjoy within the scope ratione materiae of the EC Treaty the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for" (paragraph 23) (see Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31, and Case C-224/98 *D'Hoop* [2002] ECR I–6191,

paragraph 28). The Court went on to hold that, although, as Community law stands at present, the rules governing a person's surname are matters coming within the competence of the Member States, the latter must none the less, when exercising that competence, comply with Community law and in particular the Treaty provisions on the freedom of every citizen of the Union to move and reside in the territory of the Member States.

Second, the Court recalled that, according to settled case-law, the principle of non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way. In that regard, the Court observed that, under the national provisions at issue, persons who have, in addition to Belgian nationality, the nationality of another Member State are, as a general rule, treated in the same way as persons who have only Belgian nationality. However, according to the Court, those two categories of person are not in the same situation. The Court pointed out that "in contrast to persons having only Belgian nationality, Belgian nationals who also hold Spanish nationality have different surnames under the two legal systems" (paragraph 35). Moreover, the Court observed that, in the present case, the children concerned are refused the right to bear the surname which results from application of the legislation of the Member State which determined the surname of their father. According to the Court, such a discrepancy in surnames is liable to cause serious inconvenience for those concerned at both professional and private levels and, moreover, the practice at issue cannot be justified either with regard to the principle of the immutability of surnames or with regard to the objective of integration pursued.

4.3. In Case C-378/00 *Commission* v *Parliament and Council* [2003] ECR I-937, the Court had an opportunity to clarify its case-law on comitology. In an action brought by the Commission for annulment of Regulation No 1655/2000 [5] in so far as it makes the adoption of measures for the implementation of the LIFE programme subject to the regulatory procedure under Article 5 of the second comitology decision, [6] the Court considered first the admissibility of the application, stating, by analogy with Case 166/78 *Italy* v *Council* [1979] ECR 2575, paragraph 6, that exercise of the Commission's right to challenge the legality of any measure is not conditional on the position taken by the Commission at the time when the measure in question was adopted.

5 Regulation (EC) No 1655/2000 of the European Parliament and of the Council of 17 July 2000 concerning the Financial Instrument for the Environment (LIFE) (OJ 2000 L 192, p. 1).

6 Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184, p. 23).

As to the substance, the Court recalled that, under Article 202 EC, on the basis of which the second comitology decision was adopted, the Council is empowered to lay down principles and rules with which the manner of exercising the implementing powers conferred on the Commission must comply and added that "the scope of the principles and rules which the Council is empowered to lay down in that area is not limited by Article 202 EC to establishing the various procedures to which the Commission's exercise of the implementing powers conferred on it may be subject" (paragraph 41) and those principles and rules may also apply to the methods for choosing between those various procedures. In that regard, the Court observed that the second comitology decision did not intend to make the criteria laid down in Article 2 binding in character. None the less, the legal effect of that provision is that, when the Community legislature departs, in the choice of committee procedure, from the criteria which are laid down in Article 2 of the second comitology decision, it must state the reasons for that choice. In this case the Court held that a declaration by the Council at the time of adoption of the regulation at issue cannot be taken into account for the purpose of determining whether Regulation No 1655/2000 complies with the obligation to state reasons because a declaration adopted by the Council alone cannot in any event serve as a statement of reasons for a regulation adopted jointly by the Parliament and the Council. Moreover, the Court pointed out that a statement which amounts to no more than a reference to the applicable Community instrument does not constitute a sufficient statement of reasons.

4.4. By its judgment in Case C-11/00 *Commission* v *European Central Bank* [2003] ECR I-7215, the Court annulled a decision of the European Central Bank establishing that the Directorate for Internal Audit is solely responsible for administrative investigations within the ECB so far as combating fraud is concerned [7] and thus precludes both the investigative powers conferred on OLAF by Regulation No 1073/1999 [8] and the applicability of the regulation to the ECB.

In reaching that conclusion, the Court confirmed, first, that Regulation No 1073/1999, which, under Article 1(3), applies to "institutions, bodies, offices and agencies established by, or on the basis of, the Treaties" also applies to the ECB, whether or not that circumstance is liable to affect the legality of the regulation.

Second, the Court dismissed the ECB's plea alleging that Regulation No 1073/1999 is illegal. In particular, the Court dismissed a first plea that the regulation at issue had no

[7] Decision 1999/726/EC of the European Central Bank of 7 October 1999 on fraud prevention (ECB/1999/5) (OJ 1999 L 291, p. 36).

[8] Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (OJ 1999 L 136, p. 1).

legal basis, stating that the expression "financial interests of the Community" in Article 280 EC "must be interpreted as encompassing not only revenue and expenditure covered by the Community budget but also, in principle, revenue and expenditure covered by the budget of other bodies, offices and agencies established by the EC Treaty" (paragraph 89) and that, accordingly, it also covers the resources and expenditure of the ECB. As for the argument that the regulation undermined the independence of the ECB, the Court pointed out that "neither the fact that OLAF was established by the Commission and is incorporated within the Commission's administrative and budgetary structures on the conditions laid down in Decision 1999/352, nor the fact that the Community legislature has conferred on such a body external to the ECB powers of investigation on the conditions laid down in Regulation No 1073/1999, is per se capable of undermining the ECB's independence" [9] (paragraph 138) and that "the system of investigation set up by Regulation No 1073/1999 is specifically intended to permit the investigation of suspicions relating to acts of fraud or corruption or other illegal activities detrimental to the financial interests of the European Community, without in any way being similar to forms of control which, like financial control, are likely to follow a more rigid pattern" (paragraph 141). Finally, the Court observed that, in adopting the regulation at issue, the legislature did not breach the principle of proportionality as it was entitled, in the exercise of its wide discretion in this area, to take the view that it was necessary to set up a control mechanism which is simultaneously centralised within one particular organ, specialised and operated independently and uniformly with respect to those institutions, bodies, offices and agencies.

In conclusion, the Court held that the decision of the ECB is incompatible with the regulation because it seeks to set up a system for the prevention of fraud which is distinct from and exclusive of that provided for by Regulation No 1073/1999.

It should also be noted that in Case C-15/00 *Commission* v *European Investment Bank* [2003] ECR I-7342, the Court held that Regulations Nos 1073/1999 and 1047/1999 [10] also covered the EIB. As a consequence, the Court annulled the decision of the Management Committee of the EIB of 10 November 1999 concerning cooperation with OLAF which excluded the application of those regulations and established a separate system for the prevention of fraud peculiar to the EIB.

4.5. By Case C-41/00 P *Interporc* v *Commission* [2003] ECR I-2125, the Court dismissed an appeal brought against the judgment by which the Court of First Instance

9 Commission Decision 1999/352/EC, ECSC, Euratom of 28 April 1999 establishing the European Anti-fraud Office (OLAF) (OJ 1999 L 136, p. 20).

10 Council Regulation (Euratom) No 1074/1999 of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (OJ 1999 L 136, p. 8).

partially dismissed Interporc's action for annulment of the Commission Decision refusing it access to certain documents held by the Commission of which the Commission was not the author (Case T-92/98 *Interporc* v *Commission* [1999] ECR II-3521). The Commission's refusal was based, inter alia, on the authorship rule, as provided for by the code of conduct adopted by that institution. [11] That rule establishes that where a document held by an institution was not written by that institution, any application for access must be sent direct to the author of the document.

First, the Court rejected a plea by the applicant that the authorship rule is void on the ground that it infringes the principle of transparency as a rule of law of a higher order. On that point, the Court held that the Court of First Instance had correctly applied the case-law of the Court (Case C-58/94 *Netherlands* v *Council* [1996] ECR I-2169, paragraph 37), in holding that "so long as the Community legislature has not adopted general rules on the right of public access to documents held by the Community institutions, the institutions must take measures as to the processing of such requests by virtue of their power of internal organisation, which authorises them to take appropriate measures in order to ensure their internal operation in conformity with the interests of good administration" (paragraph 40) and that "so long as there was no rule of law of a higher order according to which the Commission was not empowered, in Decision 94/90, to exclude from the scope of the Code of Conduct documents of which it was not the author, the authorship rule could be applied" (paragraph 41).

Next, the Court cited its case-law, according to which "the aim pursued by Decision 94/90 as well as being to ensure the internal operation of the Commission in conformity with the interests of good administration, is to provide the public with the widest possible access to documents held by the Commission, so that any exception to that right of access must be interpreted and applied strictly" (paragraph 48) (see Joined Cases C-174/98 P and C-189/98 P *Netherlands and Van der Wal* v *Commission* [2000] ECR I-1, paragraph 27). It concluded that "under the Code of Conduct adopted by Decision 94/90, a strict interpretation and application of the authorship rule imply that the Commission must verify the origin of the document and inform the person concerned of its author so that he can make an application for access to that author" (paragraph 49).

4.6. The Court had an opportunity in Case C-213/01 P *T. Port* v *Commission* [2003] ECR I-2319, to clarify the scope of the interim legal protection that national courts are authorised to grant to individuals. In this case, a company which imported fruit and vegetables brought an appeal against a judgment of the Court of First Instance (Case T-52/99 *T. Port* v *Commission* [2001] ECR II-981) in which it was held that it could not ask to be taken into account in determining its reference quantity the quantity of

[11] Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents (OJ 1994 L 46, p. 58).

bananas a national court authorised it to release for free circulation, on payment of the customs duties of ECU 75 per tonne.

First, the Court held that interim measures ordered in interlocutory proceedings are granted only pending the final decision in the main proceedings, and without prejudice to that decision and that, moreover, they may themselves be challenged, and may be set aside or varied pending that decision. It concluded that customs duties determined provisionally in interlocutory proceedings are not necessarily the customs duties which are applicable on the day on which customs import formalities are completed, proof of payment of which operators must provide in order to demonstrate that the quantities of bananas which they wish to have included in the calculation of the reference quantity have actually been imported. In that regard the Court stressed that "the interim legal protection which national courts are authorised to grant to individuals in accordance with the case-law of the Court of Justice must not have the effect of creating a definitive factual framework which cannot be challenged subsequently" (paragraph 21).

4.7. By Case C-211/01 *Commission* v *Council* (judgment of 11 September 2003, not yet published in the ECR), the Court annulled Decisions 2001/265 [12] and 2001/266 [13] concerning the conclusion of agreements between the European Community and Bulgaria and Hungary respectively, establishing certain conditions for the carriage of goods by road and the promotion of combined transport. Because those agreements contained provisions relating to the principle of equal treatment in the area of road vehicle taxation, they were concluded on the basis of Articles 71 EC and 93 EC. However, the Court held that the aspect of the agreements which concerns the harmonisation of fiscal laws is, in the light of their aim and their content, only secondary and indirect in nature compared with the transport policy objective which they pursue and, consequently, held that "the Council should have used Article 71 EC alone, in conjunction with Article 300(3) EC, as the legal basis for the decisions" concluding the agreements (paragraph 50). The Court therefore annulled the contested decisions, while declaring that the effects of the decisions were to be maintained until new measures had been adopted.

12 Council Decision 2001/265/EC of 19 March 2001 concerning the conclusion of the agreement between the European Community and the Republic of Bulgaria establishing certain conditions for the carriage of goods by road and the promotion of combined transport (OJ 2001 L 108, p. 4).

13 Council Decision 2001/266/EC of 19 March 2001 concerning the conclusion of the agreement between the European Community and the Republic of Hungary establishing certain conditions for the carriage of goods by road and the promotion of combined transport (OJ 2001 L 108, p. 27).

4.8. In Case C-472/00 P *Commission* v *Fresh Marine Company* [2003] ECR I-7577, the Court ruled in an appeal against a decision of the Court of First Instance of 24 October 2000 in Case T-178/98 *Fresh Marine* v *Commission* [2000] ECR II-3331 that an unlawful measure had been adopted such as to entail the non-contractual liability of the European Community. In this case the Commission, after initially exempting a Norwegian company from definitive anti-dumping and countervailing duties and accepting its undertaking to adhere to a minimum price, had then imposed provisional duties on that company on the ground that analysis of the report submitted by it suggested that that undertaking was not observed. The company complained that the Commission had manipulated the report and sent it an amended version on the basis of which the Commission concluded that there was no longer any reason to believe that the undertaking had been broken.

In its analysis of the conditions to be met for a right to damages to arise, the Court observed that the decisive test for finding that a breach of Community law is sufficiently serious is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion and pointed out that where that institution has only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach

The Court therefore analysed the limits to which the Commission's discretion was subject in this case. In so doing it found that the provisional and countervailing duties were imposed on Fresh Marine on the basis of Article 8(10) of the basic anti-dumping Regulation No 384/96 [14] and Article 13(10) of Regulation No 2026/97 [15] on protection against subsidised imports from countries not members of the European Community respectively. Those provisions, while granting the Commission the power to impose provisional anti-dumping and countervailing duties, require at the same time that there be reason to believe that the undertaking to adhere to a minimum price has been breached and that the decision imposing such duties be taken on the basis of the best information available. Accordingly, the Court concluded that the Commission's conduct must be regarded as a sufficiently serious breach of a rule of Community law satisfying one of the conditions for the incurring of non-contractual liability by the Community where it imposes such duties solely on the basis of the analysis of a report by the exporting company concerned which gave reason to believe that that company had complied with its undertaking to adhere to a minimum price, but which the Commission had amended on its own initiative, without taking the precaution of asking the company

[14] Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1).

[15] Council Regulation (EC) No 2026/97 of 6 October 1997 on protection against subsidised imports from countries not members of the European Community (OJ 1997 L 288, p. 1).

what impact its unilateral action might have on the reliability of the information with which the company had provided it.

4.9. Case C-224/01 *Köbler* (judgment of 30 September 2003, not yet published in the ECR) concerns a German national who, having worked as an ordinary professor in an Austrian University for 10 years and having applied for the special length-of-service increment normally paid to professors with 15 years' experience exclusively at Austrian universities, argued that he had completed the requisite length of service if the duration of his service in universities of other Member States of the European Community were taken into consideration. After it had referred a question on this point for a preliminary ruling the Austrian court took account of the judgment in Case C-15/96 *Schöning-Kougebetopoulou* [1998] ECR I-47, according to which the provisions of Community law on freedom of movement for workers within the Community preclude a clause in a collective agreement applicable to the public service of a Member State which provides for promotion on grounds of seniority for employees of that service after eight years' employment in a salary group determined by that agreement without taking any account of previous periods of comparable employment completed in the public service of another Member State. The Austrian court then withdrew the question it had referred for a preliminary ruling and, without referring a second question to the Court of Justice, confirmed that the refusal of the application of the person concerned was justified, on the ground that the special length-of-service increment was a loyalty bonus which objectively justified a derogation from the Community law provisions on freedom of movement for workers. The German national then brought an action for damages before the referring court for breach of Community law.

In its preliminary ruling the Court confirmed that the principle, stated in particular in Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, where Member States are obliged to make good damage caused to individuals by infringements of Community law for which they are responsible applies in cases where the alleged infringement stems from a decision of a court adjudicating at last instance where the rule of Community law infringed is intended to confer rights on individuals, the breach is sufficiently serious and there is a direct causal link between that breach and the loss or damage sustained by the injured parties. The Court made clear that, as regards the second condition, in order to determine whether the infringement is sufficiently serious when the infringement at issue stems from a decision of a court, the competent national court, taking into account the specific nature of the judicial function, must determine whether that infringement is manifest. Finally, it added that it is for the legal system of each Member State to designate the court competent to determine disputes relating to that reparation.

Although it is generally for the national courts to consider the abovementioned criteria, the Court took the view that it had available to it all the materials enabling it to establish whether the conditions necessary for liability of the Member State concerned to be incurred were fulfilled. As regards the existence of a sufficiently serious breach, it held that an infringement of Community law does not have the requisite manifest character

for liability under Community law to be incurred by a Member State for a decision of one of its courts adjudicating at last instance, where, first, Community law does not expressly cover the point of law at issue, no reply was to be found to that question in the Court's case-law and that reply was not obvious, and, second, that infringement was not intentional but is the result of an incorrect reading of a judgment of the Court.

5. On the subject of the *free movement of goods* the judgments of the Court to be noted concern the scope of the protection afforded to the name "chocolate" (5.1), the scope of the concept of selling arrangements within the meaning of the decision in *Keck and Mithouard* (5.2), the protection of protected designations of origin (5.3), a demonstration which caused the blocking of a major transit route in Austria (5.4), registration duty on second-hand cars imported into Denmark (5.5), the prohibition on the sale of medicines in Germany from another Member State via the internet (5.6) and the failure to implement certain directives in Gibraltar (5.7).

5.1. In two judgments concluding proceedings for failure to fulfil obligations, in Case C-12/00 *Commission* v *Spain* [2003] ECR I-459 and Case C-14/00 *Commission* v *Italy* [2003] ECR I-513, the Court considered whether the Spanish and Italian legislation prohibiting cocoa and chocolate products to which vegetable fats other than cocoa butter have been added, and which are lawfully manufactured in Member States which authorise the addition of those fats, from being marketed under the name "chocolate" used in the Member State of production, and requiring the use of the term "chocolate substitute" for their marketing, is consistent with the principle of free movement of goods.

In those two cases, the Court considered first whether Directive 73/241 [16] brought about total harmonisation. In the light of its previous case-law (inter alia, Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857 and Case C-191/99 *Kvaerner* [2001] ECR I-4447), it held that Directive 73/241 was not intended to regulate definitively the use of vegetable fats other than cocoa butter in the cocoa and chocolate products to which it refers. Both the wording and the scheme of the directive indicate that it lays down a common rule, that is, the prohibition on adding to chocolate fat preparations not derived exclusively from milk, and establishes in Article 10(1) free movement for products which comply with that rule, while permitting Member States in Article 14(2)(a) to adopt national rules authorising the addition of vegetable fats other than cocoa butter to cocoa and chocolate products manufactured within their territory.

[16] Council Directive 73/241/EEC of 24 July 1973 on the approximation of the laws of the Member States relating to cocoa and chocolate products intended for human consumption (OJ 1973 L 228, p. 23).

As regards the applicability of Article 28 EC to the prohibition laid down by the legislation at issue, the Court took the view that cocoa and chocolate products containing fats not authorised by the common rule but whose manufacture and marketing under the name "chocolate" are authorised in certain Member States cannot be deprived of the benefit of free movement of goods solely on the ground that other Member States require within their territory that cocoa and chocolate products be manufactured according to the common rule in the directive (Case C-3/99 *Ruwet* [2000] ECR I-8749, Case 8/74 *Dassonville* [1974] ECR 837 and Case 120/78 *REWE-Zentral* [1979] ECR 649 ("*Cassis de Dijon*")). In Case C-12/00, the Court cited Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097 and Case C-470/93 *Mars* [1995] ECR I-1923, to dismiss the objection of the Spanish Government that its national legislation constitutes a selling arrangement. As the requirements at issue relate to the labelling and packaging of the products in question they do not come under the exception referred to in *Keck and Mithouard*. In Case C-14/00 the Court also dismissed the argument that the application of Article 28 EC would effectively discriminate against national producers, on the basis of the judgments in Case 98/86 *Mathot* [1987] ECR 809 and in Case C-448/98 *Guimont* [2000] ECR I-10663.

As regards the compatibility of the legislation at issue with Article 28 EC, the Court observed that such legislation is likely to impede trade between Member States (Case 182/84 *Miro* [1985] ECR 3731, Case 298/87 *Smanor* [1988] ECR 4489, Case 286/86 *Deserbais* [1988] ECR 4907 and *Guimont*, cited above). It compels the traders concerned to adjust the presentation of their products according to the place where they are to be marketed and consequently to incur additional packaging costs and adversely affect the consumer's perception of the products. Moreover, the inclusion in the label of a neutral and objective statement informing consumers of the presence in the product of vegetable fats other than cocoa butter would be sufficient to ensure that consumers are given correct information. The Court concluded that the obligation to change the sales name of those products which is imposed by the Italian legislation does not appear to be necessary to satisfy the overriding requirement of consumer protection and that the legislation at issue is incompatible with Article 28 EC.

5.2. In Case C-416/00 *Morellato* (judgment of 18 September 2002, not yet published in the ECR) the Court ruled on the compatibility with Articles 28 EC and 30 EC of Italian legislation prohibiting the sale of bread obtained by completing the baking of partly baked bread, whether deep-frozen or not, if that bread has not been packaged by the retailer prior to sale. In considering the question, the Court had first to determine whether such requirements constituted selling arrangements which are not likely to hinder trade between Member States within the meaning of its judgment in *Keck and Mithouard*. In that regard, it recalled that, according to that judgment, the need to alter the packaging or the labelling of imported products prevents such requirements from constituting selling arrangements. Accordingly, national legislation which prohibits a product that is lawfully manufactured and marketed in another Member State from being put on sale in the first Member State without being subjected to new packaging of a specific type that complies with the requirements of that legislation cannot be held

to concern such selling arrangements. The Court held, however, that in this case the requirement for prior packaging laid down in the legislation at issue did not make it necessary to alter the product since it related only to the marketing of the bread which results from the final baking of pre-baked bread. Such a requirement is thus in principle such as to fall outside the scope of Article 28 EC provided that it does not in reality constitute discrimination against imported products. If that were so, it would not be possible, in the absence of any evidence of a risk to health, to justify such an obstacle under the derogation authorised by Article 30 EC for reasons relating to the protection of the health and life of humans.

