A – Proceedings of the Court of Justice in 2002

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1. This part of the annual report provides a survey of the activity of the Court of Justice of the European Communities in 2002. 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); freedom of movement for workers (section 6); freedom of establishment (section 7); freedom to provide services (section 8); free movement of capital (section 9); competition rules (section 10); trade mark law (section 11); public procurement (section 12); social law (section 13); external relations law (section 14); transport policy (section 15); tax law (section 16); Brussels Convention (section 17).

This selection covers only 55 of the 466 judgments and orders pronounced by the Court during 2002 and refers only to their essential points. It also does not 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 the 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*). 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 466 cases to a close in 2002 (net figure, that is to say, taking account of joinder). Of those, 269 cases were dealt with by judgments, one case concerned an opinion delivered under Article 300(6) EC and 196 cases gave rise to orders. These figures show a slight increase compared with the previous year (398 cases brought to a close). In 2002, 477 new cases arrived at the Court (504 in 2001). At the end of 2002, there were 907 cases pending (gross figure) compared with 943 at the end of 2001.

The upward trend in the duration of proceedings did not change this year. References for preliminary rulings and direct actions took approximately 24 months, as compared with 22 and 23 months respectively in 2001. The average time taken to deal with appeals was 19 months, compared with 16 months in 2001.

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). It was decided, pursuant to Article 55(2) of

the Rules of Procedure, to give two cases priority treatment; while one of them, the action for failure to fulfil obligations brought by the Commission of the European Communities against the French Republic in Case C-274/02, was swiftly removed from the register following withdrawal of the action by the applicant, the other, the reference for a preliminary ruling in Case C-491/01 *British American Tobacco and Imperial Tobacco*, gave rise to an important judgment, delivered within 12 months of receipt of the order for reference from the national court (judgment of 10 December 2002, not yet published in the ECR).

The expedited or accelerated procedure, as provided for in Articles 62a and 104a of the Rules of Procedure, which is even faster inasmuch as it allows for omission of certain stages in the proceedings, was not used in 2002: in the two cases where use of such a procedure was sought, the circumstances invoked by the parties or the national courts did not satisfy the requirement of exceptional urgency laid down in the Rules of Procedure.

By contrast, 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. A dozen orders were made on the basis of that provision.

As regards the distribution of cases between the Court in plenary session and Chambers of Judges, the former disposed of one case in five in 2002, while the remaining judgments and orders were pronounced by Chambers of five Judges (50% of cases) or of three Judges (one case in four).

For further information with regard to the statistics for the 2002 judicial year, the reader is referred to Chapter IV of this report.

3. As regards the *jurisdiction of the Court* and matters of *procedure*, this report covers a case concerning the preliminary reference procedure (3.1), another concerning proceedings for annulment (3.2), a case concerning interim relief (3.3) and a case concerning the effects of expiry of the time-limit for challenging Community decisions (3.4).

3.1. In Case C-99/00 *Lyckeskog* [2002] ECR I-4839, the Court was called upon to interpret the concept of 'a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law' (third paragraph of Article 234 EC) with regard to the Swedish judicial system. Under that system, an individual may appeal to the Högsta domstol (Supreme Court), but the appeal will be examined as to its substance only if the Högsta domstol declares it admissible. If there are no special grounds, such a declaration can be made only if examination of the appeal is important for guidance in the application of the law. In this case, the Court therefore had to determine whether a national court or tribunal whose decisions will be examined by the national supreme court only if the latter declares the appeal to be admissible is to be

regarded as a court or tribunal against whose decisions there is no judicial remedy under national law.

The Court of Justice held that decisions of a national appellate court which can be challenged by the parties before a supreme court are not decisions of a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law within the meaning of Article 234 EC, and that 'the fact that examination of the merits of such appeals is subject to a prior declaration of admissibility by the supreme court does not have the effect of depriving the parties of a judicial remedy' (paragraph 16). It explained that '[i]f a question arises as to the interpretation or validity of a rule of Community law, the supreme court will be under an obligation, pursuant to the third paragraph of Article 234 EC, to refer a question to the Court of Justice for a preliminary ruling either at the stage of the examination of admissibility or at a later stage' (paragraph 18).

3.2. Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677 concerned an appeal against an order of the Court of First Instance declaring inadmissible an action for annulment brought by an association of farmers against a regulation of the Council of the European Union. The Court of Justice's judgment did not concur with the Opinion of the Advocate General and reaffirmed its settled case-law as to the conditions governing admissibility of actions for annulment brought by individuals. The fourth paragraph of Article 230 EC provides that 'any natural or legal person may ... institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former'. The case-law recognises that a measure of general application such as a regulation can, in certain circumstances, be of individual concern to certain persons. That is so where the measure in question affects specific natural or legal persons by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee. If that condition is not fulfilled, a natural or legal person does not, under any circumstances, have standing to bring an action for annulment of a regulation.

The Court held that an individual's entitlement to effective judicial protection of rights which he derives from the Community legal order does not require any change to its earlier case-law. It pointed out that the EC Treaty has established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions. Under that system, where natural or legal persons cannot, by reason of the conditions for admissibility, directly challenge Community measures of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the Community Courts under Article 241 EC or to do so before the national courts and ask them to make a reference to the Court of Justice for a preliminary ruling. Against that background, 'it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection' (paragraph 41), and national courts are required, so far as possible,

to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act.

The Court added that while it is necessary to interpret the condition that the applicant be individually concerned in the light of the principle of effective judicial protection, such an interpretation cannot have the effect of setting aside that condition, which is expressly laid down in the EC Treaty, without going beyond the jurisdiction conferred by the Treaty on the Community Courts. It also observed that 'while it is, admittedly, possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the founding Treaty and never amended as to its principles, it is for the Member States, if necessary, in accordance with Article 48 EU, to reform the system currently in force' (paragraph 45).

3.3. In Case C-440/01 P(R) *Commission* v *Artegodan* [2002] ECR I-1489, an appeal was brought before the Court against an order of the President of the Court of First Instance of 5 September 2001 dismissing an application – made by the Commission under Article 108 of the Rules of Procedure of the Court of First Instance – for variation or cancellation of an order of the President of the Court of First Instance of 28 June 2000 which has suspended operation of a Commission decision. The 'change in circumstances' relied on by the Commission was, essentially, the setting aside, on appeal by the Commission, of eight orders of the President of the Court of First Instance, [1] which were founded on grounds almost identical to those of the order of 28 June 2000.

Having regard to the 'fundamentally precarious nature of measures granted in interim relief proceedings' (paragraph 62), the Court interpreted the term 'change in circumstances' as 'covering the occurrence of any factual or legal matter such as to call into question the assessment by the judge who heard the application with regard to the conditions ... which are to be met if the operation of an act is to be suspended or other interim relief is to be granted' (paragraph 63). It observed in particular that, unlike an appeal, an application under Article 108 of the Rules of Procedure of the Court of First Instance may be made 'at any time', and its purpose is solely to bring the judge in interim relief proceedings to reconsider, for the future only, an order granting interim relief, including, where appropriate, with regard to the assessment of the pleas of fact and of law which established a *prima facie* case for the grant of that relief. The Court

[1] See the orders of 11 April 2001 in Case C-459/00 P(R) *Commission* v *Trenker* [2001] ECR I-2823; Case C-471/00 P(R) *Commission* v *Cambridge Healthcare Supplies* [2001] ECR I-2865; Case C-474/00 P(R) *Commission* v *Bruno Farmaceutici and Others* [2001] ECR I-2909; Case C-475/00 P(R) *Commission* v *Hänseler* [2001] ECR I-2953; Case C-476/00 P(R) *Commission* v *Schuck* [2001] ECR I-2995; Case C-477/00 P(R) *Commission* v *Roussel and Roussel Diamant* [2001] ECR I-3037; Case C-478/00 P(R) *Commission* v *Roussel and Roussel Iberica* [2001] ECR I-3079; and Case C-479/00 P(R) *Commission* v *Gerot Pharmazeutika* [2001] ECR I-3121.

concluded that the President of the Court of First Instance had erred in law, by equating such an application to an appeal and transposing, without qualification, to the context of interim orders the case-law of the Court of Justice relating to the consequences of expiry of the period prescribed for bringing proceedings inasmuch as he had accorded to interim orders the binding force of a judgment or an order disposing of an action. Hence, the Court set aside the order of the President of the Court of First Instance of 5 September 2001 and, since it considered that the state of the proceedings so permitted, gave a final decision on the application, ending the suspension of operation of the contested Commission decision.

3.4. In Case C-241/01 *National Farmers' Union* [2002] ECR I-9079, the Court was asked for a preliminary ruling on, *inter alia*, whether a Member State may call into question the validity of Community decisions by invoking changes occurring after the expiry of the time-limit for challenging those decisions. The Court noted that a decision adopted by the Community institutions which has not been challenged by its addressee within the time-limit laid down by the fifth paragraph of Article 230 EC becomes definitive as against that person. That rule is based on the consideration that the periods within which legal proceedings must be brought are intended to ensure legal certainty by preventing Community measures which produce legal effects from being called into question indefinitely. The Court stated that the same considerations of legal certainty explain why a Member State, which is a party to a dispute before a national court, is not permitted to plead the unlawfulness of a Community decision addressed to it and in respect of which it did not bring an action for annulment within the time-limit laid down for that purpose by the EC Treaty.

4. So far as concerns *general principles of Community law* and cases of a *constitutional* or *institutional* nature, reference must be made to one case concerning fundamental rights (4.1), two cases concerning citizenship of the European Union (4.2), a case dealing with the legal basis and other aspects of the validity of a directive (4.3), a case concerning the rules governing non-contractual liability of the Community (4.4) and another on the direct effect of regulations (4.5).

4.1. Case C-60/00 *Carpenter* [2002] ECR I-6279 dealt with the interpretation of Article 49 EC and Directive 73/148/EEC. [2] It was necessary to determine whether those provisions confer on nationals of non-member States (in the main proceedings, Mrs Carpenter, a Philippine national) the right to reside with their spouse (in this instance Mr Carpenter, a national of the United Kingdom) in the latter's Member State of origin, if their spouse is established in that Member State and provides services to persons established in other Member States.

[2] Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (OJ 1973 L 172, p. 14).