5.3. In Case C-108/01 *Consorzio del Prosciutto di Parma* [2003] ECR I-5121 and Case C-469/00 *Ravil* [2003] ECR I-5053, the Court had an opportunity to expand its case-law on the scope of the protection conferred by protected designations of origin ("PDO") for agricultural products and foodstuffs under Regulations No 2081/92 [17] and No 1107/96 [18] by ruling as to whether certain requirements for the processing of such products are consistent with Article 29 EC. The question was whether, in the first case, a requirement that a product protected by the PDO "Parma Ham" be sliced and packaged in the region of production, and in the second, a requirement that a product bearing the PDO "Grana Padano" be grated in the region of production were consistent with Article 29 EC.

In both cases the Court found that Article 4(1) of Regulation No 2081/92 makes eligibility to use a PDO subject to the product's compliance with a specification, that that specification contains the detailed definition of the protected product and determines both the extent of the obligations to be complied with for the purposes of using the PDO and the extent of the right protected against third parties. It concluded that Regulation No 2081/92 did not preclude the use of a PDO from being subject to the condition that operations such as the slicing, grating and packaging of the product take place in the region of production, where such conditions are laid down in the specification.

As to whether such requirements are consistent with Article 29 EC, the Court followed its earlier case-law, inter alia the judgments in Case C-209/98 *Sydhavnens Sten & Grus* [2000] ECR I-3743, Case C-114/96 *Kieffer and Thill* [1997] ECR I-3629 and Case C-169/99 *Schwarzkopf* [2001] ECR I-5901, observing, first, that Article 29 EC prohibits

17 Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 1992 L 208, p. 1).

18 Commission Regulation (EC) No 1107/96 of 12 June 1996 on the registration of geographical indications and designations of origin under the procedure laid down in Article 17 of Council Regulation (EEC) No 2081/92 (OJ 1996 L 148, p. 1).

all measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade, in such a way as to provide a particular advantage for national production or for the domestic market of the State in question. Accordingly, the condition that slicing, grating and packaging operations be carried out in the region of production constitutes a measure having equivalent effect to a quantitative restriction on exports within the meaning of Article 29 EC.

The Court went on to observe, second, that designations of origin fall within the scope of industrial and commercial property rights. They are intended to guarantee that the product bearing them comes from a specified geographical area and displays certain particular characteristics. The requirement for the slicing, grating and packaging to be carried out in the region of production, in particular, is intended to allow the persons entitled to use the PDO to keep under their control one of the ways in which the product appears on the market and to thereby safeguard its quality and authenticity and consequently the reputation of the PDO. Since "Parma ham" and "Grana Padano" are consumed in large quantities in sliced and grated form respectively, slicing, grating and packaging constitute important operations, while checks performed outside the region of production would provide fewer guarantees of the quality and authenticity of the product. Therefore, the requirement for slicing, grating and packaging in the region may be regarded as justified. The Court concluded that Article 29 EC did not preclude such a requirement.

However, the Court held, third, that the principle of legal certainty required that the condition in question be brought to the knowledge of third parties by adequate publicity in Community legislation, which could have been done by mentioning that condition in Regulation No 1107/96. Failing that, such a condition could not be relied on against them before a national court. In its judgment in *Grana Padano*, however, the Court made clear that the principle of legal certainty does not preclude that condition from being regarded by the national court as capable of being relied on against operators who carried on the activity of grating and packaging the product in the period prior to the entry into force of Regulation No 1107/96, should that court consider that during that period the contested condition was applicable in its legal order by virtue of a bilateral convention [19] and capable of being relied on against those concerned by virtue of the national rules on publicity.

5.4. Again on the subject of the free movement of goods, Case C-112/00 *Schmidberger* [2003] ECR I-5659 supplemented and refined the solutions reached in Case C-265/95 *Commission* v *France* [1997] ECR I-6959. The Court observed first, that the fact that

[19] Convention of 28 April 1964 between the French Republic and the Italian Republic on the protection of designations of origin, indications of provenance and names of certain products.

the competent authorities of a Member State did not ban a demonstration which resulted in the complete closure of a major transit route for almost 30 hours on end is capable of restricting intra-Community trade in goods and must, therefore, be regarded as constituting a measure of equivalent effect to a quantitative restriction which is, in principle, incompatible with the obligations arising from Articles 28 EC and 29 EC, read together with Article 10 EC, unless that failure to ban can be objectively justified. In assessing whether there was any such objective justification in this case, the Court took account of the objective pursued by the Austrian authorities in authorising the demonstration in question and held that it was to respect the fundamental rights of the demonstrators to freedom of expression and freedom of assembly, which are enshrined in and guaranteed by the ECHR and the Austrian Constitution. Given that fundamental rights form an integral part of the general principles of law the observance of which the Court ensures, their protection is, according to the Court, a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods.

For the Court, the question whether the facts before the referring court are consistent with respect for fundamental rights raises the question of the need to reconcile the requirements of the protection of fundamental rights in the Community with those arising from a fundamental freedom enshrined in the Treaty and, more particularly, the question of the respective scope of freedom of expression and freedom of assembly and of the free movement of goods, given that they are both subject to restrictions justified by public interest objectives. In considering whether the restrictions on intra-Community trade are proportionate in the light of the objective pursued, that is the protection of fundamental rights, the Court points out differences in the facts of this case (*Schmidberger*) and those of *Commission* v *France*, cited above, in which the Court held that France had failed to fulfil its obligations under Article 28 EC in conjunction with Article 10 EC, and under the common organisations of the markets in agricultural products, by failing to adopt all necessary and proportionate measures in order to prevent the free movement of fruit and vegetables from being obstructed by actions by private individuals, such as the interception of lorries transporting such products and the destruction of their loads, violence against lorry drivers and other threats. The Court found that, in the present case, unlike in the case just cited, the demonstration at issue took place following authorisation, the obstacle to the free movement of goods resulting from that demonstration was limited, the purpose of that public demonstration was not to restrict trade in goods of a particular type or from a particular source, various administrative and supporting measures were taken by the competent authorities in order to limit as far as possible the disruption to road traffic, the isolated incident in question did not give rise to a general climate of insecurity such as to have a dissuasive effect on intra-Community trade flows as a whole, and, finally, taking account of the Member States' wide margin of discretion, in the present case the competent national authorities were entitled to consider that an outright ban on the demonstration at issue would have constituted unacceptable interference with the fundamental rights of the demonstrators to gather and express peacefully their opinion

in public. The imposition of stricter conditions concerning both the site and the duration of the demonstration in question could have been perceived as an excessive restriction, depriving the action of a substantial part of its scope. According to the Court, although an action of that type usually entails inconvenience for non-participants, such inconvenience may in principle be tolerated provided that the objective pursued is essentially the public and lawful demonstration of an opinion. The Court concluded that the fact that the Austrian authorities did not, in the circumstances, ban a demonstration is not incompatible with Articles 28 EC and 29 EC, read together with Article 10 EC.

5.5. In Case C-383/01 *De Danske Bilimportører* [2003] ECR I-6065 the Court considered, in the light of its judgment in Case C-47/88 *Commission* v *Denmark* [1990] ECR I-4509 which concerned registration duty on imported second hand cars, whether the very high amount of duty on registration in Denmark of new cars constitutes a measure having an effect equivalent to a quantitative restriction on imports prohibited under Article 28 EC which may be justified under Article 30 EC. The Court ruled out that classification. It first recalled its decision in Case C-234/99 *Nygård* [2002] ECR I-3657, paragraph 17, that provisions relating to charges having equivalent effect and those relating to discriminatory internal taxation cannot be applied together. It then found that the charge at issue was manifestly of a fiscal nature as it was charged not by reason of the vehicle crossing the frontier of the Member State which introduced it but upon first registration of the vehicle in the territory of that State, and that it had, therefore, to be examined in the light of Article 90 EC. The Court pointed out that it was not relevant, as held in Case 90/79 *Commission* v *France* [1981] ECR 283, paragraph 14, that the charge is in fact imposed solely on imported new vehicles, because there is no domestic production. Further, it recalled that, according to the judgment in *Commission* v *Denmark*, cited above, Article 90 EC cannot be invoked against internal taxation imposed on imported products where there is no similar or competing domestic production and that it does not provide a basis for censuring the excessiveness of the level of taxation which the Member States might adopt for particular products, in the absence of any discriminatory or protective effect, and concluded that the duty at issue is not covered by the prohibitions laid down in Article 90 EC. Finally, the Court took the view that the reservation it expressed in the judgment in *Commission* v *Denmark*, cited above, to the effect that such duty cannot be fixed at a level such that the free movement of goods within the common market would be impeded, is not applicable in this case. The figures communicated to it do not in any way show that the free movement of that type of goods between Denmark and the other Member States is impeded. It concluded that the Danish registration duty has not ceased to be internal taxation, within the meaning of Article 90 EC, and cannot be classified as a measure having equivalent effect to a quantitative restriction, for the purposes of Article 28 EC.

5.6. In Case C-322/01 *Deutscher Apothekerverband* (judgment of 11 December 2002, not yet published in the ECR), the Court considered whether a prohibition on the importation and retail sale of medicinal products by mail order or over the internet from

pharmacies in other Member States is consistent with Article 28 EC et seq., whether the internet site of such a pharmacy and the description of the medicinal products it contains constitutes advertising of medicinal products prohibited by national, in this case, German, legislation, and the relationship between that legislation and Articles 28 EC and 30 EC.

As regards medicinal products which are subject to, but which have not obtained, authorisation under the provisions of Directive 65/65, [20] the Court considered that the prohibition at issue was consistent with that directive and the question of inconsistency with Article 28 EC and Article 30 EC did not arise. As regards authorised medicinal products, the Court recalled its settled case-law (judgments in "*Cassis de Dijon*" and *Keck and Mithouard*, cited above, and in Case C-368/95 *Familiapress* [1997] ECR I-3689) concerning the relevance of the actual or potential effect of a measure on intra-Community trade to the assessment whether it is consistent with those provisions. In particular, the Court held that the criterion, laid down by the decision in *Keck*, for determining that legislation on selling arrangements does not constitute a measure with equivalent effect to a quantitative restriction, which requires that it must affect in the same manner, in law and in fact, the marketing of both domestic products and those from other Member States, was not fulfilled here. The prohibition at issue is more of an obstacle to pharmacies outside Germany than to those within it. Although there is little doubt that as a result of the prohibition, pharmacies in Germany cannot use the extra or alternative method of gaining access to the German market consisting of end consumers of medicinal products, they are still able to sell the products in their dispensaries. However, for pharmacies not established in Germany, the internet provides a more significant way to gain direct access to the German market. A prohibition which has a greater impact on pharmacies established outside German territory could impede access to the market for products from other Member States more than it impedes access for domestic products. The prohibition in question is, therefore, a measure having an effect equivalent to a quantitative restriction for the purposes of Article 28 EC.

Second, as regards the justification of the prohibition in the light of Article 30 EC, the Court held that the only plausible arguments are those relating to the need to provide individual advice to the customer and to ensure his protection when he is supplied with medicines and to the need to check that prescriptions are genuine and to guarantee that medicinal products are widely available and sufficient to meet requirements. None of those reasons can provide a valid basis for the absolute prohibition on the sale by mail-order of non-prescription medicines, as the "virtual" pharmacy provides customers with an identical or better level of services than traditional pharmacies. On the other

[20] 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 1965-66, p. 24).

hand, for prescription medicines, such control could be justified in view of the greater risks which those medicines may present and the system of fixed prices which applies to them and which forms part of the German health system. The need to be able to check effectively and responsibly the authenticity of doctors' prescriptions and to ensure that the medicine is handed over either to the customer himself, or to a person to whom its collection has been entrusted by the customer, is such as to justify a prohibition on mail-order sales. Article 30 EC may, therefore, be relied on to justify such a prohibition. The same arguments apply where medicinal products are imported into a Member State in which they are authorised, having been previously obtained by a pharmacy in another Member State from a wholesaler in the importing Member State.

As regards the compatibility with Community law of prohibitions on advertising of medicines sold by mail order, the judgment declared that such prohibitions cannot be justified for medicines which can only be supplied by pharmacies but which are not subject to prescription.

5.7. Case C-30/01 *Commission* v *United Kingdom* (judgment of 23 September 2003, not yet published in the ECR) concerned an action against the United Kingdom for failure to fulfil its obligations, seeking a declaration that it had failed to implement, as regards Gibraltar, certain directives adopted on the basis of Articles 94 EC and 95 EC. The Court, upholding the argument of the United Kingdom, stated that "the exclusion of Gibraltar from the customs territory of the Community implies that neither the Treaty rules on free movement of goods nor the rules of secondary Community legislation intended, as regards free circulation of goods, to ensure approximation of the laws, regulations and administrative provisions of the Member States pursuant to Articles 94 EC and 95 EC are applicable to it" (paragraph 59). The Court added that although failure to apply the directives at issue to Gibraltar may endanger the consistency of other Community policies, that fact cannot lead to the extension of the territorial scope of those directives beyond the limits imposed by the Treaty and by the United Kingdom Act of Accession.

6. Four cases concerning the *common agricultural policy* are of interest in the context of this report.

On the subject of health policy and emergency measures to combat bovine spongiform encephalopathy, in its judgment in Case C-393/01 *France* v *Commission* [2003] ECR I-5405, the Court annulled Commission Decision 2001/577 [21] setting the date on which dispatch from Portugal of bovine products under the Date-Based Export Scheme may commence by virtue of Article 22(2) of Decision 2001/376. The Court held that the Commission did not first carry out the verifications required so as to ensure adequate

[21] Commission Decision 2001/577/EC of 25 July 2001 (OJ 2001 L 203, p. 27).

safety in the operation of that scheme applicable to the products referred to in Article 11 of Decision 2001/376, [22] and thereby infringed Article 21, in conjunction with Article 22, of that decision.

The Court had an opportunity, in its judgment in Case C-305/00 *Schulin* [2003] ECR I-3525, to give a preliminary ruling on the interpretation of the sixth indent of Article 14(3) of Council Regulation (EC) No 2100/94 on Community plant variety rights [23] and Article 8 of Commission Regulation (EC) No 1768/95 implementing rules on the agricultural exemption provided for in Article 14. [24] According to the Court, those provisions cannot be construed as meaning that the holder of a Community plant variety right can require a farmer to provide the information specified in those provisions where there is no indication that the farmer has used or will use, for propagating purposes in the field, on his own holding, the product of the harvest obtained by planting, on his own holding, propagating material of a variety other than a hybrid or synthetic variety which is covered by that right and belongs to one of the agricultural plant species listed in Article 14(2) of Regulation No 2100/94.

In Case C-137/00 *Milk Marque and National Farmers' Union* (judgment of 9 September 2003, not yet published in the ECR) the Court was able to clarify its case-law on the application of national competition rules in the context of the common organisation of the market in milk and dairy products. In the main proceedings, a farmers' cooperative had contested the decisions of the United Kingdom competition authorities, alleging that, in asserting jurisdiction over the activities of the members of the cooperative and in recommending and taking steps to prevent them from obtaining a higher price for the milk produced by their members, they had acted contrary to various provisions of Community law.

The Court, having stated that the common organisations of the markets in agricultural products are not a competition-free zone, pointed out that, in accordance with settled case-law (Case 14/68 *Walt Wilhelm and Others* [1969] ECR 1, and Joined Cases 253/78, 1/79 to 3/79 *Giry and Guerlain and Others* [1980] ECR 2327), Community competition law and national competition law apply in parallel, since they consider

22 Commission Decision 2001/376/EC of 18 April 2001 concerning measures made necessary by the occurrence of bovine spongiform encephalopathy in Portugal and implementing a date-based export scheme (OJ 2001 L 132, p. 17).

23 Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ 1994 L 227, p. 1).

24 Commission Regulation (EC) No 1768/95 of 24 July 1995 implementing rules on the agricultural exemption provided for in Article 14(3) of Regulation (EC) No 2100/94 (OJ 1995 L 173, p. 14).

restrictive practices from different points of view. In that regard, it stated that that case-law can be applied in the area of the common organisation of the market in milk and dairy products where, as a result, the national authorities in principle retain jurisdiction to apply their national competition law.

Next, the Court considered the limits of that jurisdiction, and, observing that Article 36 EC gives precedence to the objectives of the common agricultural policy over those in relation to competition policy, made clear that the measures adopted by the national authorities must not produce effects which are likely to impede the functioning of the mechanisms provided for by that common organisation. With regard to the measures at issue, the Court held that the mere fact that the prices charged by a dairy cooperative were already lower than the target price for milk before those authorities intervened is not sufficient to render the measures taken by them in relation to that cooperative in application of national competition law unlawful under Community law. Furthermore, according to the Court, such measures may not compromise the objectives of the common agricultural policy as set out in Article 33(1) EC. In any event, the Court made clear that the national competition authorities are under an obligation to ensure that any contradictions between the various objectives laid down in Article 33 EC are reconciled where necessary, without giving any one of them so much weight as to render the achievement of the others impossible.

Second, the Court held that the essential function of the target price provided for by Article 3(1) of Regulation No 804/68 [25] is to define, at Community level, the desirable point of equilibrium between the objective of ensuring a fair standard of living for the agricultural community on the one hand, and that of ensuring that supplies reach consumers at reasonable prices on the other does not preclude the national competition authorities from using that price for the purposes of investigating the market power of an agricultural undertaking, by comparing variations in actual prices with the target price.

Next, the Court held that the Treaty rules on the free movement of goods do not preclude the competent authorities of a Member State from prohibiting, pursuant to their national competition law, a dairy cooperative which enjoys market power from entering into contracts with undertakings, including undertakings established in other Member States, for the processing, on its behalf, of milk produced by its members. In reaching that conclusion, the Court recalled, first, that Article 28 EC is intended to prohibit all measures which are capable of hindering intra-Community trade, but that none the less a Member State is entitled to take measures to prevent certain of its nationals, under cover of freedoms created by the Treaty, from wrongfully evading the application of their national legislation. Consequently, according to the Court, restrictive

[25] Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organisation of the market in milk and milk products (OJ, English Special Edition 1968 (I), p. 176).

measures concerning goods which have been exported for the sole purpose of being reimported in order to circumvent measures adopted under national competition law do not constitute measures having equivalent effect to a quantitative restriction on imports within the meaning of Article 28 EC. Second, the Court stated that Article 29 EC concerns national measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade, in such a way as to provide a particular advantage for national production or for the domestic market of the State in question. The Court observed that that is not the case with regard to measures which are designed to limit anti-competitive practices engaged in by just one agricultural cooperative and apply indistinctly to processing contracts entered into with undertakings established in one Member State and those entered into with undertakings established in other Member States.

Finally, the Court held that Article 12 EC and the second subparagraph of Article 34(2) EC do not preclude the adoption of measures such as the prohibition on the conclusion of contracts for milk processing on its own account imposed on a dairy cooperative which enjoys market power and exploits that position in a manner contrary to the public interest, even though large vertically-integrated dairy cooperatives are permitted to operate in other Member States. Whilst, on the one hand, it is true that Article 12 EC prohibits every Member State from applying its competition law differently on grounds of the nationality of the parties concerned, the fact remains that Article 12 EC is not concerned with any disparities in treatment which may result, for persons and undertakings subject to the jurisdiction of the Community, from divergences existing between the laws of the various Member States, so long as the latter affect all persons subject to them, in accordance with objective criteria and without regard to their nationality. The mere fact that there are vertically-integrated cooperatives in other Member States is not sufficient to establish that the adoption of those measures amounts to discrimination on grounds of nationality. On the other hand, the Court held that the second subparagraph of Article 34(2) EC which prohibits all discrimination in the context of the common agricultural policy, is merely a specific expression of the general principle of equal treatment.

By Case C-239/01 *Germany* v *Commission* (judgment of 30 September 2003, not yet published in the ECR), the Court annulled Article 5(5) of Regulation No 690/2001 [26] in so far as that provision requires each Member State concerned to finance 30% of the price of the meat purchased under that regulation. The Court reached that conclusion on the basis of the findings that, first, the disputed provision requires each Member State concerned to finance a portion of the market support measures introduced by the

[26] Commission Regulation (EC) No 690/2001 of 3 April 2001 on special market support measures in the beef sector (OJ 2001 L 95, p. 8).

contested regulation and that, second, Regulation No 1258/1999 [27] does not contain any provision expressly authorising the Commission to derogate from the principle flowing from the basic legislation that all Community support measures in the beef and veal sector must be exclusively financed by the Community.

7. In the field of *freedom of movement for workers*, the Court ruled in cases concerning posts for masters of vessels entailing participation in the exercise of powers conferred by public law (7.1), a loyalty bonus (7.2), the interpretation of Article 7(2) of Regulation No 1612/68 (7.3), access to the hospital managers' corps of the French civil service (7.4), a national of a third country married to a British national (7.5), a temporarily employed national of a Member State (7.6) and the interpretation of the first indent of Article 3(2) of Regulation No 1251/70 (7.7).

7.1. In its judgments of 30 September 2003 in Case C-47/02 *Anker and Others* (not yet published in the ECR) and Case C-405/01 *Colegio de Oficiales de la Marina Mercante Española* (not yet published in the ECR) the Court had to interpret Article 39(4) EC in relation to provisions of German and Spanish law requiring nationality of the flag State for employment as master of a vessel used in small-scale maritime shipping and for employment as master and chief mate on merchant navy ships.

Observing, first, that the concept of public service within the meaning of that article covers posts which involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities, the Court went on to consider the posts at issue in this case.

It held that the national rights concerned conferred on those holding them rights connected to the maintenance of safety and to the exercise of police powers, which go beyond the requirement merely to contribute to maintaining public safety by which any individual is bound, and certain auxiliary duties in respect of the registration of births, marriages and deaths, which cannot be explained solely by the requirements entailed in commanding the vessel. It pointed out that the fact that masters are employed by a private natural or legal person is not, as such, sufficient to exclude the application of that article since it is established that, in order to perform the public functions which are delegated to them, masters act as representatives of public authority in the service of the general interests of the flag State. However, it pointed out that the scope of the derogation from the principle of freedom of movement for workers in the case of employment in the public administration must be limited to what is strictly necessary for safeguarding the general interests of the Member State concerned, which would not be

[27] Council Regulation (EC) No 1258/1999 of 17 May 1999 on the financing of the Common agricultural policy (OJ 1999 L 160, p. 103).

imperilled if rights under powers conferred by public law were exercised only sporadically, indeed exceptionally, by nationals of other Member States. Therefore, the Court concluded that Article 39(4) EC must be construed as allowing a Member State to reserve for its nationals the posts at issue only if the rights under powers conferred by public law granted to persons holding such posts are in fact exercised on a regular basis and do not represent a very minor part of their activities.

7.2. In *Köbler*, cited above (see paragraph 4.9), the Court had an opportunity to interpret Article 39 EC and Article 7(1) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [28] in relation to legislation of a Member State allowing the grant by that State, as employer, of a special length-of-service increment to university professors who have carried on that profession for at least 15 years with a university in that State. Although the Court, in *Schöning-Kougebetopoulou*, cited above, had already had to interpret those articles in relation to a bonus in respect of seniority, it had not yet ruled on their interpretation in relation to the grant of a loyalty bonus.

The Court held, first, that by precluding, for the purpose of the grant of the special length-of-service increment for which it provides, any possibility of taking into account periods of activity completed in another Member State, such a regime is likely to impede freedom of movement for workers. As, under national law, the increment at issue constituted a bonus seeking to reward the loyalty of professors of universities in the Member State to their sole employer, namely that State, the Court considered, therefore, whether the fact that it constitutes a loyalty bonus may be deemed under Community law to indicate that it is dictated by a pressing public-interest reason capable of justifying the obstacle. Although it cannot be excluded that an objective of rewarding workers' loyalty to their employers in the context of policy concerning research or university education constitutes a pressing public-interest reason, the Court held that the obstacle which it entails clearly cannot be justified in the light of such an objective. It concluded that the above provisions of Community law relating to freedom of movement for workers are to be interpreted as meaning that they preclude such an increment which constitutes a loyalty bonus.

7.3. In Case C-466/00 *Kaba* [2003] ECR I-2219 the Court was able to supplement its judgment in Case C-356/98 [2000] ECR I-2623 delivered in the same matter. In the first judgment, the Court had held that legislation which authorises spouses of migrant workers who are nationals of a Member State to remain indefinitely in another Member State only if they have resided in the territory of that State for four years, but which requires residence of only 12 months for the grant of those rights to the spouses of

[28] Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).

persons who are settled in that Member State, which persons are not subject to any restriction on the period for which they may remain there, does not constitute discrimination contrary to Article 7(2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community. [29] Asked to rule as to whether its reply would have been different had the Court taken into consideration the fact that the respective situation of those two categories of person in national law are, according to the referring tribunal, comparable in all respects except with regard to the period of prior residence which is required for the purpose of being granted indefinite leave to remain in the Member State in question. The Court replied in the negative. Inasmuch as the right of residence of a migrant worker who is a national of another Member State is subject to the condition that the person remains a worker or, where relevant, a person seeking employment, unless he or she derives that right from other provisions of Community law, his situation is not comparable to that of a person who, under the national legislation of a Member State, is not subject to any restriction regarding the period for which he or she may reside within the territory of that Member State and need not, during his or her stay, satisfy any condition comparable to those laid down by the provisions of Community law granting nationals of a Member State a right of residence in another Member State. As the rights of residence of these two categories of persons are not in all respects comparable, the same holds true with regard to the situation of their spouses, particularly so far as concerns the question of the duration of the residence period on completion of which they may be given indefinite leave to remain in the United Kingdom.

7.4. In Case C-285/01 *Burbaud* (judgment of 9 September 2003, not yet published in the ECR) the Court gave a preliminary ruling in a case concerning a Portuguese national who was refused admission to the hospital managers' corps of the French civil service on the ground that it was first necessary to pass the entrance examination of the École nationale de la santé publique (the French National School of Public Health "the ENSP").

The Court first analysed whether the duties performed by the members of that corps fell within the scope of Directive 89/48 [30] on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration and held that confirmation of passing the ENSP final examination can be regarded as a diploma. Its equivalence to the qualification awarded by the Lisbon School must, therefore, be ascertained by the national court. The Court held that, if it transpires that the diplomas are awarded on completion of

29 Ibid.

30 Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration (OJ 1989 L 19, p. 16).

equivalent education or training, the directive precludes the French authorities from making the access of a Portuguese national to the profession of manager in the hospital public service subject to the condition that she complete the ENSP course and pass its final examination. The specific features of that method of recruitment which do not allow for account to be taken of specific qualifications in the field of hospital management of candidates who are nationals of other Member States place them at a disadvantage which is liable to dissuade them from exercising their rights, as workers, to freedom of movement. While such an obstacle to a fundamental freedom guaranteed by the Treaty may be justified by an objective in the general interest, such as selection of the best candidates in the most objective conditions possible, it is a further condition that that restriction does not go beyond what is necessary to achieve that objective. The Court found that requiring candidates who are properly qualified to pass the ENSP entrance examination has the effect of downgrading them, which is not necessary to achieve the objective pursued and which cannot therefore be justified in the light of the Treaty provisions. It therefore concluded that such an examination was incompatible with the EC Treaty.

7.5. Case C-109/01 *Akrich* (judgment of 23 September 2003, not yet published in the ECR) concerned a Moroccan national who was deported twice from the United Kingdom, returned there illegally and married a British citizen. He was again deported to Dublin in 1997, where his wife had been settled since June 1997 and had been employed from August 1997 to June 1998. Relying on its judgment in Case C-370/90 *Singh* [1992] ECR I-4265, according to which Community law requires a Member State to grant leave to enter and reside in its territory to the spouse of a national of that State who has gone, with that spouse, to another Member State in order to work there as an employed person as envisaged by Article 39 EC and returns to establish himself or herself as envisaged by Article 43 EC in the territory of the State of which he or she is a national. Mr Akrich applied to the United Kingdom authorities for entry clearance as the spouse of a person settled in the United Kingdom. The Court pointed out that Community law, and, specifically, Regulation No 1612/68 on freedom of movement for workers [31] covers only freedom of movement within the Community and that it is silent as to the rights of a national of a non-Member State, who is the spouse of a citizen of the Union, in regard to access to the territory of the Community. In order to benefit from the right to settle with that citizen of the Union, that spouse must, according to the Court, be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating. The Court stated that the same applied where a citizen of the Union, married to a national of a non-Member State returns to the Member State of which he or she is a national in order to work there as an employed person.

[31] See footnote 28.

As regards, next, the question of the abuse with which Mr and Mrs Akrich are charged in that their move to Ireland was no more than a temporary absence deliberately designed to manufacture a right of residence for Mr Akrich and thereby to evade the provisions of the United Kingdom's national legislation, the Court recalled that the motives of a citizen seeking work in a Member State are not relevant in assessing the legal situation of the couple at the time of their return to the Member State of origin. Such conduct cannot constitute an abuse even if the spouse did not, at the time when the couple installed itself in another Member State, have a right to remain in the Member State of origin. The Court considered that there would be an abuse if Community rights were invoked in the context of marriages of convenience entered into in order to circumvent the national immigration rules. The Court observed, finally, that where the marriage is genuine and where, on the return of the national of a Member State married to a national of a third country to his State of origin where the spouse does not enjoy Community rights, not having resided lawfully on the territory of another Member State, the authorities of the State of origin must none the less take account of the right to respect for family life under Article 8 of the Convention on Human Rights.

7.6. Case C-413/01 *Ninni-Orasche* (judgment of 6 November 2003, not yet published in the ECR) concerned a national of a Member State who worked for a temporary period of two and a half months in the territory of another Member State, of which he is not a national, and then applied for a study grant from that Member State. The question therefore arose whether that national could be considered to have acquired the status of a worker within the meaning of Article 39 EC.

Having observed that the concept of "worker" has a specific Community meaning and must not be interpreted narrowly, the Court pointed out that the fact that employment is of short duration cannot, in itself, exclude that employment from the scope of Article 39 EC. Employment such as that at issue can confer the status of a worker provided that the activity performed as an employed person is not purely marginal and ancillary. It is for the national court to carry out the examinations of fact necessary in order to determine whether that is so in the case before it. Factors relating to the conduct of the person concerned before and after the period of employment are not relevant in establishing the status of worker within the meaning of Article 39 EC.

In the same case, the Court held that a Community national who has the status of a migrant worker for the purposes of Article 39 EC, is not voluntarily unemployed, within the meaning established by the relevant case-law of the Court, solely because his contract of employment, from the outset concluded for a fixed term, has expired.

7.7. In case C-257/00 *Givane* [2003] ECR I-345, the Court was called upon to interpret the first indent of Article 3(2) of Regulation No 1251/70 on the right of workers to

remain in the territory of a Member State after having been employed in that State,[32] which provides that the members of the family of a worker who died during his working life before acquiring the right to remain in the territory of the host Member State are entitled to remain there permanently if that worker had continuously lived in the territory of the Member State for at least two years. The Court ruled that the two-year period of continuous residence must immediately precede the worker's death.

8. On the *freedom to provide services*, the Court ruled amongst other things on discriminatory Italian charges for access to museums (8.1), the requirement for prior authorisation of the reimbursement of medical costs incurred in a Member State other than the State of affiliation (8.2 and 8.3), difference in treatment in relation to complementary retirement insurance policies taken out in different Member States (8.4), the prohibition, without prior authorisation, of certain activities concerning the taking of bets across national borders (8.5 and 8.6) and the limitation of the reimbursement of the fees of lawyers established in other Member States to the amount prescribed by the fee scales applicable to domestic lawyers (8.7).

8.1. First, the Court held, in Case C-388/01 *Commission* v *Italy* [2003] ECR I-721, that Italian legislation whereby local authorities or decentralised national ones reserved reduced-price access to museums and monuments for persons, aged over 60 or 65, who were Italian nationals or residents within the territory of the authorities managing the cultural installation in question, to the exclusion of tourists from other Member States and non-residents who satisfied the same objective age conditions, was incompatible with Articles 12 EC and 49 EC. The Court followed its previous case-law, particularly Case C-45/93 *Commission* v *Spain* [1994] ECR I-911, in which it held that national legislation on access to museums in a Member State which discriminates against foreign tourists alone is prohibited by Articles 12 EC and 49 EC. Referring to its judgments in Case C-3/88 *Commission* v *Italy* [1989] ECR 4035 and Case C-224/97 *Ciola* [1999] ECR I-2517, the Court reiterated that the principle of equality of treatment prohibits not only obvious discrimination based on nationality but also all forms of hidden discrimination, as in the case of a measure which risks operating primarily to the detriment of nationals of other Member States.

Moreover, neither the need to preserve the coherence of the tax system nor the considerations of an economic nature put forward by the Italian government fell within the exceptions allowed by Article 46 EC in circumstances where there was no direct link between taxation of any kind and the application of preferential rates for admission to the museums and public monuments. Nor, finally, could a Member State plead conditions existing within its own legal system in order to justify its failure to comply with obligations arising under Community law.

[32] Regulation (EEC) No 1251/70 on the right of workers to remain in the territory of a Member State after having been employed in that State (OJ L 142, p. 24).

8.2. Case C-385/99 *Müller-Fauré and van Riet* [2003] ECR I-4509 follows Cases C-120/95 *Decker* [1998] ECR I-1831, C-158/96 *Kohll* [1998] ECR I-5473, and C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, but differs from *Decker* and *Kohll* in that it reasons in the context of national social security legislation based on the system of benefits in kind, whereas the former judgments dealt with the question whether it was in conformity with Community law to require prior authorisation in order to be able to reimburse a socially insured person in respect of medical costs incurred in a Member State other than that of affiliation in the context of a social security system based on the reimbursement of health costs incurred by affiliated persons.

Müller-Fauré and van Riet begins by confirming the position in principle expressed in *Smits and Peerbooms* to the effect that national legislation which makes repayment of medical expenses incurred in a Member State other than that of affiliation subject to a requirement of prior authorisation, issued only in the case of medical necessity, constitutes an obstacle to the freedom to provide services.

Subsequently, in order to establish whether or not such legislation was objectively justified, the judgment distinguishes between hospital care and non-hospital care.

Concerning hospital care, making it subject to prior acceptance of financial responsibility by the national social security system in cases where such care was provided in a Member State other than that of affiliation was, in the Court's view, a measure both reasonable and necessary so as not to compromise the planning of such care operated through the system of health service agreements (*Smits and Peerbooms*). That planning is designed both to ensure that there is sufficient and permanent accessibility to a balanced range of high-quality hospital treatment and to control costs, preventing, as far as possible, any wastage of financial, technical and human resources. The Court did, however, go on to hold that, for the system of prior authorisation to be capable of operating, the conditions placed on the granting of such authorisation must be justified and satisfy the requirement of proportionality. Similarly, a scheme of prior administrative authorisation could not legitimise discretionary decisions taken by the national authorities which were liable to negate the effectiveness of Community law provisions on the freedom to provide services. Such a scheme therefore had to be based on objective, non-discriminatory criteria which were known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it was not used arbitrarily (*Smits and Peerbooms*). Finally, still following *Smits and Peerbooms*, the Court held that a condition that treatment must be necessary may be justified under Article 49 EC provided that is interpreted as meaning that prior authorisation may be refused only where treatment which is the same or equally effective for the patient can be obtained without undue delay, within the State of affiliation, from an establishment with which the insured person's sickness insurance fund has an agreement.

Concerning non-hospital care, the Court held that the information in the documents brought before it for assessment did not demonstrate that removing the requirement for prior authorisation would cause cross-border movements of patients so large as seriously to undermine the financial stability of the social security system and thereby threaten the overall level of public health protection. Furthermore, such care is generally provided near to the place where the patient resides, in a cultural environment which is familiar to him and which allows him to build up a relationship of trust with the doctor treating him. Those factors were likely to limit any possible financial impact on the national social security system in question of removing the requirement for prior authorisation in respect of care provided in foreign practitioners' surgeries. Bearing in mind that it was for the Member States alone to determine the extent of the sickness cover available to insured persons, and finding that, in this case, the actual amount in respect of which reimbursement was sought was relatively small (paragraph 106), the Court concluded that removing the requirement for prior authorisation issued by sickness funds to their insured persons, so as to enable them to benefit from such healthcare provided in a Member State other than the State of affiliation, was not likely to undermine the essential features of the sickness insurance scheme in question. The system requiring such prior authorisation was therefore incompatible with Article 59 EC.

8.3. Some of the assessments made in that judgment are repeated in Case C-56/01 *Inizan* (judgment of 23 October 2003, not yet published in the ECR). That judgment ruled as to whether the system established by Article 22(1)(c)(i) and (2) of Regulation No 1408/71,[33] requiring that the competent social security institution give prior authorisation before assuming financial responsibility for benefits in kind provided to the affiliated person on its behalf by the institution of the place of stay or residence situated in a Member State, and also making the grant of such authorisation subject to conditions, was compatible with Articles 49 and 50 EC.

Having reaffirmed the conditions under which, in accordance with the judgments in *Kohll*, *Smits and Peerbooms* and *Müller-Fauré and Van Riet*, Article 49 EC precludes a system of prior authorisation established by national legislation, the Court held that, given that that provision did not in any way prevent the reimbursement by Member States of costs incurred on the occasion of care provided in another Member State, even in the absence of prior authorisation, and that the competent national institution cannot refuse such authorisation where the two conditions in the second paragraph of the latter are met, Article 22 of Regulation No 1408/71 contributes to facilitating the free movement of socially insured persons.

[33] Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416), as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1).

The judgment then examined the compatibility of the conditions for granting prior authorisation, to which national legislation makes reimbursement of care costs incurred in a Member State other than the affiliated person's State of residence subject, with Article 22(1)(c)(i) and (2) of Regulation No 1408/71 and Articles 49 EC and 50 EC.

Concerning Regulation No 1408/71, the Court observed that, amongst those conditions, the one stipulating that the treatment which the patient intends to undergo in a Member State other than that in which he resides must not be capable of being given to him within the time normally necessary for obtaining the treatment in question in the Member State of residence taking account of his current state of health and the probable course of the disease is not fulfilled whenever it appears that an identical course of treatment, or one with the same degree of effectiveness for the patient, may be obtained in time in the Member State of residence. In assessing whether that is the case, the competent institution is required to take into account all the circumstances of each particular case, paying due regard not only to the medical situation of the patient at the time authorisation is applied for and, where appropriate, to the degree of his pain or the nature of his handicap, which might, for example, make it impossible or excessively difficult to work, but also to his previous history (*Smits and Peerbooms* and *Müller-Fauré and van Riet*).

Concerning Articles 49 EC and 50 EC, the judgment repeated the findings in *Smits and Peerbooms* and *Müller-Fauré and van Riet*. It thus held that those findings do not preclude legislation of a Member State which, first, makes reimbursement of the cost of hospital care provided in a Member State other than that in which the insured person's sickness fund is established conditional upon prior authorisation by that fund and, secondly, makes the grant of that authorisation subject to the condition that it be established that the insured person could not receive within the territory of the Member State where the fund is established the treatment appropriate to his condition. However, authorisation may be refused on that ground only if treatment which is the same or equally effective for the patient can be obtained without undue delay in the territory of the Member State in which he resides.

8.4. The judgment in Case C-422/01 *Skandia and Ramstedt* [2003] ECR I-6817, ruled on the compatibility with Article 49 EC of Swedish legislation which provided that, in order to be capable of being regarded as an old-age insurance and thus conferring entitlement to immediate deduction from an employer's taxable income of contributions paid in respect of such insurance, an insurance policy had to be taken out with an insurer established in Sweden, whereas, if taken out with an insurer of another Member State, it was regarded as a capital life assurance policy, conferring a right to deduction only at the time of payment of the pension to the employee in question. The Court found that the disadvantage to the employer in financial terms in the postponement of the right to deduction introduced a difference in tax treatment incompatible with Article 49 EC. That difference was liable both to dissuade Swedish employers from taking out complementary pension insurance with companies established in a Member State other than Sweden and to dissuade those companies from offering their services

on the Swedish market. None of the justifications for that system put forward by the Swedish government, concerning coherence of the tax system, the effectiveness of tax controls, the need to preserve the tax base and competitive neutrality were accepted by the Court.

8.5. Case C-243/01 *Gambelli* (judgment of 6 November 2003, not yet published in the ECR), ruled that Italian legislation which made it punishable as a criminal offence, without a concession or licence from the State, to collect, accept, register or transmit proposed bets, particularly on sporting events via the internet, was contrary to Articles 43 EC and 49 EC. The judgment referred to the fact that the participation of nationals of a Member State in a lottery operated in another Member State relates to a "service" within the meaning of Article 50 EC, and transposed the case-law concerning services which a provider offered by telephone to potential recipients established in other Member States and provided by him without moving from the Member State in which he was established (Case C-384/93 *Alpine Investments* [1995] ECR I-1141) to services offered by internet. The prohibition on receiving such services and the prohibition on intermediaries facilitating the provision of betting services on sporting events organised by a provider established in a Member State other than the one in which those intermediaries did business constituted restrictions on the freedom to provide services. However, moral, religious and cultural factors, and the morally and financially harmful consequences for the individual and society associated with gaming and betting, could serve to justify the existence on the part of the national authorities of a margin of appreciation sufficient to enable them to determine what consumer protection and the preservation of public order require. In order to be justified, those restrictions must be justified by imperative requirements in the general interest, be suitable for achieving the objective which they pursue and not go beyond what is necessary in order to attain it. They must in any event be applied without discrimination.

8.6. Case C-289/03 *Lindman* (judgment of 13 November 2003, not yet published in the ECR) also dealing with the cross-border aspects of games and bets, established that Article 49 EC precludes the legislation of a Member State, in this case Finnish legislation, which provides that winnings arising from games of chance organised in other Member States are regarded as income of the winner which is liable to income tax, whereas gains arising from games of chance organised in the Member State in question are not taxable.