First of all, the Court found that Mr Carpenter was availing himself of the right freely to provide services guaranteed by Article 49 EC, since a significant proportion of his business consisted in providing services, in particular the sale of advertising space in medical and scientific journals, to advertisers established in other Member States. It also found that Directive 73/148 was not applicable to the case at issue in the main proceedings, stating that that directive does not govern the right of residence of the family members of a provider of services in his Member State of origin. The Court then considered Article 49 EC, relating to the freedom to provide services, and made the following observation: 'the separation of Mr and Mrs Carpenter would be detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom. That freedom could not be fully effective if Mr Carpenter were to be deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse' (paragraph 39). It also pointed out that 'a Member State may invoke reasons of public interest to justify a national measure which is likely to obstruct the exercise of the freedom to provide services only if that measure is compatible with the fundamental rights whose observance the Court ensures' (paragraph 40).

After finding that the decision to deport Mrs Carpenter constituted an interference with the exercise by Mr Carpenter of his right to respect for his family life within the meaning of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms ('the European Convention on Human Rights'), the Court set out the relevant case-law of the European Court of Human Rights, which establishes that the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life. Such interference infringes the Convention if it is not in accordance with the law, motivated by one or more legitimate aims, justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see *Boultif* v *Switzerland*, no. 54273/00, §§ 39, 41 and 46, ECHR 2001-IX). In the light of that case-law, the Court of Justice held that a decision to deport Mrs Carpenter taken in circumstances such as those in the main proceedings did not strike a fair balance between the right of Mr Carpenter to respect for his family life and the maintenance of public order and public safety. The Court found that since Mrs Carpenter's arrival in the United Kingdom, her conduct had not been the subject of any complaint that could give cause to fear that she might constitute a danger to public order or public safety. It also observed that Mr and Mrs Carpenter's marriage was genuine and that Mrs Carpenter continued to lead a true family life, in particular by looking after her husband's children from a previous marriage. The Court therefore held that Article 49 EC, read in the light of the fundamental right to respect for family life, precludes, in circumstances such as those in the main proceedings, the Member State of origin of a provider of services, established in that Member State, who provides services to recipients established in other Member States, from refusing that provider's spouse, who is a national of a non-member country, the right to reside in its territory.

4.2. In Case C-413/99 *Baumbast and R* [2002] ECR I-7091, the Court gave a preliminary ruling on the question whether Article 18(1) EC, concerning citizenship of the Union, has direct effect.

The Court concluded that 'a citizen of the European Union who no longer enjoys a right of residence as a migrant worker in the host Member State can, as a citizen of the Union, enjoy there a right of residence by direct application of Article 18(1) EC. The exercise of that right is subject to the limitations and conditions referred to in that provision, but the competent authorities and, where necessary, the national courts must ensure that those limitations and conditions are applied in compliance with the general principles of Community law and, in particular, the principle of proportionality' (paragraph 94). In reaching that conclusion, the Court deduced from its case-law (Case 41/74 *Van Duyn* [1974] ECR 1337, paragraph 7) that 'the application of the limitations and conditions acknowledged in Article 18(1) EC in respect of the exercise of that right of residence is subject to judicial review. Consequently, any limitations and conditions imposed on that right do not prevent the provisions of Article 18(1) EC from conferring on individuals rights which are enforceable by them and which the national courts must protect' (paragraph 86). The Court also observed that the limitations and conditions referred to in Article 18(1) EC must be applied in compliance with the limits imposed by Community law and in accordance with the general principles of that law, in particular the principle of proportionality. That means that national measures adopted on that subject must be necessary and appropriate to attain the objective pursued. As regards the main proceedings, the Court held that to refuse to allow Mr Baumbast to exercise the right of residence conferred on him by Article 18(1) EC by virtue of the application of the provisions of Directive 90/364/EEC [3] on the ground that his sickness insurance did not cover emergency treatment given in the host Member State would amount to a disproportionate interference with the exercise of that right.

In Case C-224/98 *D'Hoop* [2002] ECR I-6191, the Court gave a preliminary ruling on the interpretation of the provisions of the EC Treaty relating to citizenship of the Union and to the principle of non-discrimination with regard to Belgian legislation granting the right to tideover allowances to its own nationals only if they had completed their secondary education in a Belgian educational establishment. In the main proceedings, a Belgian national seeking her first employment, who had completed her secondary education in an educational establishment in another Member State, was refused a tideover allowance. The Court held that Community law precludes a Member State from refusing to grant a tideover allowance to one of its nationals, a student seeking first employment, on the sole ground that the student's secondary education was completed in another Member State.

4.3. The primary issue addressed in *British American Tobacco and Imperial Tobacco*, cited above, was the validity of Directive 2001/37/EC concerning the manufacture,

[3] Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26).

presentation and sale of tobacco products, [4] with regard, in particular, to its legal basis, the principle of proportionality, the fundamental right to property and the principle of subsidiarity.

The Court had to determine whether that directive was invalid in whole or in part by reason of the fact that Articles 95 EC and/or 133 EC did not provide it with an appropriate legal basis. To decide that question, the Court referred to its case-law on Article 95 EC (see, in particular, Case C-376/98 *Germany* v *Parliament and Council* [2000] ECR I-8419, on the advertising of tobacco products). After a detailed examination, the Court held that Directive 2001/37 genuinely has as its object the improvement of the conditions for the functioning of the internal market and that it was, therefore, possible for it to be adopted on the basis of Article 95 EC; it was no bar that the protection of public health was a decisive factor in the choices involved in the harmonising measures which that directive defines. That conclusion was not undermined by the argument that the prohibition on manufacture within the Community of cigarettes which do not comply with the requirements of Article 3(1) of that directive, for export to non-member countries, does not contribute to improving the conditions for the functioning of the internal market. Such a prohibition can be adopted on the basis of Article 95 EC, so long as its purpose is to prevent circumvention, particularly by unlawful reimports into the Community, of certain prohibitions concerning the internal market. The Court also found that Directive 2001/37 incorrectly cited Article 133 EC as a legal basis, since any commercial policy objective which might be pursued by that directive would be secondary to its primary aim, which is to improve the conditions for the functioning of the internal market. The incorrect reference to Article 133 EC was, however, only a purely formal defect which did not invalidate the directive, since the procedure for adoption of the directive was not flawed. The Court therefore concluded that Directive 2001/37 was not invalid for lack of an appropriate legal basis.

The Court also held that Directive 2001/37 and, in particular, Articles 3, 5 and 7 thereof, comply with the principle of proportionality. Those provisions prohibit the manufacture, release for free circulation and marketing of cigarettes that do not comply with the maximum levels of tar, nicotine and carbon monoxide set by the directive. They also lay down the obligation to show information on cigarette packets as to the levels of those substances, as well as warnings concerning the risks to health posed by tobacco products, and they prohibit the use on tobacco product packaging of certain terms, such as 'low-tar', 'light', 'ultra-light' and 'mild', which might mislead consumers. The Court held that those measures are appropriate for attaining the objective pursued and do not go beyond what is necessary to achieve it.

[4] Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products (OJ 2001 L 194, p. 26).

As regards the fundamental right to property, the Court found that the restrictions to that right which result from preventing manufacturers from using the space on some sides of cigarette packets to show their trade marks, and from the prohibition on the use of certain descriptions, such as 'light' or 'ultra-light', on the packaging, in fact correspond to objectives of general interest pursued by the Community, in particular the objective of ensuring a high level of health protection when national laws are harmonised, and do not constitute, having regard to the aim pursued, a disproportionate and intolerable interference which impairs the very substance of the right to property.

The Court also held that Directive 2001/37 does not contravene the principle of subsidiarity. It observed that this principle applies where the Community legislature makes use of Article 95 EC, inasmuch as that provision does not give the Community legislature exclusive competence to regulate economic activity in the internal market, but only a certain competence for the purpose of improving the conditions for its establishment and functioning. The Court held that the objective of Directive 2001/37 cannot be sufficiently achieved by the Member States individually and could be better achieved at Community level. It added that the intensity of the action undertaken by the Community in this instance did not go beyond what was necessary to achieve the objective pursued.

4.4. In its judgment of 10 December 2002 in Case 312/00 P *Commission* v *Camar and Tico*, not yet published in the ECR, given on appeal from the judgment of the Court of First Instance in Joined Cases T-79/96, T-260/97 and T-117/98 *Camar and Tico* v *Commission and Council* [2000] ECR II-2193, the Court gave a ruling on, *inter alia*, the circumstances in which the Community can incur non-contractual liability.

One of the grounds of appeal alleged that the Court of First Instance had wrongly relied on its case-law according to which, in the field of *administrative action*, any infringement of law constitutes illegality that is capable of rendering the Community liable. In that regard, the Court of Justice referred to the case-law according to which 'Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the author of the act and the damage sustained by the injured parties' (paragraph 53). The Court went on to state that 'as to the second condition, 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 ... 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' (paragraph 54). Therefore, the decisive test for determining whether there has been such an infringement is not the individual nature of the act in question, but the discretion available to the institution when it was adopted. The Court of Justice accordingly ruled that the Court of First Instance had erred in law when it found that Community liability could arise from the mere illegality of

the measure in question, without taking account of the discretion which the Commission enjoyed in the adoption of that measure. However, the Court replaced the relevant grounds of the judgment of the Court of First Instance. It found that, in the present case, the Commission had manifestly and gravely disregarded the limits placed on its discretion, committing a sufficiently serious infringement of Community law to render the Community liable.

4.5. Case C-253/00 *Muñoz and Superior Fruiticola* [2002] ECR I-7289 gave the Court an opportunity to clarify the effects of the general application and direct applicability of two Community regulations. [5] The Court interpreted those regulations to the effect that compliance with certain of their provisions must be capable of enforcement by means of civil proceedings instituted by a trader against a competitor.

In reaching that conclusion, the Court first noted that, pursuant to the second paragraph of Article 249 EC, regulations have general application and are directly applicable in all Member States and that, therefore, owing to their very nature and their place in the system of sources of Community law, they operate to confer rights on individuals which the national courts have a duty to protect. Referring to its case-law (Case 106/77 *Simmenthal* [1978] ECR 629, Case C-213/89 *Factortame and Others* [1990] ECR I-2433 and Case C-453/99 *Courage and Crehan* [2001] ECR I-6297), the Court then pointed out that it is for the national courts to ensure the full effect of the provisions of Community law which it is their task to apply in the areas within their jurisdiction. Finally, examining the objectives pursued by the quality standards laid down in the two regulations at issue in the main proceedings, the Court came to the conclusion that 'the full effectiveness of the rules on quality standards and, in particular, the practical effect of the obligation laid down by Article 3(1) of [those two regulations] imply that it must be possible to enforce that obligation by means of civil proceedings instituted by a trader against a competitor' (paragraph 30). It observed that 'the possibility of bringing such proceedings strengthens the practical working of the Community rules on quality standards' (paragraph 31).

5. So far as concerns the *free movement of goods*, the following cases are worthy of note.

Case C-325/00 *Commission* v *Germany* (judgment of 5 November 2002, not yet published in the ECR) concerned the compatibility with Article 28 EC of the award of a quality label, conferring the right to use the mark 'Markenqualität aus deutschen Landen' on products, only to products made in Germany which meet certain quality standards. The label was managed by a private company, which was supervised and funded by a public body.

[5] Council Regulation (EEC) No 1035/72 of 18 May 1972, and Council Regulation (EC) No 2200/96 of 28 October 1996 on the common organisation of the market in fruit and vegetables (OJ, English Special Edition 1972 (II), p. 437, and OJ 1996 L 297, p. 1, respectively).

The judgment in this case clarifies and supplements the Court's earlier case-law (in particular Case 249/81 *Commission* v *Ireland* [1982] ECR 4005 and Case 222/82 *Apple and Pear Development Council* [1983] ECR 4083). As regards the question whether the contested scheme could be classified as a public measure attributable to the Member State, the Court first pointed out that although the grant and management of the quality label lay within the competence of a private company, that company was established on the basis of a law, was characterised by that law as a central economic body and had, among the objects assigned to it by that law, that of promotion of the sale and exploitation of German agricultural and food products. It then noted that that company was obliged to observe the rules of a public body and to be guided, in particular in relation to the commitment of its financial resources, by the general interest of the German agricultural and food sector. Finally, the Court observed that the company in question was financed by a compulsory contribution from all the undertakings in the sectors concerned. Recalling its judgment in *Apple and Pear Development Council*, the Court concluded that 'such a body, which is set up by a national law of a Member State and which is financed by a contribution imposed on producers, cannot, under Community law, enjoy the same freedom as regards the promotion of national production as that enjoyed by producers themselves or producers' associations of a voluntary character ... Thus it is obliged to respect the basic rules of the Treaty on the free movement of goods when it sets up a scheme ... which can have effects on intra-Community trade similar to those arising under ... [a] scheme adopted by the public authorities' (paragraph 18).

Applying its earlier case-law, the Court confirmed that the contested scheme had restrictive effects on the free movement of goods between Member States: the scheme had been set up in order to promote the distribution of agricultural and food products made in Germany and its advertising message emphasised the German origin of the products concerned. The Court stated that the fact that the use of the label at issue was optional did not mean that it ceased to be an unjustified obstacle to trade. It also observed that a scheme such as the one at issue cannot be regarded as a geographic indication capable of justification under Article 30 EC.

In Case C-172/00 *Ferring* [2002] ECR I-6891, the Court held that 'Article 28 EC precludes national legislation under which the withdrawal of the marketing authorisation of reference for a medicinal product on application by the holder thereof means that the parallel import licence for that product automatically ceases to be valid'. However, it accepted that 'if it is demonstrated that there is in fact a risk to public health arising from the coexistence of two versions of the same medicinal product on the market in a Member State such a risk may justify restrictions on the importation of the old version of the medicinal product in consequence of the withdrawal of the marketing authorisation of reference by the holder thereof in relation to that market'.

The Court stated that the cessation of the validity of a parallel import licence following the withdrawal of the marketing authorisation of reference constitutes a restriction on the free movement of goods contrary to Article 28 EC, unless it is justified by reasons

relating to the protection of public health, in accordance with the provisions of Article 30 EC. In the case at issue in the main proceedings, the reason for withdrawal of the marketing authorisation of reference was that its holder had replaced the old version of the medicinal product with a new version, for which it had obtained a new marketing authorisation. The old version was still being lawfully marketed in the Member State of exportation under the marketing authorisation issued in that State. The Court pointed out that in a situation where a marketing authorisation of reference is withdrawn for reasons other than the protection of public health there do not appear to be any reasons to justify the automatic cessation of the validity of the parallel import licence. The withdrawal of an authorisation in those circumstances does not mean of itself that the old version of the medicinal product is called into question and the objective of verifying the quality, efficacy and non-toxicity of the old version can be attained by other, less restrictive measures. In particular, the Court observed that pharmacovigilance can ordinarily be guaranteed through cooperation with the national authorities of the other Member States by means of access to the documents and data produced by the manufacturer or other companies in the same group, relating to the old version in the Member States in which that version continues to be marketed on the basis of a marketing authorisation still in force.

The Court considered it conceivable that there may be reasons relating to the protection of public health which require that a parallel import licence for medicinal products be necessarily linked to a marketing authorisation of reference. It found, however, that no such reasons emerged from the observations submitted to it. The Court stated that if it can be demonstrated that there is in fact a risk to public health arising from the coexistence of two versions of the same medicinal product on the same market, such a risk may justify restrictions on importation. While the question of the existence and the reality of that risk, which a mere assertion by the holder of the marketing authorisation does not suffice to resolve, is a matter primarily for the competent authorities of the Member State of importation to determine, the Court suggested that appropriate labelling may be sufficient to avert that risk.

Case C-443/99 *Merck, Sharp & Dohme* [2002] ECR I-3703 and Case C-143/00 *Boehringer Ingelheim and Others* [2002] ECR I-3759 provided the Court with the opportunity to clarify its case-law on the conditions which must be met in order for repackaging of trade-marked pharmaceutical products by a parallel importer to be lawful. That case-law which originally developed with regard to Article 28 EC, and then with regard to Directive 89/104/EEC, [6] recognises that the proprietor of a trade mark right is justified, for the purposes of the first sentence of Article 30 EC, in preventing a product to which the trade mark has lawfully been applied in one Member State from being put on the market in another Member State after it has been repacked in new packaging to which the trade mark has been affixed by a third party. However, such

[6] 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).

prevention of marketing constitutes a disguised restriction on trade between Member States, where it is established, in particular, that it would contribute to the artificial partitioning of the markets between Member States. In Joined Cases C-427/93, C-429/93 and C-436/93 *Bristol-Myers Squibb and Others* [1996] ECR I-3457 and Case C-379/97 *Upjohn* [1999] ECR I-6927, the Court made it clear that, in certain circumstances, where repackaging of pharmaceutical products is necessary to allow the product imported in parallel to be marketed in the importing State opposition to repackaging is to be regarded as constituting artificial partitioning of markets.

The fundamental question raised in *Merck, Sharp & Dohme* and *Boehringer Ingelheim and Others* concerned the requirement that the repackaging be necessary. The Court held that replacement packaging of pharmaceutical products is objectively necessary within the meaning of its case-law if, without such repackaging, effective access to the market concerned, or to a substantial part of that market, must be considered to be hindered as the result of strong resistance from a significant proportion of consumers to relabelled pharmaceutical products.

In addition, in *Boehringer Ingelheim and Others*, the Court confirmed that to be entitled to repackage trade-marked pharmaceutical products, a parallel importer must, in any event, fulfil the requirement of prior notice, and added that it is incumbent on the parallel importer itself to give notice to the trade mark proprietor. It is not sufficient that the proprietor be notified of the intended repackaging by other sources. The trade mark proprietor must be allowed a 'reasonable time', which is to be determined by the national court, in which to react. As guidance for the case at issue, the Court suggested that a period of 15 working days seemed appropriate, given the evidence in the documents before it.

6. In the field of *freedom of movement for workers*, three cases should be noted.

In Case C-55/00 *Gottardo* [2002] ECR I-413, the Court held that 'the competent social security authorities of one Member State [the Italian Republic in the case at issue in the main proceedings] are required, pursuant to their Community obligations under Article 39 EC, to take account, for purposes of acquiring the right to old-age benefits, of periods of insurance completed in a non-member country [the Swiss Confederation in the main proceedings] by a national of a second Member State [the French Republic in the main proceedings] in circumstances where, under identical conditions of contribution, those competent authorities will take into account such periods where they have been completed by nationals of the first Member State pursuant to a bilateral international convention concluded between that Member State and the non-member country' (paragraph 39).

To reach that conclusion, the Court deduced from its case-law (in particular Case C-307/97 *Saint-Gobain ZN* [1999] ECR I-6161) that 'when giving effect to commitments assumed under international agreements, be it an agreement between Member States

or an agreement between a Member State and one or more non-member countries, Member States are required, subject to the provisions of Article 307 EC, to comply with the obligations that Community law imposes on them' (paragraph 33). Accordingly, when a Member State concludes a bilateral international convention on social security with a non-member country, the fundamental principle of equal treatment requires that that Member State grant nationals of other Member States the same advantages as those which its own nationals enjoy under that convention unless it can provide objective justification for refusing to do so.

In Case C-459/99 *MRAX* [2002] ECR I-6591 the Court interpreted Community legislation on freedom of movement for workers, freedom to provide services and freedom of establishment [7] in order to enable the Belgian Conseil d'État (Council of State) to assess the compatibility with Community law of national legislation concerning the procedure for publication of banns of marriage and the documents which must be produced in order to obtain a visa for the purpose of contracting a marriage or to obtain a visa for the purpose of reuniting a family on the basis of a marriage contracted abroad.

The Court began by recalling that the Community legislation concerned is not applicable to situations not presenting any link to any of the situations envisaged by Community law. It held that, in view of the importance which the Community legislature has attached to the protection of family life, on a proper construction of Article 3 of Directive 68/360, Article 3 of Directive 73/148 and Regulation No 2317/95, read in the light of the principle of proportionality, a Member State may not send back at the border a third country national who is married to a national of a Member State and attempts to enter its territory without being in possession of a valid identity card or passport or, if necessary, a visa, where he is able to prove his identity and the conjugal ties and there is no evidence to establish that he represents a risk to the requirements of public policy, public security or public health, since, in such circumstances, to refuse that person entry at the border would in any event be disproportionate.