8.7. Case C-289/02 *AMOK* (judgment of 11 December 2003, not yet published in the ECR), considered the question whether Articles 49 EC and 12 EC preclude a national legal practice limiting any claim for reimbursement of the costs of the services of a lawyer of a different Member State in domestic proceedings to the sum of the costs which would have been incurred in the case of representation by a domestic lawyer. The Court noted that the third paragraph of Article 50 EC provides that a person who

provides services across national borders may carry on business in the country where the service is provided "under the same conditions as are imposed by that State on its own nationals", and that that rule was transposed in Directive 77/249 [34] to facilitate the effective exercise by lawyers of freedom to provide services with the exception of "any conditions requiring residence, or registration with a professional organisation, in that State". The Community legislature had therefore taken the view that, apart from the exceptions expressly mentioned, all other conditions and rules in force in the host country might apply to the transfrontier provision of services by a lawyer. The reimbursement of the fees of a lawyer established in a Member State might therefore also be made subject to the rules applicable to lawyers established in another Member State. That solution was, moreover, the only one which complied with the principle of predictability, and thus of legal certainty, for a party which entered into proceedings and thus incurred the risk of having to bear the costs of the other party in the event of being unsuccessful (paragraph 30). The Court observed, however, that the fact that the party which has been successful in a dispute and which has been represented by a lawyer established in another Member State cannot also obtain reimbursement, from the unsuccessful party, of the fees of the lawyer practising before the court seised and to whom the successful party has had recourse, on the ground that such costs are not regarded as being necessary, is liable to make the transfrontier provision by a lawyer of his services less attractive. Such a solution may have a deterrent effect capable of affecting the competitiveness of lawyers in other Member States. Even if the appointment of a lawyer practising before the court seised is a mandatory requirement resulting from harmonisation measures and therefore falls outside the will of the parties, it cannot be inferred therefrom that the additional associated costs must be attributed automatically and in every case to the party which had recourse to the lawyer established in another Member State, irrespective of whether that party has been successful in the dispute. On the contrary, the obligation to have recourse to the services of a lawyer practising before the court seised means that the resulting costs will be necessary for the purposes of appropriate legal representation. The general exclusion of those costs from the amount to be reimbursed by the unsuccessful party would penalise the successful party, with the effect of strongly discouraging parties to legal proceedings from having recourse to lawyers established in other Member States. The freedom of such lawyers to provide their services would thereby be obstructed and the harmonisation of the sector, as initiated by the directive, adversely affected.

9. On the matter of *freedom of establishment*, most noteworthy were a series of judgments on the mutual recognition of university degrees and courses of professional training (9.1 to 9.3), a judgment on the mutual recognition of driving licences issued by other Member States (9.4), and a judgment on the conformity with Community law of an obligation under Netherlands law to describe a company as a "formally foreign company" when registering it in the register of commerce.

[34] Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (OJ 1977 L 78, p. 17).

9.1. The judgment in Case C-110/01 *Tennah-Durez* [2003] ECR I-6239, concerned the part of a doctor's training carried out in Algeria, subsequently recognised in Belgium, and which the person concerned sought to have recognised in France. The Court began by stating that Directive 93/16 [35] to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications establishes automatic and unconditional recognition of certain diplomas, requiring Member States to acknowledge their equivalence without being able to demand that the persons concerned comply with conditions other than those laid down. It went on to draw a distinction between that system and the system laid down by Directive 89/48, [36] where recognition is not automatic but allows Member States to require the person concerned to fulfil additional requirements, including a period of adaptation. Concerning the extent to which medical training may consist of training received in a non-member country, the Court held that the directive did not require all or any particular part of that training to be provided at a university of a Member State or under the supervision of such a university, and that neither did the general scheme of the directive preclude medical training leading to a diploma, certificate or other evidence of a medical qualification eligible for automatic recognition from being received partly outside the Community. According to the Court, what mattered was not where the training had been provided but whether it complied with the qualitative and quantitative training requirements laid down by Directive 93/16. Moreover, responsibility for ensuring that the training requirements, both qualitative and quantitative, laid down by Directive 93/16 were fully complied with fell wholly on the competent authority of the Member State awarding the diploma. A diploma thus awarded amounted to a "doctor's passport" enabling the holder to work as a doctor throughout the European Union, without the professional qualification attested to by the diploma being open to challenge in the host State except in specific circumstances laid down by Community law. Consequently, provided the competent authority in the Member State awarding the diploma was in a position to validate medical training received in a third country and to conclude on that basis that the training duly complied with the training requirements laid down by Directive 93/16, that training could be taken into account in deciding whether to award a doctor's diploma. In that respect, the proportion of the training carried out in a non-member country, and in particular the fact that the major part of the training was received in such a country, is immaterial. In the first place, Directive 93/16 contains no reference or even allusion to such a criterion. Moreover, a requirement for training to have been received mainly within the Community would undermine legal certainty, since such a concept is open to several

35 Council Directive 93/16/EEC of 5 April 1993 to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications (OJ 1993 L 165, p. 1).

36 Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration (OJ 1989 L 19, p. 16).

interpretations. The Court concluded that the training in question could consist, and even mainly consist, of training received in a non-member country, provided the competent authority of the Member State awarding the diploma was in a position to validate the training and to conclude on that basis that it duly served to meet the requirements for the training of doctors laid down by the directive. As for the extent to which national authorities are bound by a certificate certifying conformity of the diploma with the requirements of the directive, the Court held that the system of automatic and unconditional recognition would be seriously jeopardised if it were open to Member States at their discretion to question the merits of a decision taken by the competent institution of another Member State to award the diploma. However, where new evidence cast serious doubt on the authenticity of the diploma presented, or as to its conformity with the applicable legislation, it was legitimate for Member States to require from the competent institution of the Member State which awarded the diploma confirmation of its authenticity.

9.2. In Case C-313/01 *Morgenbesser* (judgment of 13 November 2003, not yet published in the ECR), the Court examined whether Community law precluded the authorities of a Member State from refusing to enrol the holder of a legal diploma obtained in another Member State in the register of persons undertaking the necessary period of practice for admission to the bar solely on the ground that it was not a legal diploma issued or confirmed by a university of the first State. The Court began by ruling that Directives 98/5 [37] and 89/48 did not apply in such a situation. The former did not apply because it concerned only lawyers fully qualified as such in their Member State of origin and did not therefore apply to persons who had not yet acquired the professional qualification necessary to carry out the profession of lawyer. Directive 89/48 did not apply to activities which were limited in time and constituted the practical part of the training necessary for access to the profession of "avvocato", that part not being capable of being described as a "regulated profession" within the meaning of that directive. The judgment went on to find that Community law precluded the authorities of a Member State from refusing to enrol the holder of a legal diploma obtained in another Member State in the register of persons undertaking the necessary period of practice for admission to the bar solely on the ground that it was not a legal diploma issued or confirmed by a university of the first State. Whilst recognition, for academic and civil purposes, of the equivalence of a diploma obtained in one Member State might be relevant, and even decisive, for enrolment with the bar of another Member State (Case 71/76 *Thieffry* [1977] ECR 765), it did not follow that it was necessary to examine the academic equivalence of the diploma relied upon by the person concerned in relation to the diploma normally required of nationals of that State. The diploma of the person concerned, such as, in this case, the maîtrise en droit granted by a French university,

37 Directive 98/5/EC of the Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (OJ 1998 L 77, p. 36).

had to be taken into account in the context of the assessment of the whole of the training, academic and professional, which that person was able to demonstrate. It was the duty of the competent authority to examine, in accordance with the principles set out in the judgments in Case C-340/89 *Vlassopoulou* [1991] ECR I-2357 and Case C-234/97 *Fernández de Bobadilla* [1999] ECR I-4773, whether, and to what extent, the knowledge certified by the diploma granted in another Member State and the qualifications or professional experience obtained there, together with the experience obtained in the Member State in which the candidate seeks enrolment, must be regarded as satisfying, even partially, the conditions required for access to the activity concerned.

9.3. In Case C-152/02 *Neri* (judgment of 13 November 2003, not yet published in the ECR), the Court held that an Italian administrative practice refusing to recognise post-secondary university diplomas issued by a British university in circumstances where the courses were given in Italy by an educational establishment operating in the form of a capital company in accordance with an agreement between the two establishments was incompatible with Article 43 EC. In the view of the Court, Article 43 EC requires the elimination of restrictions on freedom of establishment, whether they prohibit the exercise of that freedom, impede it or render it less attractive (Case C-145/99 *Commission* v *Italy* [2002] ECR I-2235). Non-recognition in Italy of degrees likely to facilitate the access of students to the employment market is likely to deter students from attending courses and thus seriously hinder the pursuit by the educational establishment concerned of its economic activity in that Member State. Moreover, inasmuch as non-recognition of diplomas relates solely to degrees awarded to Italian nationals, it does not appear suitable for attaining the objective of ensuring high standards of university education. Similarly, precluding any examination and, consequently, any possibility of recognition of degrees does not comply with the requirement of proportionality and goes beyond what is necessary to ensure the objective pursued. It cannot therefore be justified.

9.4. In its judgment in Case C-246/00 *Commission* v *Netherlands* [2003] ECR I-7504, the Court recalled, first, that Article 1(2) of Directive 91/439 [38] lays down the principle of mutual recognition of driving licences issued by the various Member States, and that, according to consistent case-law, that recognition, which must be without any formality "is a precise and unconditional obligation and the Member States have no discretion as to the measures to be adopted in order to comply with the requirement" (paragraph 61). In this case, the Court established that the holder of a driving licence issued by another Member State who has been resident in the Netherlands for over a year is deemed to have committed an offence which is subject to a fine if he drives a vehicle without having registered his driving licence in the Netherlands. In that respect, the Court held that, where registration of a driving licence issued by another Member State becomes

[38] Council Directive 91/439/EEC of 29 July 1991 on driving licences (OJ 1991 L 237, p. 1).

an obligation, that registration must be regarded as constituting a formality and is therefore contrary to Article 1(2) of the directive.

The Court further stated that the measures adopted by a Member State to avail itself of the possibility offered by the directive of applying to the holder of a driving licence issued by another Member State who takes up residence in the Netherlands its national rules on the period of validity of the licences, medical checks and tax arrangements and to enter on the licence the information indispensable for administration must not hinder or make less attractive for Community nationals the exercise of their right to free movement and freedom of establishment and, where they none the less do so, those measures must be applied in a non-discriminatory manner, be justified by imperative reasons of public interest, be appropriate for guaranteeing the attainment of the objective pursued and not go beyond what is necessary to attain that objective.

9.5. Finally, Case C-167/01 *Inspire Art* (judgment of 30 September 2003, not yet published in the ECR) examined whether it was a breach of Articles 43 EC and 48 EC for Netherlands law to require, on the registration in the commercial register of the subsidiary of a company, established in another Member State where it did not genuinely carry on business in order to benefit from less strict rules there than the rules of the State of establishment of the subsidiary, that the company describe itself as a "formally foreign company", thereby entailing obligations additional to those weighing on a company of that kind not obliged to describe itself in that way. The Court held that, even if the Netherlands legislative provision largely complied with Directive 89/666 [39] concerning disclosure requirements in respect of branches opened in a Member State other than the State of establishment (Eleventh Company Law Directive; "the Eleventth Directive"), that compliance did not automatically make the sanctions attached by Netherlands law to non-compliance with those measures compatible with Community law. Article 10 EC requires Member States to take all measures necessary to guarantee the application and effectiveness of Community law, and in particular to ensure that infringements of Community law are penalised in conditions which are analogous to those applicable to infringements of national law of a similar nature and importance and which make the penalty effective, proportionate and dissuasive (Case 68/88 *Commission* v *Greece* [1989] ECR 2965; Case C-326/88 *Hansen* [1990] ECR I-2911; Case C-36/94 *Siesse* [1995] ECR I-3573; Case C-177/95 *Ebony Maritime and Loten Navigation* [1997] ECR I-1111).

The judgment then noted that differences between the laws of the Member States on the subject of the disclosure required in respect of branches might interfere with the

[39] Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State (OJ 1989 L 395, p. 36).

exercise of the right of establishment, and that the harmonisation in relation to such disclosure carried out by the Eleventh Directive was exhaustive. It was therefore contrary to Article 2 of the Eleventh Directive for Netherlands legislation to impose on the branch of a company formed in accordance with the laws of another Member State disclosure obligations not provided for by that directive. Those obligations concern recording in the commercial register the fact that the company is formally foreign, recording in the business register of the host Member State the date of first registration in the foreign business register and information relating to sole members, compulsory filing of an auditor's certificate to the effect that the company satisfies the conditions as to minimum capital, subscribed capital and paid-up share capital, and mention on all documents emanating from the company that it is a formally foreign company.

Concerning Articles 43 EC and 48 EC, the Court stated that the fact that the parent establishment was formed for the purpose of circumventing Netherlands company law does not prevent that company's establishment of a branch in the Netherlands from benefiting from freedom of establishment. The question of the application of those articles is different from the question whether or not a Member State may adopt measures in order to prevent attempts by certain of its nationals improperly to evade domestic legislation (Case C-212/97 *Centros* [1999] ECR I-1459). Mandatory application of the rules of Netherlands company law on minimum capital and directors' liability to foreign companies when they carry on their activities exclusively, or almost exclusively, in the Netherlands, so that creation of a branch in the Netherlands by a company of that kind is subject to certain rules enacted by that State in respect of the formation of a limited-liability company, has the effect of impeding the exercise by those companies of the freedom of establishment conferred by the Treaty. As to the possible existence of justification, the Court held that neither Article 46 EC, nor the protection of creditors, nor combating improper recourse to freedom of establishment, nor safeguarding fairness in business dealings or the efficiency of tax inspections provided any justification for the hindrance to freedom of establishment guaranteed by the Treaty which the provisions of Netherlands legislation in question constituted. Articles 43 EC and 48 EC therefore precluded such national legislation.

10. On the question of *free movement of capital*, four cases are worthy of attention: the first two concern the conditions which two Member States place on the transfer of public holdings in undertakings (10.1), whilst the second two concern, respectively, national legislation on prior authorisation for acquisitions of unbuilt plots and national measures governing the acquisition of real property (10.2 and 10.3).

10.1. Two judgments delivered on 13 May 2003 (Case C-463/00 *Commission* v *Spain* [2003] ECR I-4581 and C-98/01 *Commission* v *United Kingdom* [2003] I-4641 ("*BAA*") form part of the series of judgments on "golden shares", delivered the previous year (Case C-367/98 *Commission* v *Portugal* [2002] ECR I-4731, Case C-483/99 *Commission* v *France* [2002] ECR I-4781, and Case C-503/99 *Commission* v *Belgium* [2002] ECR I-4809). The first examines Spanish legal arrangements for the disposal of public shareholdings in certain undertakings, requiring prior administrative authorisation

for decisions of commercial undertakings concerning the undertaking's winding-up, demerger or merger, the disposal or charging of the assets or shareholdings necessary for the attainment of the undertaking's object, a change in the undertaking's object, and dealings in the share capital which result in the State's shareholding in the undertaking being reduced. The second judgment concerns aspects of the scheme for privatising the British Airports Authority with regard to limiting the possibility of acquiring voting shares in BAA and to the procedure requiring consent to disposal of the company's assets, to the control of subsidiaries and to the company's winding-up. Following the case-law referred to above, the Court rejected the argument that there was no discrimination against nationals of other Member States on the ground that the prohibition laid down in Article 56 EC goes beyond the mere elimination of unequal treatment, on grounds of nationality, as between operators on the financial markets. The restrictions in question affected the position of a person acquiring a shareholding as such and were thus liable to deter investors from other Member States from making such investments and, consequently, affect access to the market. In the *BAA* judgment, the Court further held that the restrictions at issue did not arise as the result of the normal operation of company law, since the Member State acted in its capacity as a public authority. Consequently, the rules at issue constituted a restriction on the movement of capital for the purposes of Article 56 EC, and, by maintaining them in force, the United Kingdom failed to fulfil its obligations under that provision. In *Commission* v *Spain*, having held that there was a restriction on movements of capital (paragraph 62), the Court examined whether there might be a justification for it. In that respect, it confirmed its previous case-law, whereby concerns which might justify the retention by Member States of a degree of influence within undertakings that were initially public and subsequently privatised cannot entitle Member States to plead their own systems of property ownership, referred to in Article 295 EC, by way of justification for obstacles, resulting from privileges attaching to their position as shareholder in a privatised undertaking, to the exercise of the freedoms provided for by the Treaty. Such justification may result only from reasons referred to in Article 58(1) EC or from overriding requirements of the general interest. Furthermore, in order to be so justified, the national legislation had to be suitable for securing the objective which it pursued and must not go beyond what was necessary in order to attain it, so as to accord with the principle of proportionality. That was not the case here. In this case, the Court found that there were no objective, precise criteria sufficient to ensure that the scheme in question did not go beyond what was necessary in order to meet the objective of safeguarding supplies in the event of crisis in the petroleum, telecommunications and electricity sectors, and to ensure that the administrative authorities' particularly broad discretion in this area would remain under control.

10.2. In the case of *Salzmann*, referred to in paragraph 3.1 above, the Court was called upon to examine, first, whether Article 56(1) EC precludes national legislation which makes the purchase of land subject to prior administrative authorisation and provides that, apart from cases where the acquisition is carried out with a view to establishing a holiday home, authorisation is to be granted for acquisitions of unbuilt plots of land where the acquirer has plausibly demonstrated that the plot will, within a reasonable

time, be used in accordance with the local development plan or for public interest, charitable or cultural purposes. Secondly, in the event that such national legislation was precluded, the Court was called upon to determine whether such an authorisation requirement might nevertheless be covered by the derogation provided for in Article 70 of the Act of Accession of Austria. The Court held that, although the legal regime applicable to property ownership is a field of competence reserved for the Member States under Article 295 EC, it is not exempted from the fundamental rules of the Treaty (Case C-302/97 *Konle* [1999] ECR I-3099). Thus, national measures which regulated the acquisition of land for the purposes of prohibiting the establishment of secondary residences in certain areas had to comply with the provisions of the Treaty on the free movement of capital. The prior authorisation procedure restricts, by its very purpose, the free movement of capital (see Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch and Others* [2002] ECR I-2157, paragraph 32), and therefore falls within the scope of the prohibition laid down in Article 56(1) EC. Concerning the question whether such a measure might nevertheless be permitted, provided that it pursued an objective in the public interest, the judgment confirmed the case-law in *Reisch* and *Konle* to the effect that restrictions on the establishment of secondary residences in a specific geographical area, which a Member State imposed in order to maintain, for town and country planning purposes, a permanent population and an economic activity independent of the tourist sector, might be regarded as contributing to an objective in the public interest. However, in so far as it required the acquirer to produce proof of the future use of the land he was acquiring, such a measure allowed the competent administrative authority considerable latitude which might be akin to a discretionary power, with the result that it could be applied in a discriminatory way. The Court found that the condition of proportionality was not fulfilled either. A procedure simply involving a declaration might, if coupled with appropriate legal instruments, make it possible to eliminate the requirement of prior authorisation without undermining the effective pursuit of the aims of the public authorities, with the result that the prior authorisation procedure cannot be regarded as a measure strictly necessary in order to achieve the town and country planning objective pursued by the latter.

10.3. In a case that was essentially similar (Case C-452/01 *Ospelt and Schlössle Weissenberg*, judgment of 23 September 2003, not yet published in the ECR), but concerned a transaction between Liechtenstein nationals concerning a plot situated in Austria and subject to administrative authorisation, the Court reiterated that the scope of national measures governing the acquisition of immovable property had to be assessed in the light of the Treaty provisions on the movement of capital. It went on to hold that rules such as Article 40 of, and Annex XII to, the EEA Agreement, prohibiting the restrictions on capital movements and the forms of discrimination specified in those provisions, are, so far as concerns relations between the States party to the EEA Agreement, identical to those which Community law imposes with regard to relations between the Member States and must therefore be interpreted uniformly within the Member States. It would run counter to that objective as to uniformity of application of the rules relating to free movement of capital within the EEA for a State such as

Austria, which is a party to that Agreement, to be able after its accession to the European Union to maintain legislation restricting that freedom vis-à-vis another State party to that Agreement by basing itself on Article 57 EC. It follows that rules which make transactions relating to agricultural and forestry plots subject to administrative controls must, where a transaction is in issue between nationals of States party to the EEA Agreement, be assessed in the light of Article 40 of and Annex XII to that Agreement, which are provisions that have the same legal scope as the essentially identical provisions of Article 56 EC.

As for whether the provisions on the free movement of capital precluded a prior authorisation procedure for such acquisitions, the Court held that such a procedure might be allowed provided it pursued an objective in the public interest in a non-discriminatory way and was proportionate. In this case, the Court found, first, that discrimination had not been established. Secondly, the national measures in question pursued objectives in the general interest – preserving agricultural communities, maintaining a distribution of land ownership which allowed the development of viable farms and sympathetic management of green spaces and the countryside as well as encouraging a reasonable use of the available land, being objectives corresponding to those of the Common Agricultural Policy – which were capable of justifying restrictions of the freedom of capital movements. Thirdly, concerning the condition of proportionality, the principle of a sytem of prior authorisation cannot be challenged in so far as it seeks to ensure that land intended for agriculture continues to be used in that way under appropriate conditions. However, a condition that the acquirer must, in any event, farm the land himself as part of a holding in which he is also resident goes beyond what is necessary in order to attain the public-interest objectives and should therefore be regarded as incompatible with the freedom of movement of capital.