The Court then held that Article 4 of Directive 68/360 and Article 6 of Directive 73/148 do not permit a Member State to refuse issue of a residence permit and to issue an expulsion order against a third country national who is able to furnish proof of his identity and of his marriage to a national of a Member State, on the sole ground that he

[7] Articles 1(2), 3(3) and 9(2) of Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ, English Special Edition 1963-1964, p. 117); Articles 3 and 4 of Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ, English Special Edition 1968 (II), p. 485); Articles 3 and 6 of Directive 73/148; Council Regulation (EC) No 2317/95 of 25 September 1995 determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States (OJ 1995 L 234, p. 1).

has entered the territory of the Member State concerned unlawfully. Such a refusal and expulsion order would impair the very substance of the right of residence directly conferred by Community law and would be manifestly disproportionate to the gravity of the infringement. The Court also considered that Directives 68/360, 73/148 and 64/221 preclude a Member State from refusing to issue a residence permit to a third country national who is married to a national of a Member State and who entered the territory of that Member State lawfully, and from issuing an order expelling him from the territory, on the sole ground that his visa expired before he applied for a residence permit. Finally, the Court held that Directive 64/221 confers on a foreign national married to a national of a Member State the right to refer to the competent authority a decision refusing to issue a first residence permit or ordering his expulsion before the issue of the permit, including where he is not in possession of an identity document or where, requiring a visa, he has entered the territory of a Member State without one or has remained there after its expiry.

In *Oteiza Olazabal* (judgment of 26 November 2002 in Case C-100/01, not yet published in the ECR), a preliminary ruling was requested from the Court on, *inter alia*, the interpretation of Articles 12 EC, 18 EC and 39 EC with regard to measures limiting a right of residence to a part of the territory of a Member State. The main proceedings were between the French Minister for the Interior and Mr Oteiza Olazabal, a Spanish national. The latter had been refused the right to reside in part of France on the basis of police reports indicating that he maintained relations with the terrorist organisation ETA. In 1991, he had been convicted of conspiracy to disturb public order by intimidation or terror.

As a preliminary point, the Court observed that since Mr Oteiza Olazabal had been employed in France during the whole of the period relevant for the purposes of the main proceedings, his case came within the scope of Article 39 EC. It then examined whether restricting the right of residence to a part of national territory could be 'justified on grounds of public policy, public security or public health' within the meaning of Article 39(3) EC. It referred to its judgment in Case 36/75 *Rutili* [1975] ECR 1219, in which it had ruled that 'measures restricting the right of residence which are limited to part only of the national territory may not be imposed by a Member State on nationals of other Member States who are subject to the provisions of the Treaty except in the cases and circumstances in which such measures may be applied to nationals of the State concerned'. However, the Court, after recalling the background to *Rutili*, pointed out that in the present case the public order measures were taken against Mr Oteiza Olazabal because he formed part of an armed and organised group whose activity constituted a threat to public order in French territory and that prevention of such activity can be regarded as falling within the maintenance of public security. It also observed that the national court started from the premiss that reasons of public order precluded Mr Oteiza Olazabal's residence in part of national territory, and that, without the possibility of imposing a measure prohibiting residence in that part of national territory, such reasons could justify a measure prohibiting residence in the whole of national territory. Having regard to those circumstances, the Court interpreted Article

39(3) EC, stating, first, that it does not follow from the wording of Article 39(3) that limitations on the freedom of movement of workers justified on grounds of public policy must always have the same territorial scope as rights conferred by that provision. The Court then pointed out that, according to its case-law, 'the reservations contained in Article [39 EC] and Article [46 EC] permit Member States to adopt, with respect to nationals of other Member States, and in particular on the grounds of public policy, measures which they cannot apply to their own nationals, inasmuch as they have no authority to expel the latter from the territory or to deny them access thereto' (paragraph 40). It concluded that 'in situations where nationals of other Member States are liable to deportation or prohibition of residence, they are also capable of being subject to less severe measures consisting of partial restrictions on their right of residence, justified on grounds of public policy, without it being necessary that identical measures be capable of being applied by the Member State in question to its own nationals' (paragraph 41). The Court therefore ruled that neither Article 39 EC nor the provisions of secondary legislation which implement the freedom of movement for workers preclude a Member State from imposing, in relation to a migrant worker who is a national of another Member State, public order or public security measures limiting that worker's right of residence to a part of national territory, provided that: (i) such action is justified by reasons of public order or public security based on his individual conduct; (ii) by reason of their seriousness, those reasons could otherwise give rise only to a measure prohibiting him from residing in, or banishing him from, the whole of the national territory; and (iii) the conduct which the Member State concerned wishes to prevent gives rise, in the case of its own nationals, to punitive measures or other genuine and effective measures designed to combat it.

7. So far as concerns *freedom of establishment*, first of all the judgment of 5 November 2002 in Case C-208/00 *Überseering*, not yet published in the ECR, should be mentioned. In that case, the Court held that where a company formed in accordance with the law of a Member State in which it has its registered office is deemed, under the law of a second Member State, to have moved its actual centre of administration to that second Member State, Articles 43 EC and 48 EC on the freedom of establishment preclude the second Member State from denying the company legal capacity and, consequently, the capacity to bring legal proceedings before its national courts for the purpose of enforcing rights under a contract with a company established in the second Member State.

In reaching that conclusion, the Court considered that such a denial of legal capacity constitutes a restriction on freedom of establishment which is, in principle, incompatible with Articles 43 EC and 48 EC. It found that it is not inconceivable that overriding requirements relating to the general interest, such as the protection of the interests of creditors, minority shareholders, employees and even the taxation authorities, may justify restrictions on freedom of establishment. However, such objectives cannot justify denying the legal capacity and, consequently, the capacity to be a party to legal proceedings, of a company properly incorporated in another Member State in which it

has its registered office. Such a measure is tantamount to an outright negation of the freedom of establishment conferred by Articles 43 EC and 48 EC.

Secondly, in eight judgments of 5 November 2002 – Case C-467/98 *Commission* v *Denmark*, Case C-468/98 *Commission* v *Sweden*, Case C-469/98 *Commission* v *Finland*, Case C-471/98 *Commission* v *Belgium*, Case C-472/98 *Commission* v *Luxembourg*, Case C-475/98 *Commission* v *Austria*, Case C-476/98 *Commission* v *Germany* and Case C-466/98 *Commission* v *United Kingdom*, all not yet published in the ECR, – the first seven of which also concerned the Community's *external relations* (see section 14 of this part of the report), the Court declared that by entering into or maintaining in force, despite the renegotiation of bilateral agreements with the United States of America in the air transport sector (the 'open skies' agreements), international commitments granting that non-member country the right to withdraw, suspend or limit traffic rights in cases where air carriers designated by each of those Member States were not owned by the Member State in question or by nationals of that State, those Member States had failed to fulfil their obligations under Article 43 EC. In reaching that conclusion, the Court referred to its case-law on the obligations of Member States when they negotiate treaties on double taxation with non-member countries (see, in particular, *Saint-Gobain ZN*, cited above, paragraph 59). In the cases in point, the clause on the ownership and control of airlines permitted the United States of America to refuse or withdraw licences or authorisations in respect of an airline designated by the Member State in question but of which a substantial part of the ownership and effective control was not vested in that Member State or in nationals of that State or of the United States. Airlines of other Member States could always be excluded from the benefit of such an 'open skies' agreement, while that benefit was assured to the airlines of the Member State which had concluded the agreement. Community airlines therefore suffered discrimination which prevented them from benefiting from the treatment which the host Member State accorded to its own nationals. The Court rejected the public policy and public security justifications put forward by the defendants. The clause concerning the ownership and control of airlines did not limit the power to refuse or withdraw licences or authorisations in respect of an airline designated by the other party solely to the case where that airline represented a threat to public policy or public security. Furthermore, there was no direct link between such a threat and generalised discrimination against Community airlines.

8. In the field of *freedom to provide services*, it is worth briefly mentioning Case C-164/99 *Portugaia Construções* [2002] ECR I-787, which raised the issue of the applicability of provisions of a collective agreement, declared to be of binding general application in a particular Member State and laying down a minimum wage, to an undertaking established in another Member State which posts its workers to the first State for the purpose of providing services.

The Court examined the legislation in question in the light of Articles 49 EC and 50 EC. It recalled its case-law, from which it is clear that 'in principle Community law does not preclude a Member State from requiring an undertaking established in another Member

State which provides services in the territory of the first State to pay its workers the minimum remuneration laid down by the national rules of that State' (paragraph 21). The Court concluded that 'it may be acknowledged that, in principle, the application by the host Member State of its minimum-wage legislation to providers of services established in another Member State pursues an objective of public interest, namely the protection of employees' (paragraph 22). However, the Court continued, 'there may be circumstances in which the application of such rules would not be in conformity with Articles [49 EC and 50 EC]' (paragraph 23). The assessment of those circumstances is a task for the national authorities or, as the case may be, the national courts, which, more specifically, must 'determine whether, considered objectively, that legislation provides for the protection of posted workers. In that regard, although the declared intention of the legislature cannot be conclusive, it may nevertheless constitute an indication as to the objective pursued by the legislation' (paragraph 30).

In answer to a second question submitted by the national court, the Court ruled that 'the fact that, in concluding a collective agreement specific to one undertaking, a domestic employer can pay wages lower than the minimum wage laid down in a collective agreement declared to be generally applicable, whilst an employer established in another Member State cannot do so, constitutes an unjustified restriction on the freedom to provide services' (paragraph 35).

9. As regards the *free movement of capital*, the 'golden shares' cases must be mentioned. In three parallel cases (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 Court examined the compatibility with Community law of certain measures by which, in those three Member States, the State retained certain rights to intervene in the activities of specific undertakings which had been privatised or were undergoing privatisation.

Some of the measures at issue in *Commission* v *Portugal* imposed limits on the shareholdings of foreign nationals in privatised undertakings. In addition, a decree-law established a procedure for prior authorisation by the Minister for Financial Affairs of any acquisition by a single natural or legal person of shares which would result in a shareholding in excess of 10% of the voting capital in companies which were to be reprivatised.