11. In the area of *transport policy*, reference should first be made to Case C-445/00 *Austria* v *Council* (judgment of 11 September 2003, not yet published in the ECR), concerning the system of ecopoints for heavy goods vehicles in transit across Austria.

The Court first held that the provisions of Regulation No 2012/2000, [40] which were designed to establish on a permanent basis the principle of spreading the reduction in ecopoints over a number of years, were incompatible with Annex 5, point 3, to Protocol No 9 to the Act of Accession of Austria, which provides that, in the event of reduction, the number of ecopoints is to be established for the following year. The Court drew attention to the fact that protocols and annexes to an Act of Accession are provisions of primary law which, unless the Act of Accession provides otherwise, can be suspended,

[40] Council Regulation (EC) No 2012/2000 of 21 September 2000 amending Annex 4 to Protocol No 9 to the 1994 Act of Accession and Regulation (EC) No 3298/94 with regard to the system of ecopoints for heavy goods vehicles transiting through Austria (OJ 2000 L 241, p. 18).

modified or abrogated only in accordance with the procedures laid down for the revision of the original treaties (paragraph 62).

Concerning the provisions of the same regulation for the spreading over the years 2000 to 2003 of the reduction in ecopoints made on account of the transit journey threshold provided for in Article 11 of Protocol No 9 to the Act of Accession of Austria having been exceeded in 1999, the Court held that the Council, faced with a situation in which reliable statistics had been transmitted late by the responsible national authorities, was justified in spreading the reduction in ecopoints beyond the end of the year following that in which the excess was established, as otherwise applying the reduction in ecopoints solely to the remaining months of that year would have had the disproportionate effect of stopping practically all transit traffic of goods by road through Austria, contrary to the fundamental principles of Community law. However, the Court held that to spread the reduction over a number of years would be contrary to the protocol. Moreover, the same illegality affected the provision of the regulation providing for the spreading of ecopoints between Member States.

Finally, when considering the method used in the contested regulation to calculate the reduction in ecopoints, based on the actual level of NO_x emission per heavy goods vehicle, without taking "illegal" journeys into consideration, the Court held that that method complied both with the letter and with the spirit of Protocol No 9 to the Act of Accession of Austria. The protocol is concerned with the average level of NO_x emissions by heavy goods vehicles and not the fictitious calculation of a number of ecopoints. However, the Court held that a method of calculation which consisted in practice of dividing the total number of ecopoints used by the total number of journeys recorded, in circumstances where the total number of ecopoints used took no account of journeys for which the carrier should have used ecopoints but did not do so ("illegal" journeys) even though those "illegal" journeys were included in the total number of journeys made, did not comply with Annex 5, points 2 and 3 of that protocol. In any event, the Court decided that the effects of the annulled provisions of the regulation should be regarded as definitive.

12. Two series of cases are worthy of note in the area of the *competition rules*: the first concerns the rules applicable to undertakings (12.1) and the second concerns State aid (12.2).

12.1. Concerning the first series, mention should be made of four cases.

12.1.1. In Case C-198/01 *Consorzio Industrie Fiammiferi* (judgment of 9 September 2003, not yet published in the ECR), the Court was asked to rule upon the scope of Article 81 EC where undertakings engaged in conduct contrary to Article 81(1) EC and where that conduct was required or facilitated by national legislation which legitimised or reinforced the effects of the conduct, specifically with regard to price-fixing or market-sharing arrangements.

The Court held that, faced with such conduct, a national competition authority, entrusted inter alia with the task of ensuring compliance with 81 EC, was under an obligation to disapply that national legislation. Since that provision, in conjunction with Article 10 EC, imposes a duty on Member States to refrain from introducing measures contrary to the Community competition rules, those rules would be rendered less effective if, in the course of an investigation under Article 81 EC into the conduct of undertakings, the authority were not able to declare a national measure contrary to the combined provisions of Articles 10 EC and 81 EC and if, consequently, it failed to disapply it.

Nevertheless, if the general Community-law principle of legal certainty was not to be violated, the duty of national competition authorities to disapply such an anti-competitive law could not expose the undertakings concerned to any penalties, either criminal or administrative, in respect of past conduct where the conduct was required by the law concerned. The national authority could not therefore impose penalties on the undertakings concerned in respect of past conduct which had been required of them by that national legislation; it could, however, impose penalties on such undertakings in respect of conduct subsequent to the decision finding infringement of Article 81 EC, once that decision had become definitive in their regard.

The Court finally stated that, in any event, the national competition authority may impose penalties on the undertakings concerned in respect of past conduct where the conduct was merely facilitated or encouraged by the national legislation, whilst taking due account of the specific features of the legislative framework in which the undertakings acted. In that respect, when determining the level of the penalty, the conduct of those undertakings could be assessed in the light of the extenuating factor constituted by the national legal framework.

12.1.2. In Case C-338/00 *Volkswagen* v *Commission* (judgment of 18 September 2003, not yet published in the ECR), the Court dismissed the appeal of the Volkswagen Group against the judgment of the Court of First Instance of 6 July 2000 in Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, which in turn partially dismissed the action for annulment of the Commission's decision imposing a fine for infringement of Article 81 EC. In its judgment, the Court reaffirmed, in line with its judgment in Case C-70/93 *Bayerische Motorenwerke* [1995] ECR I-3439, that a measure which was liable to partition the market between Member States could not come under those provisions of Regulation No 123/85 [41] that dealt with the obligations which a distributor may lawfully assume under a dealership contract. Although that

[41] Commission Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 8[8](3) of the EEC Treaty to certain categories of motor vehicle distribution and servicing agreements (OJ 1985 L 15, p. 16), replaced, as from 1 October 1995 by Commission Regulation (EC) No 1475/95 of 28 June 1995 (OJ 1995 L 145, p. 25).

regulation provides manufacturers with substantial means by which to protect their distribution systems, it does not authorise them to adopt measures which contribute to a partitioning of the market.

The Court also considered that the Court of First Instance had correctly applied the case-law (particularly *Bayerische Motorenwerke* and Joined Cases 25/84 and 26/84 *Ford* v *Commission* [1985] ECR 2725) whereby "a call by a motor vehicle manufacturer to its authorised dealers is not a unilateral act which falls outside the scope of Article 81(1) but is an agreement within the meaning of that provision if it forms part of a set of continuous business relations governed by a general agreement drawn up in advance". For a motor manufacturer to implement of policy of supply quotas on dealers with a view to blocking re-exports constitutes not a unilateral measure but an agreement within the meaning of that provision where, in order to impose that policy, the manufacturer uses clauses of the dealership agreement, such as that enabling supplies to dealers to be limited, and thereby influences the commercial conduct of those dealers.

12.1.3. In Case C-170/02 P *Schlüsselvertrag J.S. Moser and Others* v *Commission* (judgment of 25 September 2003, not yet published in the ECR), the Court had to determine an appeal against the order of the Court of First Instance of 11 March 2002 in Case T-3/02 *Schlüsselverlag J.S. Moser and Others v Commission* [2002] ECR II-1473, dismissing as manifestly inadmissible an action for a declaration that, by unlawfully failing to adopt a decision on the compatibility of a concentration with the common market, the Commission had failed to act.

The Court began by stating that the Commission cannot refrain from taking account of complaints from undertakings which are not party to a concentration capable of having a Community dimension. Indeed, the implementation of such a transaction for the benefit of undertakings in competition with the complainants is likely to bring about an immediate change in the complainants' situation on the market or markets concerned. Nor, in the Court's view, could the Commission validly maintain that it was not required to take a decision on the very principle of its competence as supervising authority, when it is solely responsible, under Article 21 of Regulation No 4064/89 [42] on the control of concentrations between undertakings, for taking, subject to review by the Court of Justice, the decisions provided for by that regulation. If the Commission refused to adjudicate formally, at the request of third-party undertakings, on the question whether or not a concentration which has not been notified to it falls within the scope of the regulation, it would make it impossible for such undertakings to take advantage of the procedural guarantees which the Community legislation accords them. The Commission would, at the same time, deprive itself of a means of checking

[42] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1).

that undertakings which are parties to a concentration with a Community dimension comply properly with their obligation to notify. Moreover, the complainant undertakings could not challenge, by means of an action for annulment, a refusal by the Commission to act which, as was stated in the previous paragraph, is likely to do them harm. Finally, nothing justifies the Commission in avoiding its obligation to undertake, in the interests of sound administration, a thorough and impartial examination of the complaints which are made to it. The fact that the complainants do not have the right, under Regulation No 4064/89, to have their complaints investigated under conditions comparable to those for complaints within the scope of Regulation No 17,[43] does not mean that the Commission is not required to consider whether the matter is within its competence and to draw the necessary conclusions. It does not release the Commission from its obligation to give a reasoned response to a complaint that it has specifically failed to exercise its competence.

The Court further found that, in this case, on the date on which the complainants lodged their complaint with the Commission, nearly four months had elapsed since the national authorities' decision approving completion of the transaction. The requirements of legal certainty and of continuity of Community action, which underlie both the fifth paragraph of Article 230 EC and Articles 4, 6 and 10(1), (3) and (6) of Regulation No 4064/89 would be disregarded if the Commission could, pursuant to the second paragraph of Article 232 EC, be requested to make a determination, outside a reasonable period, on the compatibility with the common market of a concentration which was not notified to it. Undertakings could thus lead the Commission to call in question a decision taken by the competent national authorities with regard to a concentration, even after the exhaustion of the possible legal remedies against such decision in the legal system of the Member State concerned. The Court concluded that a period of four months from the time when the competent national authority took its decision on the concentration operation could not be regarded as reasonable. The applicants' action for failure to act was therefore manifestly inadmissible, and the Court dismissed their appeal.

12.1.4. In Case C-462/99 *Connect Austria Gesellschaft für Telekommunikation and Others* [2003] ECR I-5197, two questions were referred for a preliminary ruling in a dispute between an Austrian telecommunications undertaking and the national regulatory authority with responsibility for issuing authorisations for the provision of telecommunications services concerning the allocation to a public undertaking, which already held a licence to provide digital mobile telecommunications services over a frequency band, of additional frequencies in another band without imposing a separate fee.

43 Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87)

The Court ruled first on a question concerning the interpretation of Article 5a(3) of Council Directive 90/387 [44] on the establishment of the internal market for telecommunications services through the implementation of open network provision. That provides that Member States are to ensure that suitable mechanisms exist at national level under which a party affected by a decision of the national regulatory authority responsible for issuing authorisations for the provision of telecommunications services has a right of appeal to a body independent of the parties involved. However, under a provision of Austrian constitutional law, appeals alleging the unlawfulness of decisions by the Telekom-Control-Kommission, the Austrian regulatory authority, are inadmissible because that provision does not expressly provide for them to be admissible.

The Court held that the requirement for national law to be interpreted in accordance with Directive 90/387 and the requirement that the rights of individuals should be effectively protected requires national courts to determine whether the relevant provisions of their national law provide individuals with a right of appeal against decisions of the national regulatory authority which satisfies the criteria laid down in Article 5a(3) of that directive. If national law cannot be applied so as to comply with the requirements of that article, a national court or tribunal which satisfies those requirements and which would be competent to hear appeals against decisions of the national regulatory authority if it were not prevented from doing so by a provision of national law explicitly excluding its competence is under an obligation to disapply that provision.

The Court then answered the question whether Articles 82 EC and 86(1) EC, Article 2(3) and (4) of Directive 96/2, [45] and Articles 9(2) and 11(2) of Directive 97/13 [46] had to be interpreted as precluding national legislation under which additional frequencies in a frequency band may be allocated to a public undertaking in a dominant position which already holds a licence to provide the same telecommunications services in another band without imposing a separate fee, whereas a new entrant to that market has had to pay a fee to obtain a licence to provide services in the first frequency band. The Court replied in the affirmative.

44 Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision (OJ 1990 L 192, p.1).

45 Commission Directive 96/2/EC of 16 January 1996 amending Directive 90/388/EEC with regard to mobile and personal communications (OJ 1996 L 20, p. 59).

46 Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services (OJ 1997 L 117, p. 15).

The Court also considered, however, that those provisions did not preclude such legislation if the fee imposed on the public undertaking in a dominant position for its licence, including the subsequent allocation without additional payment of additional frequencies, appeared to be equivalent in economic terms to the fee imposed on the new entrant. Concerning, more particularly, the case of Article 2(3) and (4) of Directive 96/2, the Court held that those provisions do not preclude legislation allowing such a limited allocation of additional frequencies after at least three years have elapsed since the grant of the DCS 1800 licence or before the expiry of that period if the capacity of the public undertaking holding a GSM 900 licence to accept new customers has been exhausted despite the use of all commercially viable technical possibilities.

12.2. On the matter of *State aid*, four cases are worthy of note.

12.2.1. The first judgment to note is that in Joined Cases C-83/01 P, C-93/01 P and C-94/01 P *Chronopost, La Poste and French Republic* [2003] ECR I-7018, on an action brought by a trade association of companies offering express courier services against a Commission decision declaring that the logistical and commercial assistance given by the French Post Office (La Poste) to a private company to which it had entrusted the management of its express courier service did not constitute State aid. In its judgment of 14 December 2000 in Case T-613/97 *Ufex and Others* [2000] ECR II-4055, the Court of First Instance annulled that decision on the ground that the Commission should have examined whether those full costs took account of the factors which an undertaking acting under normal market conditions should have taken into consideration when fixing the remuneration for the services provided.

Hearing the case on appeal, the Court considered at the outset that that assessment by the Court of First Instance failed to take account of the fact that an undertaking such as La Poste was in a situation very different from that of a private undertaking acting under normal market conditions. La Poste had had to acquire substantial infrastructures and resources to enable it to carry out its task of providing a service of general economic interest within the meaning of Article 86 EC, even in sparsely populated areas where the tariffs did not cover the cost of providing the service in question. The creation and maintenance of the basic postal network were not in line with a purely commercial approach. The Court then held that the provision of logistical and commercial assistance was inseparably linked to that network, since it consisted precisely in making available that network which had no equivalent on the market.

The Court therefore concluded that, in the absence of any possibility of comparing the situation of La Poste with that of a private group of undertakings not operating in a reserved sector, “normal market conditions”, which are necessarily hypothetical, allowing it to be determined whether the provision by a public undertaking of logistical and commercial assistance to its private-law subsidiary was capable of constituting State aid, had to be assessed by reference to the objective and verifiable elements which were available. The costs borne by La Poste in providing such assistance could

constitute such objective and verifiable elements. On that basis, there could be no question of State aid to the subsidiary if, first, it were established that the price charged properly covered all the additional, variable costs incurred in providing the logistical and commercial assistance, an appropriate contribution to the fixed costs arising from use of the postal network and an adequate return on the capital investment in so far as it was used for the subsidiary's competitive activity and if, secondly, there was nothing to suggest that those factors had been underestimated or fixed in an arbitrary fashion.

12.2.2. The judgment in Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7810, concerns the question whether State aid, within the meaning of the EC Treaty, covers public subsidies to allow the operation of regular urban, suburban or regional transport services. Examining first whether the condition that trade between Member States had to be affected was met, the Court emphasised that the latter did not depend on the local or regional character of the transport services supplied or on the scale of the field of activity concerned. Referring to its case-law describing State aid as an advantage granted to a beneficiary undertaking which the latter would not have obtained under normal market conditions, the Court emphasised that public subsidies such as those referred to above are not caught by Article 87(1) EC where such subsidies are to be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations. The Court defined four conditions which had to be met for such compensation to be regarded as being present. First, the recipient undertaking must be actually required to discharge public service obligations and those obligations must have been clearly defined. Second, the parameters on the basis of which the compensation is calculated must have been established beforehand in an objective and transparent manner. Third, the compensation must not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations. Fourth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed must have been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

12.2.3. In Joined Cases C-261/01 and C-262/01 *Van Calster and Cleeren and Openbare Slachthuis* (judgment of 21 October 2003, not yet published in the ECR) the Court analysed a number of questions referred for a preliminary ruling in relation to an aid measure which provided for a scheme of charges that formed an integral part of that measure and was intended specifically and exclusively to finance it. It first pointed out that a State aid measure in the narrow sense might not substantially affect trade between Member States and might thus be acknowledged as permissible, whilst the disturbance which it created was increased by a method of financing it which would render the scheme as a whole incompatible with a single market and the common

interest. The Court further considered that where a charge specifically intended to finance aid proved to be contrary to other provisions of the Treaty, for example Articles 23 EC and 25 EC or Article 90 EC, the Commission could not declare the aid scheme of which the charge formed part to be compatible with the common market. Consequently, the method by which an aid is financed could render the entire aid scheme incompatible with the common market. Therefore, examination of an aid measure could not be considered separately from the effects of its method of financing, and the Member State was therefore required in such a case to notify not only the planned aid in the narrow sense, but also the method of financing it.

It follows that, where an aid measure of which the method of financing is an integral part has been implemented in breach of the obligation to notify, national courts must draw all the consequences under their national law concerning both the validity of the measures implementing the aid concerned and the recovery of the financial support granted and therefore, in principle, order reimbursement of charges or contributions levied specifically for the purpose of financing that aid.

12.2.4. Joined Cases C-328/99 and C-399/00 *Italian Republic and SIM 2 Multimedia* v *Commission* [2003] ECR I-4035 concerned, first, the position of a consumer electronics company called Seleco, whose capital was held, inter alia, by Friula, a finance company entirely controlled by the region of Friuli Venezia Giulia, and by Ristruttorazione Elettronica (REL), a company controlled by the Italian Ministry of Industry, Commerce and Craft Trades, and, secondly, the position of the company Multimedia created by Seleco.

The first problem examined by the Court was whether interventions by Friula and REL in the recapitalisation operations of Seleco should be classified as State aid.

Considering first the question whether Friula's operations had been carried out using State resources, the Court held that the financial resources of a private-law company such as Friulia, 87% of which was held by a public authority such as the Region of Friuli Venezia Giulia and which acted under the control of that authority, could be regarded as State resources within the meaning of Article 87(1) EC. The fact that Friulia participated using its own funds was irrelevant in that regard, because for funds to be categorised as State resources it was sufficient that they constantly remain under public control and therefore available to the competent national authorities.

Recalling that, pursuant to the principle that the public and private sectors are to be treated equally, capital placed directly or indirectly at the disposal of an undertaking by the State in circumstances which correspond to normal market conditions cannot be regarded as State aid, the Court considered that it had to be determined whether, in similar circumstances, a private investor of a dimension comparable to that of the bodies managing the public sector could have been prevailed upon to make capital contributions of the same size, having regard in particular to the information available

and foreseeable developments at the date of those contributions. Since that involved a complex economic appraisal, the Court had to limit its review to verifying whether the Commission complied with the relevant rules governing procedure and the statement of reasons, whether the facts on which the contested finding was based were accurately stated and whether there had been any manifest error of assessment or a misuse of powers. In this case, it concluded that the Commission was right to hold that the interventions by REL and Friula in the recapitalisation operations of Seleco did indeed constitute State aid.

The second problem which drew the Court's attention was that of recovering State aid from Multimedia, the question arising in this case being whether that company should also be considered as having been a beneficiary of the aid. Seleco had effectively created that company, concentrated its most profitable activities in it, and become its sole owner. It had then sold two thirds of the shares it held in Multimedia, the final third having been sold to a private company at a public sale by court order in the context of Seleco's liquidation.

The Court held first that the possibility of a company in economic difficulties taking measures to rehabilitate the business could not be ruled out a priori because of requirements relating to recovery of the aid which was incompatible with the common market. However, if it were permissible, without any condition, for an undertaking experiencing difficulties and on the point of being declared bankrupt to create, during the formal inquiry into the aid granted it, a subsidiary to which it then transfers its most profitable assets before the conclusion of the inquiry, that would amount to accepting that any company may remove such assets from the parent undertaking when aid is recovered, which would risk depriving the recovery of that aid of its effect in whole or in part. In order to prevent the effectiveness of the decision to recover the aid from being frustrated and the market from continuing to be distorted, the Commission might be compelled to require that the recovery not be restricted to the original firm but be extended to the firm which continued the activity of the original firm, using the transferred means of production, in cases where certain elements of the transfer pointed to economic continuity between the two firms.

In this case, however, the Court considered that the statement of reasons on which the contested decision was based was inadequate for the purposes of Article 253 EC, in particular in relation to the alleged irrelevance of the fact that the shares in Multimedia were bought at a price which seemed to be the market price, although that point was also required to be taken into account in the present case. The Commission had assumed that the price of the transfer of the multimedia branch was influenced and dictated by the risk for the parties that they might have to face a proceeding under Article 88(2) EC and eventually repay aid held to be unlawful, but it did not adduce any concrete evidence from which it might be inferred that the sworn expert took account of such a risk in his estimate of the value of the multimedia branch. Similarly, in reply to the Commission's contention that, whatever the price of the sale, it was not relevant in the present case, since it concerned an operation relating to the shares, the Court held

that, whilst it was correct that the sale of shares in a company which is the beneficiary of unlawful aid by a shareholder to a third party does not affect the requirement for recovery, the situation at issue here was different from that case. This case involved the sale of Multimedia shares by Seleco, which created that company, and whose assets benefited from the sales price of the shares. Therefore, it could not be excluded that Seleco retained the benefit of the aid received from the sale of its shares at market price. The Court concluded by annulling the Commission's decision on that point.

13. In the area of *trade protection measures*, two judgments are worthy of note (13.1 and 13.2).

13.1. In Case C-76/01 P *Eurocoton* (judgment of 30 September 2003, not yet published in the ECR), the Court heard an appeal against the decision of the Court of First Instance in Case T-213/97 *Eurocoton and Others* v *Council* [2000] ECR II-3727, dismissing an action for the annulment of the "decision" of the Council of the European Union not to adopt a Commission proposal for a regulation imposing a definitive anti-dumping duty on imports of cotton fabrics from certain non-member countries as inadmissible.

Considering first the question whether or not the measure concerned was open to challenge, the Court held that failure to adopt a proposal submitted by the Commission for a regulation imposing a definitive anti-dumping duty, together with the expiry of the 15-month period prescribed in Article 6(9) of the basic anti-dumping regulation, Regulation No 384/96,[47] which definitively fixed the Council's position in the final phase of the anti-dumping proceeding, bore all the characteristics of a reviewable act within the meaning of Article 230 EC, in that it produced binding legal effects capable of affecting the interests of undertakings which had brought a complaint, at the origin of the anti-dumping inquiry, in the name of Community industry. It therefore annulled the judgment of the Court of First Instance.

Considering next whether the Council, which had not indicated why the proposal for a regulation had been rejected, was in breach of its obligation to state reasons, the Court held that, from the time when under Article 9(4) of the basic antidumping regulation, Regulation No 384/96, the Council imposed a definitive anti-dumping regulation in circumstances where the facts as finally established show that there was dumping and injury caused thereby, and the Community interest called for intervention in accordance with Article 21 of that regulation, compliance with the obligation to state reasons requires the act in question to indicate the absence of dumping or corresponding injury or that the Community interest does not call for intervention on its part. The Court therefore annulled the Council's decision.

47 Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1).

13.2. In Case C-76/00 P *Petrotub and Republica* v *Council* [2003] ECR I-79, the Court heard an appeal seeking the annulment of the judgment of the Court of First Instance in Joined Cases T-33/98 and T-34/98 *Petrotub and Republica v Council* [1999] ECR II-3837 dismissing the application by two companies established in Romania for the annulment of Council Regulation (EC) No 2320/97 imposing definitive anti-dumping duties on imports of certain seamless pipes and tubes of iron or non-alloy steel originating in a number of countries including Romania. [48]

Petrotub first argued that the Court of First Instance had erred in law by holding that the obligation to state reasons was complied with even though the contested regulation contained no explanation as to why, in order to establish the dumping margin, the Council discarded the second symmetrical method in favour of the asymmetrical method.

The Court upheld that argument, holding, first, that it was clear from the actual wording of Article 2(11) of the basic anti-dumping regulation, Regulation No 384/96, [49] that the existence of a dumping margin is normally to be established using one of the two symmetrical methods and that recourse to the asymmetrical method, by way of an exception to that rule, may be had only on the twofold condition that, on the one hand, the pattern of export prices differs significantly among different purchasers, regions or time periods and, on the other hand, the symmetrical methods do not reflect the full degree of dumping being practised. The Court further took the view that it was necessary to take account of Article 2.4.2 of the 1994 Anti-dumping Code [50] in so far as that provision states that an explanation must be provided as to why significant differences in the pattern of export prices as among different purchasers, regions or time periods cannot be taken into account appropriately by the use of the symmetrical methods. The Community adopted the basic regulation in order to satisfy its obligations arising from the 1994 Anti-dumping Code and, by means of Article 2(11) of the basic anti-dumping regulation, Regulation No 384/96, it intended to implement the particular obligations laid down by Article 2.4.2 of that code. The fact that it was not expressly specified in Article 2(11) of the basic regulation that the explanation required by Article 2.4.2 of the 1994 Anti-dumping Code had to be given by the Community

48 Council Regulation (EC) No 2320/97 of 17 November 1997 imposing definitive anti-dumping duties on imports of certain seamless pipes and tubes of iron or non-alloy steel originating in Hungary, Poland, Russia, the Czech Republic, Romania and the Slovak Republic, repealing Regulation (EEC) No 1189/93 and terminating the proceeding in respect of such imports originating in the Republic of Croatia (OJ 1997 L 322, p. 1).

49 Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1).

50 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (OJ 1994 L 336, p. 103).

institution in the event of recourse to the asymmetrical method may be explained by the existence of Article 253 EC. Once Article 2.4.2 is transposed by the Community, the specific requirement to state reasons laid down by that provision can be considered to be subsumed under the general requirement imposed by the Treaty for acts adopted by the institutions to state the reasons on which they are based.

Concerning the appeal by Republica, the Court allowed the appeal on the ground that the Court of First Instance had erred in law by holding that the Council had given, in the contested regulation, an adequate statement of the reasons for its refusal to exclude sales made using compensation from the determination of normal value.

Determination of the normal value constituted one of the essential steps required to prove the existence of any dumping. It followed from the first and third subparagraphs of Article 2(1) of the basic anti-dumping regulation that, in principle, prices between parties which have a compensatory arrangement with each other may not be taken into account in determining normal value, and that there is no exception to this, unless it is determined that those prices are unaffected by the relationship. By merely stating, in the contested regulation, that it had been "found that sales made using compensation were indeed made in the ordinary course of trade", the Council did not satisfy the requirements of the obligation to state reasons. Such a peremptory statement, which amounted to no more than a reference to the provisions of Community law, contained no explanatory element of such a kind as to enlighten the parties concerned and the Community judicature as to the reasons which had led the Council to consider that the prices charged in connection with those sales made using compensation had not been affected by the relationship (paragraph 87) and did not enable the parties concerned to know whether those prices were, by way of exception, correctly taken into consideration for the purpose of calculating normal value, or whether that latter circumstance might constitute a flaw affecting the legality of the contested regulation (paragraph 88).

14. In the field of *trade mark law*, the Court gave a number of judgments on the concept of genuine use of a mark (14.1), the burden of proof of the exhaustion of the right conferred by a mark (14.2), the criteria for assessing the distinctiveness of three-dimensional marks (14.3), the possibility of using a colour as such as a mark (14.4), the concept of a mark consisting exclusively of signs or indications which may serve to designate the characteristics of goods (14.5), the extent of the protection conferred by a mark with a reputation within the meaning of Article 5(2) of Directive 89/104 [51] (14.6), and, finally, the interpretation of Regulation 40/94 [52] on the Community trade mark

[51] First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1).

[52] Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1).

concerning the use of the second language before the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) (14.7).

14.1. In its judgment in Case C-40/01 *Ansul* [2003] ECR I-2439 the Court interpreted the concept of "genuine use" of a trade mark in Articles 12(1) and 10(2) of Directive 89/104. It observed to begin with, citing Joined Cases C-414/99 to C-416/99 *Zino Davidoff and Levi Strauss* [2001] ECR I-8691, that it was the Community legislature's intention that the maintenance of rights in a trade mark should be subject to the same condition regarding genuine use in all the Member States, so that the level of protection trade marks enjoy does not vary according to the legal system concerned (paragraph 29), and that that concept must be given a uniform interpretation (paragraph 31). Genuine use is actual use of the mark (paragraph 31) which is not merely token, serving solely to preserve the rights conferred by the mark (paragraph 36). "Use of the mark must therefore relate to goods or services already marketed or about to be marketed and for which preparations by the undertaking to secure customers are under way, particularly in the form of advertising campaigns … Finally, when assessing whether there has been genuine use of the trade mark, regard must be had to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark is real, in particular whether such use is viewed as warranted in the economic sector concerned", giving consideration if appropriate to the nature of the goods or service at issue, the characteristics of the market concerned and the scale and frequency of use of the mark. Use of the mark need not therefore always be quantitatively significant for it to be deemed genuine, and under certain conditions there may also be genuine use of the mark for goods for which it was registered that were sold in the past and are not newly available on the market. That applies inter alia where the proprietor makes use of the mark to sell component parts that are integral to the make-up or structure of the goods, or for goods or services directly connected with the goods previously sold and intended to meet the needs of customers of those goods.

14.2. Case C-244/00 *Van Doren + Q* [2003] ECR I-3051 examined the compatibility with Directive 89/104 and Articles 28 EC and 30 EC of a national provision imposing on a third party who is proceeded against for infringement of the exclusive right to the mark the burden of proving exhaustion of the right conferred by the mark. The Court began by noting that the place where the goods were first marketed was not identified in the case before it, unlike in *Zino Davidoff and Levi Strauss*, in which it had held that the burden of proving the proprietor's consent to the goods being marketed in the EEA, entailing exhaustion of the right conferred by the mark, is on the trader who relies on that consent. The Court pointed out that Articles 5 to 7 of the directive embody a complete harmonisation of the rules relating to the rights conferred by a trade mark. It is apparent from those provisions that the extinction of the exclusive right results either from the consent of the proprietor to goods being placed on the market within the EEA or from their being placed on the market within the EEA by the proprietor himself. It follows that a national rule that the exhaustion of the trade mark right constitutes a plea in defence for a third party against whom the trade mark proprietor brings an action, so

that the conditions for such exhaustion must, as a rule, be proved by the third party who relies on it (paragraph 35), is consistent with those provisions. However, the requirements deriving from Articles 28 EC and 30 EC may mean that that rule needs to be qualified, in particular where it allows the proprietor of the trade mark to partition national markets, as is the case where – as in the main proceedings – the trade mark proprietor markets his products in the EEA using an exclusive distribution system. Where the third party against whom proceedings have been brought succeeds in establishing that there is such a risk if he bears the burden of proof, it is for the proprietor of the trade mark to establish that the products were initially placed on the market outside the EEA by him or with his consent. If such evidence is adduced, it is then for the third party to prove the consent of the proprietor to subsequent marketing of the products in the EEA.

14.3. The judgment in Joined Cases C-53/01 to C-55/01 *Linde and Others* [2003] ECR I-3161 related to the criteria for assessing the distinctiveness of three-dimensional trade marks. The Court noted that a three-dimensional sign may constitute a mark (Case C-299/99 *Philips* [2002] ECR I-5475) if it is capable of being represented graphically and is distinctive. Also according to *Phillips*, the criteria for assessing the distinctiveness of three-dimensional marks are no different from those to be applied to other categories of trade mark. However, under Article 3(1)(e) of Directive 89/104,[53] signs which consist exclusively of the shape which results from the nature of the goods themselves will not be registered. Thus, while neither the scheme of the directive nor the wording of Article 3(1)(b) indicates that stricter criteria than those used for other categories of trade mark ought to be applied when assessing the distinctiveness of a three-dimensional shape of product mark, it is nevertheless true that it may in practice be more difficult to establish distinctiveness in relation to such a mark than to a word or figurative trade mark. That difficulty, which may explain why such a mark is refused registration, does not mean that it cannot acquire distinctive character following the use that has been made of it and thus be registered as a trade mark under Article 3(3) of the directive.

In answer to the question whether Article 3(1)(c) of the directive [54] also has significance for three-dimensional marks consisting of the shape of the product, the Court observed that each of the grounds for refusal listed in that provision is independent of the others and calls for separate examination, so that it also has significance for three-dimensional shape of product marks. As regards, finally, the question whether the general interest of the trade in the preservation of the availability of the shape of the

53 See note 51.

54 Under that provision, trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, or the time of production of the goods or of rendering of the service, or other characteristics of the goods shall not be registered, or if registered shall be liable to be declared invalid.

product should be taken into account if Article 3(1)(e) alone applies to three-dimensional marks, the Court recalled that each of the grounds for refusing registration is to be interpreted in the light of the underlying general interest. The rationale of the grounds for refusing registration laid down in that provision is to prevent trade mark protection from granting its proprietor a monopoly on technical solutions or functional characteristics of a product which a user is likely to seek in the products of competitors. Similarly, Article 3(1)(c) of the directive pursues an aim which is in the public interest, namely preventing such signs or indications from being reserved to one undertaking alone because they have been registered as trade marks. It follows that, when examining the ground for refusing registration in Article 3(1)(c) of the directive in a concrete case, regard must be had to the public interest underlying that provision, which is that all three-dimensional shape of product trade marks which consist exclusively of signs or indications which may serve to designate the characteristics of the goods or service within the meaning of that provision should be freely available to all and, subject always to Article 3(3) of the directive, cannot be registered.

14.4. The judgment in Case C-104/01 *Libertel* [2003] ECR I-3793 examined whether and in what circumstances a colour may constitute a mark within the meaning of Articles 2 and 3 of Directive 89/104. The Court began by finding that a colour is capable of constituting a mark if it is a sign which is capable of graphic representation and of distinguishing the goods or services of one undertaking from those of other undertakings.

In view of the limited number of colours that the relevant public, composed of the average consumer, reasonably well informed and reasonably observant and circumspect, is capable of distinguishing, and of the aim in the public interest pursued by Article 3(1)(c) of Directive 89/104, which requires that the signs and indications descriptive of the categories of goods or services for which registration is sought may be freely used by all (Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee* [1999] ECR I-2779, and *Linde and Others*), registration as trade marks of colours per se would have the effect of creating an extensive monopoly which would be incompatible with a system of undistorted competition, in particular because it could have the effect of creating an unjustified competitive advantage for a single trader (paragraph 54). There is therefore a public interest in not unduly restricting the availability of colours for the other traders who offer for sale goods or services of the same type as those in respect of which registration is sought (paragraph 55), and that interest is relevant in assessing the potential distinctiveness of a given colour as a trade mark.

As to the conditions under which a colour may be regarded as distinctive and so eligible for registration in accordance with Article 3(1)(b) and Article 3(3) of the directive, the Court first recalled the essential function of a trade mark, namely to guarantee the identity of the origin of the marked goods or service to the consumer by enabling him, without any possibility of confusion, to distinguish them from others which have another origin (Case C-39/97 *Canon* [1998] ECR I-5507 and Case C-517/99 *Merz*

& Krell [2001] ECR I-6959). Such distinctiveness without any prior use is inconceivable save in exceptional circumstances, and particularly where the number of goods or services for which the mark is claimed is very restricted and the relevant market very specific. However, that distinctive character may be acquired following the use made of the colour, in particular after the normal process of familiarising the relevant public has taken place. The Court drew two conclusions from all those considerations. First, a colour *per se*, not spatially delimited, may, in respect of certain goods and services, have a distinctive character within the meaning of Article 3(1)(b) and Article 3(3) of the directive, provided that, inter alia, it may be represented graphically in a way that is clear, precise, self-contained, easily accessible, intelligible, durable and objective. The latter condition cannot be satisfied merely by reproducing on paper the colour in question, but may be satisfied by designating that colour using an internationally recognised identification code. Second, a colour may be found to possess distinctive character within the meaning of Article 3(1)(b) and Article 3(3) of the directive, provided that, as regards the perception of the relevant public, the mark is capable of identifying the product or service for which registration is sought as originating from a particular undertaking and distinguishing that product or service from those of other undertakings.

In the light of those findings, the Court also found that the number of goods or services for which registration of a colour as a trade mark is sought is relevant to assessing both the distinctive character of the colour and whether registration is consistent with the general interest described above.

Finally, as regards the question whether the competent registration authority has to carry out an examination in the abstract or by reference to the actual situation in order to assess distinctive character, the Court confirmed that the examination must refer to the actual situation and take account of all the relevant circumstances of the case, including any use which has been made of the sign in respect of which trade mark registration is sought.

14.5. In Case C-191/01 P *Wrigley* (judgment of 23 October 2003, not yet published in the ECR) the Court ruled, on appeal, on the concept of marks which consist exclusively of signs or indications which may serve to designate the characteristics of goods within the meaning of Article 7(1)(c) of Regulation No 40/94,[55] which lays down that registration is to be refused in such a case. In the Court's view, by prohibiting the registration as Community trade marks of such signs and indications, that provision pursues an aim which is in the public interest, namely that descriptive signs or indications relating to the characteristics of goods or services in respect of which registration is sought may be freely used by all. That provision accordingly prevents such signs and indications from being reserved to one undertaking alone because they have been registered as trade marks (*Windsurfing Chiemsee* and *Linde and Others*).

[55] See note 52.

For OHIM to refuse on the basis of that provision to register a trade mark, it suffices that the signs and indications can be used to describe goods or services. A word sign must therefore be refused registration if at least one of its possible meanings designates a characteristic of the goods or services concerned. To consider, as the Court of First Instance did, that the compound "Doublemint" could not be refused registration, because it could not be "characterised as exclusively descriptive", amounted to considering that the provision in question must be interpreted as precluding the registration of trade marks which are "exclusively descriptive" of the goods or services in respect of which registration is sought, or of their characteristics. The Court of First Instance had therefore applied a test which is not laid down by Regulation No 40/94,[56] without ascertaining whether the word at issue could be used by other operators to designate a characteristic of their goods and services, and thereby erred as to the scope of that provision. The Court concluded that OHIM's submission that the contested judgment was vitiated by an error of law was well founded, and set aside the judgment.

14.6. The judgment in Case C-408/01 *Adidas* (judgment of 23 October 2003, not yet published in the ECR), which was given on a reference for a preliminary ruling, ruled on the extent of the protection conferred by a trade mark with a reputation within the meaning of Article 5(2) of Directive 89/104.[57] In answer to the first question, whether transposition of that provision entitles Member States to provide protection for the mark with a reputation in cases where the later mark or sign, which is identical with or similar to it, is intended to be used or is used in relation to goods or services identical with or similar to those covered by the mark, the Court, recalling its judgment in Case C-292/00 *Davidoff* [2003] ECR I-389, stated that, where the sign is used for identical or similar goods or services, a mark with a reputation must enjoy protection which is at least as extensive as where a sign is used for non-similar goods or services. The Member State must therefore grant protection which is at least as extensive for identical or similar goods or services as for non-similar goods or services.

The Court then addressed the question whether the protection conferred by that provision is conditional on a finding of a degree of similarity between the mark with a reputation and the sign such that there exists a likelihood of confusion between them on the part of the relevant section of the public. It recalled that Article 5(2) of the directive establishes, for the benefit of trade marks with a reputation, a form of protection whose implementation does not require the existence of such a likelihood. Article 5(2) applies to situations in which the specific condition of the protection consists of a use of the sign in question without due cause which takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark (Case C-425/98 *Marca Mode* [2000] ECR I-4861). The condition of similarity

56 Ibid.

57 See note 51.

between the mark and the sign requires the existence of elements of visual, aural or conceptual similarity, whereas the infringements referred to in the provision in question, where they occur, are the consequence of a certain degree of similarity between the mark and the sign, by virtue of which the relevant public makes a connection between the sign and the mark, that is to say, establishes a link between them even though it does not confuse them (see, to that effect, Case C-375/97 *General Motors* [1999] ECR I-5421).

As regards, finally, the effect on the question concerning the similarity between the mark with a reputation and the sign of a finding of fact by the national court to the effect that the sign in question is viewed by the public purely as an embellishment, the Court considered that in such circumstances the public, by definition, does not establish any link with a registered mark, with the result that one of the conditions of the protection conferred by Article 5(2) of the directive is then not satisfied.

14.7. Finally, Case C-361/01P *Kik* (judgment of 9 September 2003, not yet published in the ECR) concerned an application for registration of a trade mark filed in Dutch and also indicating Dutch as the second language, Dutch not being one of the five languages of OHIM.

The Court, on appeal, first stated that the Court of First Instance had been right to conclude that Regulation No 40/94 on the Community trade mark [58] cannot be taken, in itself, as in any sense implying differentiated treatment as regards language, given that it in fact guarantees use of the language of the application filed as the language of proceedings. The Court reached that conclusion by finding that, according to Article 115(4) of Regulation No 40/94, the language of proceedings before OHIM is to be the language used for filing the application for a Community trade mark, although the second language chosen by the applicant may be used by OHIM to send him written communications. It follows from that provision that the option of using a second language for written communications is an exception to the principle that the language of proceedings be used, and that the term "written communications" must therefore be interpreted strictly. Since the proceedings comprise all such acts as must be carried out in processing an application, it follows that the term "procedural documents" covers any document that is required or prescribed by the Community legislation for the purposes of processing an application for a Community trade mark or necessary for such processing, be they notifications, requests for correction, clarification or other documents. All such documents must therefore be drawn up by OHIM in the language used for filing the application. In contrast to procedural documents, "written communications", as referred to in the second sentence of Article 115(4) of the regulation, are any communications which, from their content, cannot be regarded as

58 See note 52.

amounting to procedural documents, such as letters under cover of which OHIM sends procedural documents, or by which it communicates information to applicants.

The Court, going on to analyse the obligation imposed on an applicant for registration of a Community trade mark by Article 115(3) to "indicate a second language which shall be a language of [OHIM] the use of which he accepts as a possible language of proceedings for opposition, revocation or invalidity proceedings", decided that it does not infringe the principle of non-discrimination. The language regime of a body such as OHIM is the result of a difficult process which seeks to achieve the necessary balance between the interests of economic operators and the public interest in terms of the cost of proceedings, but also between the interests of applicants for Community trade marks and those of other economic operators in regard to access to translations of documents which confer rights, or proceedings involving more than one economic operator, such as the opposition, revocation and invalidity proceedings referred to in Regulation No 40/94. Therefore, in determining the official languages of the Community which may be used as languages of proceedings in opposition, revocation and invalidity proceedings, where the parties cannot agree on which language to use, the Council was pursuing the legitimate aim of seeking an appropriate linguistic solution to the difficulties arising from such a failure to agree. Similarly, even if the Council did treat official languages of the Community differently, its choice to limit the languages to those which are most widely known in the European Community is appropriate and proportionate.