In *Commission* v *France*, the action concerned a decree vesting in the French State a 'golden share' in Société nationale Elf-Aquitaine. The rights attached to that 'golden share' included the right to appoint two members of the company's board of directors. It also made 'any direct or indirect shareholding by a natural or legal person, acting alone or in conjunction with others, which exceeds the ceiling of one-tenth, one-fifth or one-third of the capital of, or voting rights in, the company' conditional upon prior authorisation from the Minister for Economic Affairs. Finally, the share conferred on the

French State the right to oppose certain decisions to transfer or use as security various company assets.

In *Commission* v *Belgium*, the rights at issue were those attached to the 'golden shares' of the Belgian State in Société nationale de transport par canalisations and in Société de distribution du gaz Distrigaz. Those 'golden shares' established the obligation to give advance notice to the Minister for Energy of any use as security or change in the intended use of certain assets of those companies, the Minister being entitled to oppose such operations if he considered that they adversely affected the national interest in the energy sector. The shares also conferred the right to appoint to the board of directors two representatives entitled to propose to the Minister the annulment of any decision of the board of directors or management committee which they regarded as contrary to the country's energy policy.

The Court examined the three cases with regard to the principle of the free movement of capital, on the ground that direct investment in the form of participation in an undertaking by means of a shareholding or the acquisition of securities on the capital market constitutes movement of capital within the meaning of Article 56 EC.

As regards the prohibition precluding investors from other Member States from acquiring more than a given number of shares in certain Portuguese undertakings, the Court found that this amounted to 'unequal treatment of nationals of other Member States and [restricted] the free movement of capital' (*Commission* v *Portugal*, paragraph 40). Since no valid justification was put forward by the Portuguese Government, the Court held that the Portuguese Republic had indeed failed to fulfil its obligations.

The other measures examined by the Court in these three cases did not involve discrimatory treatment of nationals of other Member States. However, the Court pointed out 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' (*Commission* v *Portugal*, paragraph 44, and *Commission* v *France*, paragraph 40). Recalling its case-law, the Court found that even though those measures might not give rise to unequal treatment, they were liable to impede the acquisition of shares in the undertakings concerned and to dissuade investors in other Member States from investing in the capital of those undertakings, and were liable, as a result, to render the free movement of capital illusory. It concluded that the rules at issue had to be regarded as restrictions on the movement of capital within the meaning of Article 56 EC.

The Court then examined the grounds relied on by the defendants to justify those measures. While accepting that 'it is undeniable that, depending on the circumstances, certain concerns may justify the retention by Member States of a degree of influence within undertakings that were initially public and subsequently privatised, where those

undertakings are active in fields involving the provision of services in the public interest or strategic services' (*Commission* v *Portugal*, paragraph 47, *Commission* v *France*, paragraph 43, and *Commission* v *Belgium*, paragraph 43), the Court considered that those concerns cannot entitle Member States to plead their own systems of property ownership 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 EC Treaty. To be compatible with the EC Treaty, a national rule which restricts the free movement of capital must be justified by reasons referred to in Article 58(1) EC or by overriding requirements of the general interest and be applicable to all persons and undertakings pursuing an activity in the territory of the host Member State. Furthermore, in order to be so justified, the national rule must accord with the principle of proportionality.

In keeping with settled case-law, the Court rejected the economic justifications relied on in *Commission* v *Portugal*. By contrast, the Court accepted that the objectives relating to the need to safeguard energy supplies in the event of a crisis, relied on in *Commission* v *France* and *Commission* v *Belgium*, fell within the ambit of a legitimate public interest and were among the 'public security' objectives covered by Article 58(1)(b) EC.

In *Commission* v *France*, the Court, noting the nature of the powers vested in the French Government and the fact that there were no conditions imposed on their exercise, concluded that the legislation at issue went beyond what was necessary in order to attain the objective indicated.

By contrast, in *Commission* v *Belgium*, the Court, after finding that the scheme at issue was one of opposition, and not of prior authorisation, which was limited to intervention in a number of specific decisions, and that, in order for that power of opposition to be exercised, the public authorities were obliged to adhere to strict time-limits, concluded that that scheme made it possible 'to guarantee, on the basis of objective criteria which [were] subject to judicial review, the effective availability of the lines and conduits ... as well as other infrastructures' and that it thus enabled 'the Member State concerned to intervene with a view to ensuring, in a given situation, compliance with the public service obligations incumbent on [Société nationale de transport par canalisations] and Distrigaz, whilst at the same time observing the requirements of legal certainty' (paragraph 52). Since the Commission had not shown that less restrictive measures could have been taken to attain the objective pursued, the Court found that the legislation at issue was justified. The Court also dismissed the Commission's action as regards its claim that the Kingdom of Belgium had failed to fulfil its obligations under Article 43 EC, on freedom of establishment, since Article 46 EC also provides for a ground of justification based on public security.

10. As regards the *competition rules*, this report focuses on four cases.

In Case C-309/99 *Wouters and Others* [2002] ECR I-1577, the Court gave a ruling on the interpretation of the competition rules with regard to a regulation prohibiting multi-disciplinary partnerships between members of the Bar and accountants, adopted by the Netherlands Bar pursuant to the Netherlands legislation on the legal profession.

First of all, the Court held that the regulation in question in the main proceedings must be regarded as a decision adopted by an association of undertakings within the meaning of Article 81(1) EC. It considered that members of the Bar in the Netherlands carry on an economic activity and are, therefore, undertakings for the purposes of the EC Treaty provisions on competition. Accordingly, the Netherlands Bar must be regarded as an association of undertakings when it adopts a regulation such as the one at issue in the main proceedings. Such a regulation constitutes 'the expression of the intention of the delegates of the members of a profession that they should act in a particular manner in carrying on their economic activity' (paragraph 64). That finding is not called into question by the fact that the constitution of the Bar of the Netherlands is regulated by public law. Nor does it infringe the principle of the institutional autonomy of Member States, which remain free to choose between two approaches: either (i) when a Member State grants regulatory powers to a professional association, it is careful to define the public-interest criteria and the essential principles with which the rules of that association must comply and also to retain its power to adopt decisions in the last resort, in which case the rules adopted by the professional association remain State measures and are not covered by the competition rules applicable to undertakings, or (ii) the rules adopted by the professional association are attributable to it alone, in which case the competition rules are applicable.

Second, the Court turned its attention to the question whether the regulation at issue in the main proceedings has the object or effect of restricting competition and is likely to affect trade between the Member States. The Court found that it 'has an adverse effect on competition and may affect trade between Member States' (paragraph 86). By prohibiting multi-disciplinary partnerships between members of the Bar and accountants, it is liable to limit production and technical development within the meaning of Article 81(1)(b) EC. The Court also found that such regulations have an effect on intra-Community trade. The regulation, which applies over the whole of the territory of a Member State, has the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the EC Treaty is designed to bring about. Nevertheless, the Court found that 'not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article [81(1) EC]'. It added that 'for the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with

the necessary guarantees in relation to integrity and experience' (paragraph 97). The Court stated that lawyers' obligations of professional conduct have not inconsiderable implications for the structure of the market in legal services, and more particularly for the possibilities for the practice of law jointly with accountancy, a profession which is not subject in general, and more particularly in the Netherlands, to comparable requirements of professional conduct. The Court therefore held that the regulation in question in the main proceedings could reasonably be considered to be necessary in order to ensure the proper practice of the legal profession, as organised in the Member State concerned, and that its restrictive effects on competition do not go beyond what is necessary in order to ensure the proper practice of the legal profession. Accordingly, the Court ruled that the regulation did not infringe Article 81(1) EC.

Third, the Court held that the Netherlands Bar does not constitute either an undertaking or group of undertakings for the purposes of Article 82 EC because it does not carry on any economic activity and registered members of the Netherlands Bar are not sufficiently linked to each other to adopt the same conduct on the market with the result that competition between them is eliminated.

Case C-35/99 *Arduino* [2002] ECR I-1529 concerned the question whether Articles 10 EC and 81 EC preclude a Member State (the Italian Republic in the case at issue in the main proceedings) from adopting a law or regulation which approves, on the basis of a draft produced by a professional body of members of the Bar in a Member State, a tariff fixing minimum and maximum fees for members of the legal profession.

The Court began by recalling its case-law establishing that Articles 10 EC and 81 EC are infringed where a Member State requires or favours the adoption of agreements, decisions or concerted practices contrary to Article 81 EC or reinforces their effects, or where it divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere (see Case 267/86 *Van Eycke* [1988] ECR 4769, paragraph 16). In this case, the Court considered that the Italian State had not waived its power to make decisions of last resort or to review implementation of the tariff, since, in particular, the professional body of members of the Bar was responsible for producing only a draft which was not binding unless it was approved by the competent Minister, who accordingly had the power to have the draft amended. In those circumstances, the Court ruled that Articles 10 EC and 81 EC did not preclude a measure such as the one at issue.

In the '*PVC II*' cases (Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375), the Court ruled, by way of a single judgment, on a series of eight appeals brought by the undertakings to which a Commission decision imposing fines for infringement of the prohibition laid down in Article 81(1) EC was addressed. A first Commission decision relating to that infringement ('the PVC I decision') had been declared non-existent by the Court of First Instance, then annulled

by the Court of Justice on appeal (Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555). On 27 July 1994, the Commission adopted a second decision ('the PVC II decision') imposing on the undertakings to which it was addressed fines of the same amounts as those imposed on them by the PVC I decision. Fresh annulment proceedings were brought before the Court of First Instance, which, for the most part, rejected the pleas and arguments put forward by the undertakings concerned.

In its judgment, the Court dismissed the appeals in their entirety, except for two pleas raised by one of the appellants (Montedison SpA) which had been rejected by the Court of First Instance. The Court set aside the judgment of the Court of First Instance in that regard alone; it then examined the merits of Montedison's two pleas and rejected them.

The numerous pleas for annulment raised by all, or some, of the appellants alleged, amongst other things, infringement of the principle of *res judicata*, infringement of the principle *non bis in idem*, invalidity of the procedural measures preceding the PVC I decision and failure by the Commission to fulfil a duty to take a number of those procedural measures again. A second group of pleas alleged that the Commission acted out of time, in the light of both the rules on limitation periods and the principle that decisions must be adopted within a reasonable time. The Court also examined a number of pleas raised by the appellants alleging infringement of the rights of the defence, incomplete examination, or distortion, of the facts by the Court of First Instance, failure of that court to respond to certain pleas, and contradictory and insufficient grounds for the contested judgment. The judgment was also contested on grounds relating to the substance of the case.