15. In the field of *harmonisation of laws*, there were cases concerning the procedure for the maintenance of national measures derogating from a harmonising directive (15.1), misleading advertising (15.2), the protection of personal data (15.3), two cases relating to novel foods and novel food ingredients (15.4), one case concerning authorisation to market medicinal products (15.5), one on national provisions more stringent than those provided for by Directive 97/69 [59] (15.6) and, finally, two cases on the interpretation of Directive 90/435 [60] (15.7.1 and 15.7.2).

15.1. In Case C-3/00 *Denmark* v *Commission* [2003] ECR I-2643 the Court had to rule for the first time on an action brought by a Member State against a refusal by the Commission to approve the maintenance of national measures derogating from a directive adopted under Article 95 EC. In this case, Denmark sought annulment of a Commission decision refusing to approve the national provisions notified concerning

[59] Commission Directive 97/69/EC of 5 December 1997 adapting to technical progress for the 23rd time Council Directive 67/548/EEC on the approximation of the laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances (OJ 1997 L 343, p. 19).

[60] Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 1990 L 225, p 6).

the use of sulphites, nitrites and nitrates in foodstuffs, by derogation from Directive 95/2.[61]

The Court recalled that, under Article 95 EC, the maintenance of already existing national provisions that derogate from a measure for the harmonisation of laws must be justified on grounds of the major needs referred to in Article 30 EC or relating to the protection of the environment or the working environment, whereas the introduction of new national provisions must be based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure. In this case, the Court rejected a plea by the Danish Government alleging a misinterpretation by the Commission of Article 95(4) EC, by finding that the contested decision had considered the possible existence of a situation specific to the Kingdom of Denmark merely as a useful element in assessing what decision to adopt, and had not treated such a situation as a condition of approval for already existing derogating national provisions. The Court none the less considered that "[a] Member State may base an application to maintain its already existing national provisions on an assessment of the risk to public health different from that accepted by the Community legislature when it adopted the harmonisation measure from which the national provisions derogate. To that end, it falls to the applicant Member State to prove that those national provisions ensure a level of health protection which is higher than the Community harmonisation measure and that they do not go beyond what is necessary to attain that objective" (paragraph 64). In this respect, the Court held that "[i]n the light of the uncertainty inherent in assessing the public health risks posed by, inter alia, the use of food additives, divergent assessments of those risks can legitimately be made, without necessarily being based on new or different scientific evidence" (paragraph 63).

15.2. In Case C-44/01 *Pippig Augenoptik* [2003] ECR I-3095 four questions were referred to the Court for a preliminary ruling on the interpretation of Directive 84/450 as amended by Directive 97/55.[62] In the main proceedings, an undertaking was asking the national court to order a competitor to desist from comparative advertising.

The Court noted, first, that in order for there to be comparative advertising, it is sufficient for there to be a statement referring even by implication to a competitor or to

61 European Parliament and Council Directive No 95/2/EC of 20 February 1995 on food additives other than colours and sweeteners (OJ L 61, p. 1).

62 Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (OJ 1984 L 250, p. 17), as amended by Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising (OJ 1997 L 290, p. 18).

the goods or services which he offers (Case C-112/99 *Toshiba Europe* [2001] ECR I-7945, paragraphs 30 and 31). In the context of the directive, it is not therefore necessary to establish distinctions in the legislation between the various elements of comparison, that is to say the statements concerning the advertiser's offer, the statements concerning the competitor's offer, and the relationship between those two offers. In this respect, the Court pointed out that the directive, which exhaustively harmonised the conditions under which comparative advertising is lawful in the Member States, precludes the application to comparative advertising of stricter national provisions on protection against misleading advertising, as far as the form and content of the comparison is concerned.

As regards compliance with the conditions under which comparative advertising is lawful, the Court held that "whereas the advertiser is in principle free to state or not to state the brand name of rival products in comparative advertising, it is for the national court to verify whether, in particular circumstances, characterised by the importance of the brand in the buyer's choice and by a major difference between the respective brand names of the compared products in terms of how well known they are, omission of the better-known brand name is capable of being misleading" (paragraph 56). Next, the Court stated that Article 3a(1) of the directive does not preclude compared products from being bought through different distribution channels. Moreover, the Court added that, where the conditions for the lawfulness of comparative advertising are complied with, that provision does not preclude an advertiser from carrying out a test purchase with a competitor before his own offer has even commenced, nor does it prevent comparative advertising, in addition to citing the competitor's name, from reproducing its logo and a picture of its shop front. Finally, the Court said that a price comparison does not entail the discrediting of a competitor, either on the grounds that the difference in price between the products compared is greater than the average price difference or by reason of the number of comparisons made.

15.3. In Case C-101/01 *Lindqvist* (judgment of 6 November 2003, not yet published in the ECR) the Court gave a preliminary ruling on the interpretation of Directive 95/46.[63] The main proceedings concerned criminal proceedings against a Swedish national, who was accused of unlawfully publishing on her internet site personal data on a number of people working with her on a voluntary basis in a parish of the Swedish Protestant Church.

As regards the application of the directive to the case, the Court held that the act of referring, on an internet page, to various persons and identifying them by name or by other means constitutes "the processing of personal data wholly or partly by automatic means" within the meaning of Directive 95/46. The Court added that such processing of

63 See note 4.

personal data for the purpose of charitable or religious activities does not fall within any of the exceptions to the application of the directive set out in Article 3.

The Court then turned to the concept of "transfer [of data] to a third country" within the meaning of Article 25 of the directive, and noted that Chapter IV of the directive contains no provision concerning use of the internet. Consequently, given the state of development of the internet at the time when the directive was drawn up, one cannot presume that the Community legislature intended the expression "transfer [of data] to a third country" to cover prospectively the case where an individual in a Member State "loads personal data onto an internet page which is stored with his hosting provider which is established in that State or in another Member State, thereby making those data accessible to anyone who connects to the internet, including people in a third country" (paragraph 71).

As regards the compatibility of the directive with the general principle of freedom of expression or with other rights and freedoms corresponding to the right enshrined in Article 10 of the ECHR, the Court stated that, while the directive does not in itself bring about a restriction of that principle, it is for the national authorities and courts responsible for applying the national legislation implementing Directive 95/46 to ensure a fair balance between the rights and interests in question, including the fundamental rights protected by the Community legal order.

In conclusion, the Court held that measures taken by the Member States to ensure the protection of personal data must be consistent both with the provisions of Directive 95/46 and with its objective of maintaining a balance between the free movement of personal data and the protection of private life. However, nothing prevents a Member State from extending the scope of the national legislation implementing the provisions of Directive 95/46 to areas not included in the scope thereof provided that no other provision of Community law precludes it.

It may be noted, next, that in *Österreichischer Rundfunk and Others* (see point 4.1) the Court recalled that Directive 95/46 [64] had been adopted on the basis of Article 95 EC, and consequently that its applicability "cannot depend on whether the specific situations at issue in the main proceedings have a sufficient link with the exercise of the fundamental freedoms guaranteed by the Treaty, in particular, in those cases, the freedom of movement of workers. A contrary interpretation could make the limits of the field of application of the directive particularly unsure and uncertain, which would be contrary to its essential objective of approximating the laws, regulations and administrative provisions of the Member States in order to eliminate obstacles to the functioning of the internal market deriving precisely from disparities between national legislations" (paragraph 42).

64 Ibid.

15.4. Case C-236/01 *Monsanto Agricoltura Italia and Others* (judgment of 9 September 2003, not yet published in the ECR) gave the Court an occasion to give a preliminary ruling on the interpretation and validity of various provisions of Regulation No 258/97 concerning novel foods.[65] The main proceedings concerned an action brought by undertakings involved in the development of genetically modified food plants for use in agriculture against a preventive measure adopted by the Italian authorities suspending the trade in and use of certain transgenic products in Italy. The Italian authorities considered, inter alia, that the foods the applicants wished to market, for which they had made use of the simplified procedure under Article 5 of Regulation No 258/97, were not "substantially equivalent" to existing foods, so that the use of that procedure was not appropriate.

The Court, first, interpreted the concept of substantial equivalence, holding that the concept does not preclude novel foods which display differences in composition that have no effect on public health from being considered substantially equivalent to existing foods. The Court further said that the concept of substantial equivalence does not in itself involve a safety assessment, but rather constitutes an approach for comparing the novel food with its conventional counterpart in order to determine whether it should be subject to a risk assessment as regards, in particular, its unique composition and properties. The Court held, consequently, that "the absence of substantial equivalence does not necessarily imply that the food in question is unsafe, but simply that it should be subject to an assessment of its potential risks" (paragraph 77), and concluded that "the mere presence in novel foods of residues of transgenic protein at certain levels does not preclude those foods from being considered substantially equivalent to existing foods and, consequently, use of the simplified procedure for placing those novel foods on the market" (paragraph 84). However, the Court stated that that is not the case where the existence of a risk of potentially dangerous effects on human health can be identified on the basis of the scientific knowledge available at the time of the initial assessment, and that it is for the national court to determine whether that condition is satisfied.

Second, the Court ruled on the effect of the validity of the use of the simplified procedure on the power of the Member States, by virtue of the precautionary principle, to adopt measures such as those at issue in the main proceedings. In this respect, the Court stated that, since the simplified procedure does not imply any consent by the Commission, a Member State is not required to challenge the lawfulness of such a consent before adopting such measures. As regards protective measures adopted by a Member State under the safeguard clause, the Court said that they may not properly be based on a purely hypothetical approach to risk, founded on mere suppositions which are not yet scientifically verified. Such measures, said the Court, can be adopted only if they are based on a risk assessment which is as complete as possible in the

65 Regulation (EC) No 258/97 of the European Parliament and of the Council of 27 January 1997 concerning novel foods and novel food ingredients (OJ 1997 L 43, p. 1).

particular circumstances of an individual case, which indicate that those measures are necessary in order to ensure that novel foods do not present a danger for the consumer. As to the burden of proof on the Member State concerned, the Court stated that, while the reasons put forward by the Member State, such as result from a risk assessment, cannot be of a general nature, the Member State none the less, in the light of the limited nature of the initial safety analysis of novel foods under the simplified procedure and of the essentially temporary nature of measures based on the safeguard clause, satisfies the burden of proof if it relies on evidence which indicates the existence of a specific risk which those novel foods could involve.

In addition, the Court confirmed that the safeguard clause constitutes a specific expression of the precautionary principle, and that the conditions for the application of that clause must therefore be interpreted having due regard to this principle. Consequently, such protective measures may be taken even if it proves impossible to carry out as full a scientific risk assessment as possible in the particular circumstances of a given case because of the inadequate nature of the available scientific data, and presuppose that the risk assessment available to the national authorities provides specific evidence which, without precluding scientific uncertainty, makes it possible reasonably to conclude on the basis of the most reliable scientific evidence available and the most recent results of international research that the implementation of those measures is necessary in order to avoid novel foods which pose potential risks to human health being offered on the market.

Finally, the Court found no factor such as to affect the validity of Article 5 of Regulation No 258/97 as regards the possibility of using the simplified procedure notwithstanding the presence of residues of transgenic protein in novel foods. In particular, after observing that if dangers for human health or the environment are identifiable, the simplified procedure may not be used, and a more comprehensive risk assessment under the normal procedure is then required, the Court held that the provision at issue is sufficient to ensure a high level of protection of human health and the environment. As to compliance with the precautionary principle and the principle of proportionality, the Court observed that the simplified procedure applies only to certain novel foods, when the condition of substantial equivalence is satisfied, and that the recognition in advance of substantial equivalence may subsequently be reassessed by means of various procedures at both national and Community level.

15.5. In *Commission* v *Artegodan and Others* the Court upheld a judgment of the Court of First Instance in which it had annulled decisions of the Commission concerning the withdrawal of authorisations to market medicinal products for human use containing certain anorectics.[66] The Court observed, in particular, that the Court of First Instance

66 Joined Cases T-74/00, T-76/00, T-83/00 to T-85/00, T-132/00, T-137/00 and T-141/00 *Artegodan and Others* v *Commission* [2002] ECR II-4945.

had been right to hold that the Commission lacked jurisdiction to adopt the contested decisions. It was common ground that they had been adopted solely on the basis of Article 15a of Directive 75/319,[67] which applies only to marketing authorisations which have been granted in accordance with the provisions of Chapter III of that directive, whereas the marketing authorisations whose withdrawal was ordered by the decisions at issue had initially been granted under purely national procedures. The Court then ruled that the amendment of certain terms of the initial marketing authorisations by decision of the Commission in 1996 could not amount to an authorisation granted in accordance with the provisions of Chapter III of Directive 75/319.

15.6. Still in the field of harmonisation of laws, the Court ruled in Case C-512/99 *Germany v Commission* [2003] ECR I-845, an action for annulment, on the temporal effect of Article 95 EC in connection with a dispute challenging the introduction by the German Government of national provisions which were more stringent than those provided for by Directive 97/69 [68] as regards the classification and labelling of certain carcinogenic fibres. The applicant Government submitted that its application for a derogation from the provisions of the directive, submitted on the basis of Article 100a(4) of the EC Treaty (now, after amendment, Article 95 EC) which was applicable at the material time, should have been decided on that basis, whereas the Commission had rejected it on the basis of Article 95(6) EC. It also argued that the Commission had breached its duty of cooperation under Article 10 EC and had misinterpreted the conditions of application in Article 95(5) EC.

The Court observed that the Treaty of Amsterdam had amended the chapter relating to the approximation of laws without introducing transitional provisions (paragraph 38) and that the legal rules laid down in Article 100a of the EC Treaty differ from those laid down in Article 95 EC. Unlike Article 100a of the EC Treaty, Article 95 EC distinguishes between national provisions already in place prior to harmonisation and those which a Member State seeks to introduce: the former must be justified on grounds of the major needs referred to in Article 30 EC or relating to the protection of the environment or the working environment, while the latter must be based on new scientific evidence relating to those questions. The procedure for authorisation of the derogation starts with the notification of the application to the Commission and ends with the Commission's final decision. No new legal situation can be established before the final step in that procedure has been taken; it is only then that, through approval or rejection by the Commission, a measure likely to affect the earlier legal situation arises (Case C-319/97 *Kortas* [1999] ECR I-3143). Since, moreover, in the absence of transitional provisions,

67 Second Council Directive 75/319/EEC of 20 May 1975 on the approximation of provisions laid down by law, regulation or administrative action relating to proprietary medicinal products (OJ 1975 L 147, p. 13), as amended by Council Directive 93/39/EEC of 14 June 1993 (OJ 1993 L 214, p. 22).

68 See note 59.

new rules apply immediately to the future effects of a situation which arose under the old rules, the contested decision was rightly based on Article 95(6) EC.

As to whether the Commission had complied with its duty of cooperation under Article 10 EC, the Court observed that the applicant Government could not have been unaware of the entry into force of the new provisions on the approximation of laws and was deemed to know that the Commission's decision would necessarily be based on the new legal basis, Article 95 EC. It follows that the Commission was in no way required to inform the Government that the notification of the contested provisions would be assessed in the light of that provision.

Finally, in the Court's view, the Commission had not misinterpreted the conditions of application in Article 95(5) EC. Among those conditions, which are cumulative, the German Government had failed to notify the reasons for the adoption of the contested provisions, as required by Article 95(5) EC.

15.7. Two judgments, in Case C-168/01 *Bosal* (judgment of 18 September 2003, not yet published in the ECR) and Case C-58/01 *Océ van der Grinten* (judgment of 25 September 2003, not yet published in the ECR) interpreted Directive 90/435 [69] on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.

15.7.1. In *Bosal* the Court held that that directive, interpreted in the light of Article 43 EC, precludes a national provision which, when determining the tax on the profits of a parent company established in one Member State, makes the deductibility of costs in connection with that company's holding in the capital of a subsidiary established in another Member State subject to the condition that such costs be indirectly instrumental in making profits which are taxable in the Member State where the parent company is established. The Court began by noting that Article 4(2) of the directive leaves each Member State the option of providing that any charges relating to such a holding may not be deducted from the taxable profits of the parent company and that that option is not accompanied by any condition. The Court drew an initial conclusion, namely that the national provision implementing that option was compatible with the directive. However, in examining whether the option had been implemented in compliance with Article 43 EC, the Court observed, first, that the condition at issue constituted a hindrance to the establishment of subsidiaries in other Member States, since such subsidiaries do not normally generate profits that are taxable in the Netherlands. Second, the condition went against the directive's objective of eliminating the disadvantage to groups of companies caused by the application of different tax treatment depending on whether a parent company has subsidiaries in the Member State in which it is established or in a different Member State. Similarly, none of the

69 See note 60.

conditions was satisfied which could establish a direct link between the granting of a tax advantage to parent companies established in the Netherlands and the tax system relating to the subsidiaries of parent companies where the latter are established in that Member State, so that the coherence of the tax system could not be relied upon. Finally, the conditions for the application of the principle of the territoriality of tax defined in Case C-250/95 *Futura Participations and Singer* [1997] ECR I-2471 were not satisfied here.

15.7.2. The case in which the second judgment in this field was given, *Océ van der Grinten*, concerned the charge of 5% imposed on the aggregate amount of the dividends paid by the subsidiary resident in the United Kingdom to its parent company resident in the Netherlands and the partial tax credit to which that distribution confers entitlement when profits are distributed in the form of dividends, that charge being provided for by the Convention for the Avoidance of Double Taxation concluded in 1980 between the United Kingdom and the Netherlands. The Court classified the charge, in so far as it is imposed on the dividends distributed by the resident subsidiary to its non-resident parent company, as a withholding tax which is abolished for distributions of profits between companies within the same transnational group by Article 5 of the directive. As far as that part of the charge is concerned, it satisfies the characteristics of a withholding tax, as determined in Case C-375/98 *Epson Europe* [2000] ECR I-4243 and Case C-294/99 *Athinaiki Zithopoiia* [2001] ECR I-6797. Thus, first, it is imposed directly on the dividends in the State in which they are distributed because they form part of the amount chargeable to tax and, second, its chargeable event is the payment of those dividends. In this respect, it is irrelevant that the charge applies subject to the condition that a tax credit is granted, since, in accordance with the above convention, the tax credit is granted in conjunction with the payment of the dividends. Finally, the part of the 5% charge applying to the dividends is proportional to their value or amount. It is irrelevant in this respect that the shareholding parent company ultimately receives an overall amount exceeding the amount of the dividends which are paid to it by its subsidiary. The rate of such a charge need only be set at a higher level in order for that sum to be less than the amount of the dividends paid, whereas the uniform interpretation of Community law cannot depend on the percentage at which the tax in question is set.

On the other hand, the part of the charge applying to the tax credit does not possess the characteristics of a withholding tax on distributed profits, because it is not imposed on the profits distributed by the subsidiary. The tax credit does not constitute income from shares but an instrument designed to avoid double taxation of dividends in the case of cross-border distributions. Moreover, the partial reduction of the tax credit, by virtue of the 5% tax to which it is subject, does not affect the fiscal neutrality of such a distribution because that reduction does not apply to the distribution of dividends and does not diminish their value in the hands of the parent company to which they are paid.

The Court found, however, that Article 7(2) of the Directive allowed the contested charge. First, that provision entitles Member States to derogate from the prohibition in principle of withholding tax on profits distributed by the subsidiary and to tax the distribution of profits in the hands of the parent company where the provision imposing the tax forms an integral part of a body of domestic or agreement-based provisions which are designed to lessen economic double taxation of dividends (which is in principle so in the case of a bilateral convention for the avoidance of double taxation) and relate to the payment of tax credits to the recipients of dividends. Second, the charge at issue, which was established directly in conjunction with payment of a tax credit, was not set at a rate such as to cancel out the effects of that lessening of the economic double taxation of dividends, so that the objective of fiscal neutrality in the directive is not called into question even though the charge constitutes a withholding tax. The Court held, finally, that since Article 7(2) merely enables specific sets of domestic or agreement-based rules to continue to apply where they are consistent with the aim of the directive, the insertion of that provision into the text of the directive must be regarded as a technical adjustment and does not constitute a substantial change requiring consultation of the Parliament and the Economic and Social Committee for a second time. It follows that the validity of the provision cannot be called into question.