The Court of Justice's response to the grounds of appeal alleging infringement of the principle that a body must act within a reasonable time merits attention in this report. It upheld the Court of First Instance's examination of the case in so far as the latter considered that that principle had been respected during each of the two stages of the administrative procedure preceding adoption of the PVC II decision and throughout that administrative procedure taken as a whole. The Court of Justice also held that the duration of the judicial proceedings leading to the contested judgment, while lengthy, was justified in the light of the particular complexity of the case and thus did not infringe the principle that a decision be adjusted within a reasonable time. In response to a plea raised by a number of the appellants, the Court added that 'even assuming that the consideration of the plea alleging infringement of the reasonable period principle requires not only a separate examination of each procedural stage but also a comprehensive assessment of the administrative procedure and any judicial proceedings as a whole, it must be held in this case that the principle that decisions are to be adopted within a reasonable time has not been infringed despite the exceptional duration of the period which has elapsed between the commencement of the administrative procedure and delivery of this judgment' (paragraph 230). The Court ruled that the total duration of that period could be explained and justified by the conjunction of a complex administrative procedure and four successive sets of judicial

proceedings. It found, in particular, that the longest part of the period in question was concerned with the judicial assessment of the case, which provided the appellants with the opportunity to exercise fully their rights of defence. The Court also made reference to the constraints of the language rules applicable to the Community judicature and to the very large number of pleas which were given extensive consideration, some of which raised new and complex legal issues.

Two other significant passages in the judgment should also be noted:

'The principle of *non bis in idem*, which is a fundamental principle of Community law also enshrined in Article 4(1) of Protocol No 7 to the [European Convention on Human Rights], precludes, in competition matters, an undertaking from being found guilty or proceedings from being brought against it a second time on the grounds of anti-competitive conduct in respect of which it has been penalised or declared not liable by a previous unappealable decision. ... The application of that principle therefore presupposes that a ruling has been given on the question whether an offence has in fact been committed or that the legality of the assessment thereof has been reviewed. ... The principle of *non bis in idem* merely prohibits a fresh assessment in depth of the alleged commission of an offence which would result in the imposition of either a second penalty, in addition to the first, in the event that liability is established a second time, or a first penalty in the event that liability not established by the first decision is established by the second' (paragraphs 59, 60 and 61).

'The mere bringing of an action does not entail the definitive transfer to the Community judicature of the power to impose penalties. The Commission finally loses its power once the court has actually exercised its unlimited jurisdiction. On the other hand, where the Community judicature simply annuls a decision on the ground of illegality without itself ruling on the substance of the infringement or on the penalty, the institution which adopted the annulled measure may reopen the procedure at the stage at which the illegality was found to have occurred and exercise again its power to impose penalties' (paragraph 693).

In Case C-94/00 *Roquette-Frères* [2002] ECR I-9011, the French Cour de cassation (Court of cassation) asked the Court for a preliminary ruling on the scope of the review which is to be undertaken by a national court having jurisdiction under domestic law to authorise entry onto the premises of undertakings suspected of having infringed the competition rules where application is made to that court pursuant to a request by the Commission for assistance made under Article 14(6) of Regulation No 17. [8]

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

The Court was thus able to clarify and develop its case-law on this subject, particularly its judgment in Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR I-2859, to take account of rulings of the European Court of Human Rights which postdate that judgment, especially Eur. Court HR, Niemietz v. Germany judgment of 16 December 1992, Series A no 251-B and the judgment of 16 April 2002 in *Colas Est and Others* v. *France*, not yet published in the *Reports of Judgments and Decisions*. In *Hoechst* v *Commission* the Court had recognised that the need for protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any person constitutes a general principle of Community law which the competent authorities of the Member States are required to respect when they are called upon to act in response to a request for assistance made by the Commission. The Court had also held that it is for the competent national body to consider whether the coercive measures envisaged are arbitrary or excessive having regard to the subject-matter of the investigation, and that the Commission for its part must make sure that the national body has all that it needs to perform that supervisory task and to ensure that national law is respected in the implementation of the coercive measures.

Called upon to clarify that case-law, the Court first stated that the review carried out by the national court must concern itself only with the coercive measures applied for and may not go beyond an examination to establish that the coercive measures in question are not arbitrary and that they are proportionate to the subject-matter of the investigation. Such an examination exhausts the jurisdiction of the national court as regards the justification of those measures.

The Court then considered the precise scope of that review and the information that can be required from the Commission. It stated that the Commission is required to provide the national court with 'explanations showing, in a properly substantiated manner, that the Commission is in possession of information and evidence providing reasonable grounds for suspecting infringement of the competition rules by the undertaking concerned' (paragraph 61). 'On the other hand, the competent national court may not demand that it be provided with the information and evidence in the Commission's file on which the latter's suspicions are based' (paragraph 62). Where coercive measures are requested on a precautionary basis, 'it is for the Commission to provide the competent national court with the explanations needed by that court to satisfy itself that, if the Commission were unable to obtain, as a precautionary measure, the requisite assistance in order to overcome any opposition on the part of the undertaking, it would be impossible, or very difficult, to establish the facts amounting to the infringement' (paragraph 75). Given that a further aim of the review of proportionality is to establish that the intended measures do not constitute a disproportionate and intolerable interference in relation to the aim pursued by the investigation, it must be open to the national court to refuse to grant the coercive measures applied for 'where the suspected impairment of competition is so minimal, the extent of the likely involvement of the undertaking concerned so limited, or the evidence sought so peripheral, that the intervention in the sphere of the private activities of a legal person which a search using law-enforcement authorities entails

necessarily appears manifestly disproportionate and intolerable in the light of the objectives pursued by the investigation' (paragraph 80). It follows that the Commission 'must in principle inform that court of the essential features of the suspected infringement, so as to enable it to assess their seriousness, by indicating the market thought to be affected, the nature of the suspected restrictions of competition and the supposed degree of involvement of the undertaking concerned' (paragraph 81). The Commission must also indicate 'as precisely as possible the evidence sought and the matters to which the investigation must relate' (paragraph 83). However, it is not indispensable that the information communicated should precisely define the relevant market, or indicate the infringement period, and the Commission cannot be required to limit its investigation to requesting the production of documents or files which it is able to identify precisely in advance.

Finally, the Court stated that, where the competent national court considers that the information supplied by the Commission does not fulfil the requirements set out by the Court, it is required to inform, as rapidly as possible, the Commission or the national authority which has brought the latter's request before it of the difficulties encountered and where necessary to ask for additional information, while paying particular heed to the coordination, expedition and discretion necessary to ensure the effectiveness of investigations. For its part, the Commission must provide any additional information with the minimum of delay; however, Community law does not require the information so communicated to be in any particular form. Those reciprocal duties derive from the principle of cooperation in good faith provided for in Article 10 EC.

11. As regards *trade mark law*, four cases concerning the interpretation of Directive 89/104 [9] should be mentioned.

In Case C-299/99 *Philips* [2002] ECR I-5475, the Court gave its first ruling on the interpretation of Directive 89/104 with regard to a sign consisting exclusively of the shape of goods. The questions submitted to it were raised in proceedings consisting of an action for trade mark infringement and a counter-claim for revocation of the trade mark. The infringement proceedings were brought by the proprietor of a trade mark registered in the United Kingdom consisting of a graphic representation of the shape and configuration of the head of an electric shaver, comprising three circular heads with rotating blades in the shape of an equilateral triangle. Asked to interpret several provisions of Directive 89/104 which could be decisive for the validity of that trade mark, the Court clarified the relationship between the various grounds for refusal and invalidity of registration listed in Article 3 of that directive. In particular, as regards the shape of goods, the Court held that 'in order to be capable of distinguishing an article for the purposes of Article 2 of [Directive 89/104], the shape of the article in respect of which the sign is registered does not require any capricious addition, such as an embellishment which has no functional purpose' (paragraph 50). It set out the

[9] Cited in footnote 6.

circumstances in which extensive use of a sign which consists of the shape of an article is sufficient to give the sign a distinctive character for the purposes of Article 3(3) of that directive, concerning distinctive character acquired through use.

The Court above all clarified, in its answer to the fourth question referred by the national court, the interpretation of the grounds for refusal of registration set out in Article 3(1)(e) of Directive 89/104. Under that provision, trade mark registration is to be refused for signs which consist exclusively of the shape which results from the nature of the goods themselves, the shape of the goods which is necessary to obtain a technical result, or the shape which gives substantial value to the goods. Where a sign is refused registration on the above grounds, it cannot under any circumstances be registered under Article 3(3) of the directive (paragraphs 57 and 75). The Court recalled its case-law that the various grounds for refusal of registration listed in Article 3 of Directive 89/104 must be interpreted in the light of the public interest underlying each of them (Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee* [1999] ECR I-2779, paragraphs 25, 26 and 27). As regards, in particular, signs consisting exclusively of the shape of the product 'necessary to obtain a technical result', the Court noted that that provision 'is intended to preclude the registration of shapes whose essential characteristics perform a technical function, with the result that the exclusivity inherent in the trade mark right would limit the possibility of competitors supplying a product incorporating such a function or at least limit their freedom of choice in regard to the technical solution they wish to adopt in order to incorporate such a function in their product' (paragraph 79). The Court therefore concluded that a sign consisting exclusively of the shape of a product is unregistrable 'if it is established that the essential functional features of that shape are attributable only to the technical result'. Moreover, that ground for refusal or invalidity of registration cannot be overcome by establishing that there are other shapes which allow the same technical result to be obtained.

In Case C-2/00 *Hölterhoff* [2002] ECR I-4187, the Court was called upon to interpret Article 5(1) of Directive 89/104, which entitles the proprietor of a trade mark to prevent all third parties from using in the course of trade any sign which is identical with the trade mark in relation to goods which are identical with those for which the trade mark is registered or any sign where, because of its identity with, or similarity to, the trade mark and the identity or similarity of the goods in question, there exists a likelihood of confusion on the part of the public. The Court ruled that 'the proprietor of a trade mark cannot rely on his exclusive right where a third party, in the course of commercial negotiations, reveals the origin of goods which he has produced himself and uses the sign in question solely to denote the particular characteristics of the goods he is offering for sale so that there can be no question of the trade mark used being perceived as a sign indicative of the undertaking of origin'.

In its judgment of 12 November 2002 in Case C-206/01 *Arsenal Football Club*, not yet published in the ECR, the Court was asked to interpret Article 5(1)(a) of Directive 89/104 in the context of an action for trade mark infringement brought by Arsenal

Football Club Plc against a trader, concerning the latter's selling of scarves marked in large lettering with the word 'Arsenal', a sign which is registered as a trade mark by that club for those and other goods. The Court ruled that, in a situation where a third party uses in the course of trade a sign which is identical to a validly registered trade mark on goods which are identical to those for which the mark is registered, the trade mark proprietor is entitled, in circumstances such as those in this case, to rely on Article 5(1)(a) of Directive 89/104 to prevent that use.

In reaching that conclusion, the Court referred to its case-law, from which it follows that the exclusive right under Article 5(1)(a) of Directive 89/104 was conferred in order to enable the trade mark proprietor to protect his specific interests, that is, to ensure that the trade mark can fulfil its functions. The Court deduced that the exercise of that right must be reserved to cases in which a third party's use of the sign affects or is liable to affect the functions of the trade mark, in particular its essential function of guaranteeing to consumers the origin of the goods. By contrast, the proprietor may not prohibit the use of a sign identical to the trade mark for goods identical to those for which the mark is registered if that use cannot affect his own interests as proprietor of the mark, having regard to its functions. The Court, referring to *Hölterhoff*, pointed out that certain uses for purely descriptive purposes are excluded from the scope of Article 5(1) of Directive 89/104 because they do not affect any of the interests which that provision aims to protect, and do not therefore fall within the concept of use within the meaning of that provision. The Court found, however, that the situation in question in the main proceedings was fundamentally different from that in *Hölterhoff*, since in this case, the use of the sign took place in the context of sales to consumers and was obviously not intended for purely descriptive purposes. The presence on the trader's stall of a notice stating that the goods concerned were not official club products could not call that finding into question.

The Court also found that, in the case at issue in the main proceedings, there was no guarantee that all the goods designated by the trade mark had been manufactured or supplied under the control of a single undertaking responsible for their quality. In those circumstances, the use by a third party of a sign identical to the trade mark is liable to affect the guarantee of origin of the goods and the trade mark proprietor must be able to prevent this. The Court held that it is immaterial that in the context of that use the sign is perceived as a badge of support for, or loyalty or affiliation to, the proprietor of the mark.

In its judgment of 12 December 2002 in Case C-273/00 *Sieckmann*, not yet published in the ECR, the Court was called upon to interpret Article 2 of Directive 89/104 concerning signs of which a trade mark may consist, with regard to an olfactory sign. The Court ruled that that provision must be interpreted as meaning that 'a trade mark may consist of a sign which is not in itself capable of being perceived visually, provided that it can be represented graphically, particularly by means of images, lines or characters, and that the representation is clear, precise, self-contained, easily accessible, intelligible, durable and objective'. As regards olfactory signs, the Court

held, however, that 'the requirements of graphic representability are not satisfied by a chemical formula, by a description in written words, by the deposit of an odour sample or by a combination of those elements'.

In reaching that conclusion, the Court took account of the essential role of registration in the scheme of protection established by both Directive 89/104 and Regulation (EC) No 40/94 on the Community trade mark. [10] While Article 2 of that directive states that a trade mark may consist, in particular, of 'words, ... designs, letters, numerals, the shape of goods or of their packaging', that is a list of examples, as stated in the seventh recital in the preamble to the directive. That provision does not expressly exclude signs which are not in themselves capable of being perceived visually. A trade mark may consist of such a sign provided that it can be represented graphically. The Court set out the requirements which must be met by a graphic representation, given the functions which it is required to perform, particularly in terms of accessibility to the register's users. It drew particular attention to the need for the graphic representation to be clear, precise, self-contained, easily accessible, intelligible, durable and objective.

Applying those requirements to the method of graphic representation of olfactory signs, which was the subject of the national court's request for a ruling, the Court held that a chemical formula 'does not represent the odour of a substance, but the substance as such, and nor is it sufficiently clear and precise' (paragraph 69), that the description of an odour, 'although it is graphic, ... is not sufficiently clear, precise and objective' (paragraph 70), that the deposit of an odour sample does not constitute a graphic representation for the purposes of Article 2 of the directive and that, moreover, such a sample 'is not sufficiently stable or durable' (paragraph 71). For olfactory signs, a combination of those various methods is likewise not capable of satisfying the requirements which must be met by a graphic representation, 'in particular those relating to clarity and precision' (paragraph 72).

12. In the field of *public procurement*, two cases will be noted.

In Case C-92/00 *HI* [2002] ECR I-5553, the Court was asked for a ruling on the interpretation of Directive 89/665/EEC. [11] More specifically, it was requested to rule on whether there is a right to review of the decision of a contracting authority to withdraw an invitation to tender and on the extent of the judicial review to be carried out in such a review procedure.

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

11 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), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

In answer to the questions submitted to it, the Court stated, first, that 'Article 1(1) of [Directive 89/665] requires the decision of the contracting authority to withdraw the invitation to tender for a public service contract to be open to a review procedure, and to be capable of being annulled where appropriate, on the ground that it has infringed Community law on public contracts or national rules implementing that law' and, second, that that directive 'precludes national legislation from limiting review of the legality of the withdrawal of an invitation to tender to mere examination of whether it was arbitrary'.

In Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213, the Court turned its attention for the first time to the question whether ecological criteria may be taken into consideration in the procedures for the award of certain public service contracts. The questions referred by the national court principally concerned the interpretation of Directive 92/50/EEC. The Court indicated, however, that its answer would not be different if the procedure for the award of the public contract fell within the scope of Council Directive 93/38/EEC. [12]

The main proceedings concerned the award of a contract for the provision of bus transport services in the city of Helsinki (Finland). The Court held that where, in the context of a public contract for the provision of urban bus transport services, the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, it may take into consideration ecological criteria such as the level of nitrogen oxide emissions or the noise level of the buses, provided that those criteria satisfy certain conditions.

In reaching the conclusion that Directive 92/50 does not preclude the use of criteria relating to the preservation of the environment, the Court noted that the criteria which may be used as criteria for the award of a public contract to the economically most advantageous tender are not listed exhaustively in the directive, and that Article 36(1)(a) of the directive cannot be interpreted as meaning that each of the award criteria used by the contracting authority must necessarily be of a purely economic nature, since it cannot be excluded that factors which are not purely economic may influence the value of a tender from the point of view of the contracting authority. The Court also referred to the wording of the third sentence of the first subparagraph of Article 130r(2) of the EC Treaty (transferred by the Treaty of Amsterdam in slightly amended form to Article 6 EC), which provides that environmental protection requirements must be integrated into the definition and implementation of Community policies and activities.

Guided by its settled case-law, the Court listed the conditions which must be met in order for the application of criteria relating to the preservation of the environment to be

[12] Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84).

compatible with Community law. Those criteria must be linked to the subject-matter of the contract, may not have the effect of conferring on the contracting authority an unrestricted freedom of choice, must be expressly mentioned in the contract documents or the tender notice, and must comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.

13. As regards *social law*, this report records three cases on social security (13.1), two cases on equal treatment of men and women (13.2) and two cases concerning the interpretation of employment-related directives (13.3).

13.1. Case C-255/99 *Humer* [2002] ECR I-1205 dealt with the question whether the requirement, under Austrian law, that minor children be ordinarily resident in Austria in order to be entitled to advances on maintenance payments was compatible with Community law. The Court first observed that such a benefit is a family benefit within the meaning of Article 4(1)(h) of Regulation (EEC) No 1408/71 [13] (Case C-85/99 *Offermanns* [2001] ECR I-2261). It then stated that a person, one or other of whose parents is an employed person or is out of work, is covered by that regulation as a member of the family of a worker. Finally, the Court held that Articles 73 and 74 of the regulation are to be construed as meaning that, where, following a divorce, a minor child resides with the parent who has custody in a Member State other than the Member State providing the benefit, and where the other parent, who is under an obligation to pay maintenance, works or is unemployed in the Member State providing the benefit, that child is entitled to receive a family benefit such as the advance on maintenance payments provided for under Austrian law.

In Case C-277/99 *Kaske* [2002] ECR I-1261, the Court ruled on the possibility of applying a convention relating to unemployment insurance concluded between the Federal Republic of Germany and the Republic of Austria, in place of Regulation No 1408/71, by extending the principles set out in *Rönfeldt* (Case C-227/89 [1991] ECR I-323) to unemployment benefit. The Court held that such application was possible in the case at issue in the main proceedings. It stated that the sole purpose of the principles laid down in *Rönfeldt* is to perpetuate entitlement to an established social right not enshrined in Community law at the time when the national of a Member State relying on it enjoyed that right. Accordingly, the fact that Regulation No 1408/71 became applicable in a national's Member State of origin on the date when that Member State acceded to the European Community does not affect his established right to benefit from a bilateral rule which was the only one applicable to him when he exercised his right to freedom of movement.

[13] 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 (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1).

Joined Cases C-393/99 and C-394/99 *Hervein and Others* [2002] ECR I-2829 concerned the validity of certain provisions of Regulation No 1048/71, [14] inasmuch as they provide that persons who pursue an activity as an employee in one Member State and an activity as a self-employed person in another Member State are subject to the legislation of both those Member States. The Court declared that examination of the questions referred had not disclosed any factor of such a kind as to affect the validity of the provisions in question. It added that it is, where appropriate, for the national court hearing disputes in the context of the application of those provisions, first, to ascertain that the legislation of the States concerned applied in that context is applied in accordance with Articles 39 EC and 43 EC, and in particular that the national legislation whose conditions for application are at issue does afford social security cover for the person concerned, and, second, to determine whether those provisions should, exceptionally, be disapplied at the request of the worker concerned where they would cause him to lose a social security advantage which he originally enjoyed under a social security convention in force between two or more Member States.