16. In the field of *public procurement*, Case C-327/00 *Santex* [2003] ECR I-1877 may be noted. It gave the Court an opportunity to develop its case-law on the compatibility with Directive 89/665 [70] of national rules establishing limitation periods in connection with applications for review of contracting authorities' decisions covered by that directive. In this respect, the Court recalled its case-law (Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 79) according to which the directive in question does not preclude national legislation which provides that any application for review of a contracting authority's decision must be commenced within a time-limit laid down to that effect and that any irregularity in the award procedure relied upon in support of such application must be raised within the same period, if it is not to be out of time, provided that the time-limit in question is reasonable. Applying that case-law, the Court observed that, first, a limitation period of 60 days appears reasonable and, second, that such a period, which runs from the date of notification of the act or the date on which it is apparent that the party concerned became fully aware of it, is also in accordance with the principle of effectiveness. However, the Court said, "the possibility that, in the context of the particular circumstances of the case before the referring court, the application of that time-limit may entail a breach of that principle cannot be excluded" (paragraph 57). In particular, it said, where a contracting authority has rendered impossible or excessively difficult the exercise of the rights conferred by the Community legal order, Directive 89/665 imposes on the competent national courts an

[70] 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).

obligation to allow as admissible pleas in law alleging that the notice of invitation to tender is incompatible with Community law, which are put forward in support of an application for review of that decision, by availing itself, where appropriate, of the possibility afforded by national law of disapplying national rules on limitation periods, under which, when the period prescribed for bringing proceedings for review of the notice of invitation to tender has expired, it is no longer possible to plead such incompatibility.

17. As regards *social law*, one case concerning social security (17.1), four relating to equal treatment of men and women (17.2), one on the protection of the health and safety of workers (17.3) and two on the safeguarding of workers' rights in the event of transfers of undertakings (17.4) will be noted.

17.1. In Case C-326/00 *IKA* [2003] ECR I-1703 the Court ruled on the interpretation of Regulation No 1408/71 [71] with respect to the funding of hospital treatment received by a pensioner during a stay in another Member State, when the illness in question manifested itself suddenly during that stay, making the provision of treatment immediately necessary. In this respect, the Court noted that Regulation No 1408/71 provides for different rules for pensioners and workers. In particular, that regulation does not subject the funding of care received by pensioners during a stay in another Member State to the condition, which applies to workers, that their "condition necessitates immediate benefits during [the] stay" (paragraph 31). According to the Court, that difference may be explained by a desire on the part of the Community legislature to promote effective mobility of pensioners. The Court added that the right to benefits in kind guaranteed to pensioners by Regulation No 1408/71 cannot be limited solely to cases where the treatment appears necessary because of a sudden illness. In particular, the circumstance that the treatment necessitated by developments in the insured person's state of health during his temporary stay in another Member State may be linked to a pre-existent pathology of which he is aware, such as a chronic illness, cannot suffice to prevent him from enjoying the benefits in kind under Article 31 of Regulation No 1408/71. Finally, the Court stated that Article 31 of Regulation No 1408/71 precludes a Member State from subjecting the enjoyment of the benefits in kind guaranteed by that provision to any authorisation procedure.

As regards the application in practice of the regulation in question, the Court recalled that the principle which applies is that of reimbursement of the costs of the institution of the place of stay by the institution of the place of residence. It stated, however, that where it appears that the institution of the place of stay has wrongly refused to provide

[71] Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), with subsequent amendments.

those benefits in kind and the institution of the place of residence, on being advised of that refusal, has declined to contribute to facilitating the correct application of that provision, it is for the latter institution, without prejudice to the possible liability of the institution of the place of stay, to reimburse directly to the insured person the cost of the treatment he has had to bear. The Court added, moreover, that in that event Regulation No 1408/71 precludes national legislation from subjecting such reimbursement to the obtaining of ex post facto authorisation which is granted only in so far as it is shown that the illness which necessitated the treatment in question manifested itself suddenly during the stay, making that treatment immediately necessary.

17.2. The question whether the limitation of compulsory military service to men is compatible with the principle of equal treatment of men and women in Community law was considered in Case C-186/01 *Dory* [2003] ECR I-2479.

The Court first defined the conditions under which that principle applies to activities relating to the organisation of the armed forces, pointing out that, in the absence of an inherent general exception in the Treaty excluding all measures taken for reasons of public security from the scope of Community law, "[m]easures taken by the Member States in this domain are not excluded in their entirety from the application of Community law solely because they are taken in the interests of public security or national defence" (paragraph 30). The Court observed that Directive 76/207 [72] is applicable to access to posts in the armed forces and that it is for the Court to verify whether the measures taken by the national authorities, in the exercise of their recognised discretion, do in fact have the purpose of guaranteeing public security and whether they are appropriate and necessary to achieve that aim. As the Court said, "decisions of the Member States concerning the organisation of their armed forces cannot be completely excluded from the application of Community law, particularly where observance of the principle of equal treatment of men and women in connection with employment, including access to military posts, is concerned" (paragraph 35). However, the Court stated that Community law does not govern the Member States' choices of military organisation for the defence of their territory or of their essential interests, and that "[i]t is for the Member States, which have to adopt appropriate measures to ensure their internal and external security, to take decisions on the organisation of their armed forces" (paragraph 36; see on this point Case C-273/97 *Sirdar* [1999] ECR I-7403, paragraph 15, and Case C-285/98 *Kreil* [2000] ECR I-69, paragraph 15).

[72] 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).

Applying those principles, the Court held that the decision of the Federal Republic of Germany to ensure its defence in part by compulsory military service was the expression of such a choice of military organisation to which Community law is not applicable, and that while "[i]t is true that limitation of compulsory military service to men will generally entail a delay in the progress of the careers of those concerned, even if military service allows some of them to acquire further vocational training or subsequently to take up a military career[, n]evertheless, the delay in the careers of persons called up for military service is an inevitable consequence of the choice made by the Member State regarding military organisation and does not mean that that choice comes within the scope of Community law" (paragraphs 40 and 41). The Court added that "[t]he existence of adverse consequences for access to employment cannot, without encroaching on the competences of the Member States, have the effect of compelling the Member State in question either to extend the obligation of military service to women, thus imposing on them the same disadvantages with regard to access to employment, or to abolish compulsory military service" (paragraph 43).

In Case C-187/00 *Kutz-Bauer* [2003] ECR I-2741 the Court interpreted Directive 76/207 [73] in relation to a collective agreement applicable to the public service which allowed male and female employees to take advantage of the scheme of part-time work for older employees. Under that provision, part-time work for older employees was available only until the date on which the person concerned first became eligible for a full retirement pension under the statutory old-age insurance scheme. The Court ruled that the directive precludes a collective agreement which imposes such conditions "where the class of persons eligible for such a pension at the age of 60 consists almost exclusively of women whereas the class of persons entitled to receive such a pension only from the age of 65 consists almost exclusively of men, unless that provision is justified by objective criteria unrelated to any discrimination on grounds of sex" (paragraph 63).

The Court also recalled its case-law according to which a national court which is called upon to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation (Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 24), and stated that "[i]t is equally necessary to apply such considerations to the case where the provision at variance with Community law is derived from a collective agreement. It would be incompatible with the very nature of Community law if the court having jurisdiction to apply that law were to be precluded at the time of such application from being able to take all necessary steps to set aside the provisions of a collective agreement which might constitute an obstacle to the full effectiveness of Community rules" (paragraphs 73 and 74).

[73] Ibid.

It may also be noted that in Joined Cases C-4/02 and C-5/02 *Schönheit and Becker* (judgment of 23 October 2003, not yet published in the ECR) the Court held that Article 141 EC precludes legislation which may entail a reduction in the pension of national civil servants who have worked part-time for at least a part of their working life, where that category of civil servants includes a considerably higher number of women than men, unless the legislation is justified by objective factors unrelated to any discrimination on grounds of sex.

The Court also said that national legislation which has the effect of reducing a worker's retirement pension by a proportion greater than that resulting when his periods of part-time work are taken into account cannot be regarded as objectively justified by the fact that the pension is in that case consideration for less work or on the ground that its aim is to prevent civil servants employed on a part-time basis from being placed at an advantage in comparison with those employed on a full-time basis.

In Case C-25/02 *Rinke* (judgment of 9 September 2003, not yet published in the ECR) the Court examined whether the requirement laid down in Directives 86/457 [74] and 93/16 [75] that certain components of the specific training in general medical practice, completion of which confers the right to use the title "general medical practitioner", must be undertaken full-time constitutes indirect discrimination on grounds of sex within the meaning of Directive 76/207, and, if so, how the incompatibility between Directive 76/207, on the one hand, and Directives 86/457 and 93/16, on the other, is to be resolved. The Court noted, to begin with, that the rule that part-time training must include a certain number of periods of full-time training does not constitute direct discrimination. As to whether it involves indirect discrimination against women workers, that is, according to the case-law, whether it works to the disadvantage of a much higher percentage of women than men, unless justified by objective factors unrelated to any discrimination on grounds of sex, the Court observed that, in fact, in the light of the statistical data available to it, the percentage of women working part-time is much higher than that of men working on a part-time basis. The Court therefore examined whether the requirement in question was justified by objective factors independent of any discrimination on grounds of sex. It held that it is. In Article 5(1) of Directive 86/457 and Article 34(1) of Directive 93/16 the Community legislature considered that adequate preparation for the effective exercise of general medical practice requires a certain number of periods of full-time training, both for students in hospitals or clinics and for those in approved medical practices or in approved centres where doctors provide primary care. It was reasonable for the legislature to take the view that that requirement enables doctors to acquire the experience necessary, by following patients' pathological conditions as they may evolve over time, and to obtain sufficient

74 Council Directive 86/457/EEC of 15 September 1986 on specific training in general medical practice (OJ 1986 L 267, p. 26).

75 See note 35.

experience in the various situations likely to arise more particularly in general medical practice.

17.3. Case C-151/02 *Jaeger* (judgment in 9 September 2003, not yet published in the ECR) gave the Court an occasion to refine its case-law on the concept of "working time" within the meaning of Directive 93/104 [76] in the case of doctors who are on call (see Case C-303/98 *Simap* [2000] ECR I-7963). The main proceedings concerned the question whether time spent in the provision of the on-call service ("Bereitschaftsdienst") organised by the city of Kiel in the hospital operated by it should be regarded as working time or as a rest period. The on-call duty was organised in such a way that the doctor in question stayed at the clinic and was called upon to carry out his professional duties as the need arose, and was allocated a room with a bed in the hospital.

The Court found, first, that on-call duty with the requirement of being physically present in the hospital must be regarded as constituting in its totality working time for the purposes of Directive 93/104. The decisive factor, in the Court's view, in considering that the characteristic features of the concept of "working time" were present was that the doctors were required to be present at the place determined by the employer and to be available to the employer in order to be able to provide their services immediately in case of need. The Court said that that conclusion is not altered by the mere fact that the employer makes available to the doctor a room to rest in. Consequently, the directive precludes legislation of a Member State which classifies as rest periods an employee's periods of inactivity in the context of such on-call duty and "has the effect of enabling, in an appropriate case by means of a collective agreement or a works agreement based on a collective agreement, an offset only in respect of periods of on-call duty during which the worker has actually been engaged in professional activities" (paragraph 103).

The Court stated, finally, that "in order to come within the derogating provisions set out in Article 17(2), subparagraph 2.1(c)(i) of the directive, a reduction in the daily rest periods of 11 consecutive hours by a period of on-call duty performed in addition to normal working time is subject to the condition that equivalent compensating rest periods be accorded to the workers concerned at times immediately following the corresponding periods worked. Furthermore, in no circumstances may such a reduction in the daily rest period lead to the maximum weekly working time laid down in Article 6 of the directive being exceeded" (paragraph 103).

17.4. In Case C-4/01 *Martin and Others* (judgment of 6 November 2003, not yet published in the ECR) the Court gave a preliminary ruling on the interpretation of

[76] Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18).

Article 3 of Directive 77/187.[77] The Court explained, first, that rights contingent upon dismissal or the grant of early retirement by agreement with the employer fall within the "rights and obligations" referred to in that provision. In this respect, the Court stated that early retirement benefits and benefits intended to enhance the conditions of such retirement, paid in the event of early retirement arising by agreement between the employer and the employee to employees who have reached a certain age, are not old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes within the meaning of Article 3(3) of the directive.

The Court held, next, that Article 3 of the directive is to be interpreted as meaning that obligations arising upon the grant of early retirement, arising from a contract of employment, an employment relationship or a collective agreement binding the transferor as regards the employees concerned, are transferred to the transferee subject to the conditions and limitations laid down by that article, regardless of the fact that those obligations derive from statutory instruments or are implemented by such instruments and regardless of the practical arrangements adopted for such implementation.

The Court then said that Article 3 of the directive precludes the transferee from offering the employees of a transferred entity terms less favourable than those offered to them by the transferor in respect of early retirement, and those employees from accepting those terms, where those terms are merely brought into line with the terms offered to the transferee's other employees at the time of the transfer, unless the more favourable terms previously offered by the transferor arose from a collective agreement which is no longer legally binding on the employees of the entity transferred, having regard to the conditions set out in Article 3(2).

Finally, the Court held that where, in breach of the public policy obligations imposed by Article 3 of Directive 77/187, the transferee has offered employees of the entity transferred early retirement less favourable than that to which they were entitled under their employment relationship with the transferor and those employees have accepted such early retirement, it is for the transferee to ensure that those employees are accorded early retirement on the terms to which they were entitled under their employment relationship with the transferor.

In Case C-340/01 *Abler and Others* (judgment of 20 November 2003, not yet published in the ECR) the Court pointed out that Directive 77/187 [78] is applicable whenever, in the context of contractual relations, there is a change in the legal or natural person who is

[77] Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJ 1977 L 61, p. 26).

[78] Ibid.

responsible for carrying on the business and who by virtue of that fact incurs the obligations of an employer vis-à-vis the employees of the undertaking, regardless of whether or not ownership of the tangible assets is transferred. Consequently, the Court held that the directive applies to a situation in which a contracting authority which has awarded the contract for the management of the catering services in a hospital to one contractor terminates that contract and concludes a contract for the supply of the same services with a second contractor, where the second contractor uses substantial parts of the tangible assets previously used by the first contractor and subsequently made available to it by the contracting authority, even where the second contractor has expressed the intention not to take on the employees of the first contractor.

18. In the field of the *environment*, it may be noted that in Case C-182/02 *Ligue pour la protection des oiseaux and Others* (judgment of 16 October 2003, not yet published in the ECR) the Court gave a preliminary ruling on the interpretation of Directive 79/409,[79] in which it held that "Article 9(1)(c) of the directive permits a Member State to derogate from the opening and closing dates for hunting which follow from consideration of the objectives set out in Article 7(4) of the directive" (paragraph 12). In this respect, the Court found that the hunting of wild birds for recreational purposes during the periods mentioned in Article 7(4) of the directive may constitute a judicious use of certain birds in small numbers authorised by Article 9(1)(c) of the directive, as do the capture and sale of wild birds even outside the hunting season with a view to keeping them for use as live decoys or to using them for recreational purposes in fairs and markets.

The Court said, however, that hunting can be authorised under Article 9 only if there is no other satisfactory solution. According to the Court, that condition would not be fulfilled if the sole purpose of the derogation authorising hunting were to extend the hunting periods for certain species of birds in territories which they already frequent during the hunting periods fixed in accordance with Article 7 of the directive. Moreover, the Court pointed out that hunting must be organised so that it is carried out under strictly supervised conditions and on a selective basis and applies only to certain birds in small numbers. As regards the latter condition, the Court held that it "cannot be satisfied if a hunting derogation does not ensure the maintenance of the population of the species concerned at a satisfactory level" (paragraph 17). Finally, the Court stressed that the measures under which hunting is authorised pursuant to Article 9 of the directive must specify the species which are subject to the derogations, the means, arrangements or methods authorised for capture or killing, the conditions of risk and the circumstances of time and place under which such derogations may be granted, the authority empowered to declare that the required conditions obtain and to decide what means, arrangements or methods may be used, within what limits and by whom, and the controls which will be carried out.

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

19. In the field of *justice and home affairs*, the Court ruled for the first time on the interpretation of the Schengen Agreement. In Joined Cases C-187/01 and C-385/01 *Gözütok and Brügge* [2003] ECR I-1345 two questions were referred to the Court for a preliminary ruling concerning the interpretation of the ne bis in idem principle laid down by Article 54 of the Convention implementing the Schengen Agreement ("the CISA") in relation to national procedures under which it is possible for criminal proceedings to be discontinued following a settlement proposed by the prosecuting authorities without the involvement of a court. The Court pointed out that, in such procedures, "the prosecution is discontinued by the decision of an authority required to play a part in the administration of criminal justice in the national legal system concerned" (paragraph 28) and that those procedures, "whose effects as laid down by the applicable national law are dependent upon the accused's undertaking to perform certain obligations prescribed by the Public Prosecutor, [penalise] the unlawful conduct which the accused is alleged to have committed" (paragraph 29). The Court drew the conclusion that, where further prosecution is definitively barred, the person concerned must be regarded as someone whose case has been "finally disposed of" for the purposes of Article 54 of the CISA in relation to the acts which he is alleged to have committed, and that, once the accused has complied with his obligations, the penalty entailed in the procedure whereby further prosecution is barred must be regarded as having been "enforced" for the purposes of Article 54.

Moreover, according to the Court, the fact that no court is involved in such a procedure and that the decision in which the procedure culminates does not take the form of a judicial decision does not cast doubt on that interpretation, since such matters of procedure and form do not impinge on the effects of the procedure. In this respect, the Court pointed out that, in the absence of harmonisation or approximation of the criminal laws of the Member States relating to procedures whereby further prosecution is barred, the ne bis in idem principle, whether it is applied to procedures whereby further prosecution is barred (regardless of whether a court is involved) or to judicial decisions, necessarily implies that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied. Moreover, the application by one Member State of that principle to procedures whereby further prosecution is barred, which have taken place in another Member State without a court being involved, cannot be made subject to a condition that the first State's legal system does not require such judicial involvement either.

Finally, the Court stated that applying Article 54 of the CISA to settlements in criminal proceedings cannot prejudice the rights of the victim of an offence, since the only effect of the ne bis in idem principle, as set out in that provision, is to ensure that a person whose case has been finally disposed of in a Member State is not prosecuted again on the same facts in another Member State, and it does not preclude the victim or any other person harmed by the accused's conduct from bringing a civil action to seek compensation for the damage suffered.

20. In connection with the *external relations of the Community*, one case to be noted is Case C-438/00 *Deutscher Handballbund* [2003] ECR I-4135, relating to the Association Agreement between the Communities and Slovakia.[80] In its judgment the Court held that the first indent of Article 38(1) of that agreement precludes the application to a professional sportsman of Slovak nationality, who is lawfully employed by a club established in a Member State, of a rule drawn up by a sports federation in that State under which clubs are authorised to field, during league or cup matches, only a limited number of players from non-member countries that are not parties to the Agreement on the European Economic Area.

In reaching that conclusion, the Court observed, first, that in its judgment in Case C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049 it had recognised Article 37 of the Association Agreement with the Republic of Poland [81] as having direct effect. Since the wording of the said Article 37 and Article 38 is identical and the two association agreements do not differ in regard to their objectives or the context in which they were adopted, Article 38 must also be recognised as having such effect. Addressing, next, the applicability of that article to a rule laid down by a sporting association, the Court recalled certain points made in its judgment in Case C-415/93 *Bosman* [1995] ECR I-4921, namely that the prohibition of discrimination laid down in the context of the provisions of the EC Treaty on the freedom of movement of workers applies not only to acts of the public authorities but also to rules laid down by sporting associations which determine the conditions under which professional sportsmen can engage in gainful employment. Referring to *Pokrzeptowicz-Meyer*, in which it held that the right to equal treatment established by Article 37 has the same extent as that conferred in similar terms by Article 39 EC on Community nationals, the Court then considered that the interpretation of Article 39 EC adopted in *Bosman* could be transposed to Article 38 of the Association Agreement with Slovakia, and therefore concluded that the latter provision applies to a rule drawn up by a sporting association. Examining, finally, the scope of the principle of non-discrimination set out in Article 38, the Court stated that the prohibition of discrimination on grounds of nationality applies only to workers of Slovak nationality who are already lawfully employed in the territory of a Member State and solely with regard to conditions of work, remuneration or dismissal. However, since the sports rule at issue directly affects participation in league matches of a professional player, in other words the essential object of his activity, it relates to working conditions.

80 Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Slovak Republic, of the other part, concluded and approved on behalf of the Community by Decision 94/909/ECSC, EEC, Euratom of the Council and the Commission of 19 December 1994 (OJ 1994 L 359,, p. 1).

81 First indent of Article 37(1) of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part, concluded and approved on behalf of the Community by Decision 93/743/Euratom, ECSC, EC of the Council and the Commission of 13 December 1993 (OJ 1993 L 348, p. 1).

21. Finally, in the field of the *Brussels Convention* (Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters), only one judgment will be mentioned. This is the judgment in Case C-116/02 *Gasser* (judgment of 9 December 2003, not yet published in the ECR) concerning the interpretation to be given to Article 21 of the Convention, under which, where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established, in two particular cases: first, where the jurisdiction of the court second seised has been claimed under an agreement conferring jurisdiction and, second, where, in general, the duration of proceedings before the courts of the Contracting State in which the court first seised is established is excessively long.

As regards the former case, the Court, having been asked whether the court second seised may, by way of derogation from Article 21, give judgment in the case without waiting for a declaration from the court first seised that it has no jurisdiction, answered that it may not, pointing out that the procedural rule in that article is based clearly and solely on the chronological order in which the courts involved are seised.

As regards the latter case, the Court likewise refused to accept a derogation from the provisions of Article 21, stating that an interpretation whereby the application of that article should be set aside in such a case would be manifestly contrary both to the letter and spirit and to the aim of the Convention.