13.2. In Case C-476/99 *Lommers* [2002] ECR I-2891, the Court held that Article 2(1) and (4) of Directive 76/207/EEC [15] does not preclude a scheme set up by a minister to tackle extensive under-representation of women within his ministry under which, in a context characterised by a proven insufficiency of proper, affordable care facilities, a limited number of subsidised nursery places made available by the ministry to its staff is reserved for female officials alone, whilst male officials may have access to them only in cases of emergency, to be determined by the employer. The Court added that that is so, however, only in so far, in particular, as that exception in favour of male officials is construed as allowing those of them who take care of their children by themselves to have access to the nursery places scheme on the same conditions as female officials.

Case C-320/00 *Lawrence and Others* [2002] ECR I-7325 dealt with the interpretation of Article 141(1) EC, with regard to female workers who, following a process of compulsory competitive tendering, were transferred from a public body to private undertakings and received lower rates of pay than they received prior to the transfer. In that connection, the Court found that there is nothing in the wording of Article 141(1) EC to suggest that its applicability is limited to situations in which men and women work for the same employer. However, where the differences identified in the pay conditions of workers cannot be attributed to a single source, there is no body which is responsible for the inequality and which could restore equal treatment. The Court therefore held that Article 141(1) EC does not apply to a situation in which the

14 Article 14c(1)(b), now Article 14c(b), of, and Annex VII to, Regulation No 1408/71, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), and as amended by Council Regulation (EEC) No 3811/86 of 11 December 1986 (OJ 1986 L 355, p. 5).

15 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).

differences identified in the pay conditions of workers of different sex performing equal work or work of equal value cannot be attributed to a single source.

13.3. In Case C-164/00 *Beckmann* [2002] ECR I-4893, the Court gave a preliminary ruling on the interpretation of Directive 77/187/EEC relating to the safeguarding of employees' rights in the event of transfers of undertakings. [16] The order for reference was made in proceedings between Mrs Beckmann and her former employer concerning an early retirement pension and other benefits which Mrs Beckmann considered to be due to her following her dismissal for redundancy, and which her former employer refused to pay to her. The Court held that 'early retirement benefits and benefits intended to enhance the conditions of such retirement, paid in the event of dismissal to employees who have reached a certain age, such as the benefits at issue in the main proceedings, are not old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes within the meaning of Article 3(3) of [Directive 77/187]' (paragraph 32).

In reaching that conclusion, the Court held that given the general objective of safeguarding the rights of employees in the event of transfers of undertakings pursued by Directive 77/187, the exception to the rule that provides for transfer to the transferee of the transferor's rights and obligations arising from a contract of employment, from an employment relationship or from a collective agreement must be interpreted strictly. In that connection, it is only benefits paid from the time when an employee reaches the end of his normal working life as laid down by the general structure of the pension scheme in question, and not benefits paid in circumstances such as those in point in the main proceedings (dismissal for redundancy), that can be classified as old-age benefits, even if they are calculated by reference to the rules for calculating normal pension benefits. The Court also held that the obligations applicable in the event of the dismissal of an employee are transferred to the transferee, 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.

In its judgment of 12 December 2002 in Case C-442/00 *Rodríguez Caballero*, not yet published in the ECR, the Court gave a preliminary ruling on the interpretation of Directive 80/987/EEC relating to the protection of employees in the event of the insolvency of their employer. [17] Applying the general principle of equality and non-discrimination, the Court ruled that claims in respect of 'salarios de tramitación'

16 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).

17 Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (OJ 1980 L 283, p. 23).

(post-dismissal remuneration during proceedings) must be regarded as employees' claims arising from contracts of employment or employment relationships and relating to pay, within the meaning of that directive, irrespective of the procedure under which they are determined, if, according to the national legislation concerned, such claims, when recognised by judicial decision, give rise to liability on the part of the guarantee institution and if a difference in treatment of identical claims acknowledged in a conciliation procedure is not objectively justified.

14. So far as concerns the law relating to the Community's *external relations*, one Opinion and four judgments merit attention.

Opinion 1/00 [2002] ECR I-3493 was given following a request from the Commission, pursuant to Article 300(6) EC, concerning the compatibility with the provisions of the EC Treaty of a proposed agreement on the establishment of a European Common Aviation Area ('the ECAA Agreement') to be concluded between a number of States applying for accession to the European Community and the European Community itself, and, in particular, of the system of legal supervision provided for in that agreement.

In its Opinion, the Court applied the principles set out in Opinion 1/91 [1991] ECR I-6079 and Opinion 1/92 [1992] ECR I-2821 concerning a proposed agreement relating to the creation of the European Economic Area. The Court stated that where a request was made for an Opinion concerning a proposed agreement such as the ECAA Agreement, a large number of whose rules were essentially rules of Community law, it had to ascertain whether the agreement before it included adequate measures to guarantee that neither the endeavour to ensure uniform interpretation of those rules nor the new institutional links established by the agreement between the Community and the States party to it affected the autonomy of the Community legal order. It found that preservation of that autonomy required, first, that the essential character of the powers of the Community and its institutions as conceived in the EC Treaty remained unaltered. Second, it required that the procedures for ensuring uniform interpretation of the rules of the ECAA Agreement and for resolving disputes would not have the effect of binding the Community and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of Community law referred to in that agreement. After a detailed examination of the proposed agreement, the Court concluded that it did not affect the essential character of powers of the Community and its institutions to such an extent that it had to be declared incompatible with the EC Treaty.

In Case C-13/00 *Commission* v *Ireland* [2002] ECR I-2943, the Court declared that, by failing to obtain its adherence before 1 January 1995 to the Berne Convention for the Protection of Literary and Artistic Works, Ireland had failed to fulfil its obligations under Article 300(7) EC in conjunction with Article 5 of Protocol 28 to the Agreement on the

European Economic Area. [18] In this judgment, the Court found that the obligation on Member States to adhere to the Berne Convention, imposed by Article 5 of Protocol 28 to the Agreement on the European Economic Area, comes within the scope of Community law and that the Commission is thus competent to assess compliance with that obligation, subject to review by the Court, given that the obligation features in a mixed agreement concluded by the Community and its Member States and relates to an area covered in large measure by the EC Treaty.

In seven of the eight cases concerning the 'open skies' agreements, referred to in section 7 of this part of the report (*Commission* v *Denmark*, *Commission* v *Sweden*, *Commission* v *Finland*, *Commission* v *Belgium*, *Commission* v *Luxembourg*, *Commission* v *Austria* and *Commission* v *Germany*), the Commission claimed that the Member States had infringed the external competence of the Community by entering into the disputed commitments. It maintained that that competence arose, first, from the necessity, within the meaning of Opinion 1/76 [1977] ECR 741, of concluding an agreement containing such commitments at Community level and, second, from the fact that the disputed commitments affected, within the meaning of the judgment in Case 22/70 *Commission* v *Council* [1971] ECR 263 (the *'ERTA'* judgment), the rules adopted by the Community in the field of air transport.

The Court held first that the principles set out in Opinion 1/76 were not applicable. After a detailed analysis, it found that the present case did not disclose a situation in which internal competence could effectively be exercised only at the same time as external competence. The Court then considered whether the Community had competence in the sense contemplated in the *ERTA* judgment, according to which the Community's competence to conclude international agreements arises not only from an express conferment by the EC Treaty but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of these provisions, by the Community institutions. The Court pointed out that the Community acquires an external competence by reason of the exercise of its internal competence in the following cases: (i) where the international commitments fall within the scope of the common rules or within an area which is already largely covered by such rules, even if there is no contradiction between the international commitments and the common rules, (ii) whenever the Community has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries, and (iii) where the Community has achieved complete harmonisation in a given area. On the other hand, any distortions in the flow of services in the internal market which might arise from bilateral 'open skies' agreements did not in themselves affect the common rules adopted in that area and were thus not capable of establishing an external competence of the Community. Finally, the Court applied those criteria and, after a detailed examination of Community air transport legislation, declared that, by entering into or

[18] Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3).

maintaining in force, despite the renegotiation of the 'open skies' agreements, international commitments with the United States of America concerning air fares and rates charged by carriers designated by that non-member country on intra-Community routes and computerised reservation systems offered for use or used in the territory of the Member States concerned, those Member States had failed to fulfil their obligations under Article 10 EC and under Regulations No 2409/92 and No 2299/89. [19]

In Case C-29/99 *Commission* v *Council* (judgment of 10 December 2002, not yet published in the ECR), the Commission sought the partial annulment of the Council Decision of 7 December 1998 approving the accession of the European Atomic Energy Community ('the EAEC') to the Nuclear Safety Convention. In the Commission's view, the declaration annexed to that decision concerning the respective competences of the EAEC and the Member States with regard to the convention did not refer to a number of articles in the convention in respect of which the EAEC had competence to act. In its judgment, the Court annulled the declaration in so far as Articles 7, 14, 16(1) and (3), 17, 18 and 19 of the convention, which relate to fields in which the EAEC has competence, were not referred to there.

Case C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049 concerned the question whether the Court's interpretation of Article 39 EC (on freedom of movement for workers) in Case C-272/92 *Spotti* [1993] ECR I-5185, to the effect that a provision of the German framework law on higher education could not be applied to Community nationals because of its discriminatory character, could be applied to the provision of the Europe Agreement with the Republic of Poland relating to freedom of movement for workers. [20] After finding that that provision of the agreement has direct effect, so that Polish nationals who assert it may also rely on it before the national courts of the host Member State, the Court held that the interpretation of Article 39 EC could be applied to that provision, in view of the aims of the agreement, and that no argument providing objective justification for the discrimination in question had been advanced before the Court.

15. In the field of *transport*, Case C-115/00 *Hoves Internationaler Transport-Service* [2002] ECR I-6077 merits attention. This case concerned the application of certain provisions in force in Germany to a road haulage undertaking which was established in Luxembourg and authorised in that State to engage in international road haulage. By virtue of that authorisation, the undertaking was entitled, in accordance with Article 1 of

[19] Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services (OJ 1992 L 240, p. 15), and Council Regulation (EEC) No 2299/89 of 24 July 1989 on a code of conduct for computerised reservation systems (OJ 1989 L 220, p. 1), as amended by Council Regulation (EEC) No 3089/93 of 29 October 1993 (OJ 1993 L 278, p. 1).

[20] 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).

Regulation (EEC) No 3118/93, [21] to operate national haulage services in another Member State (cabotage services by road). In concrete terms, the question arose whether the obligation to register the vehicle in the host Member State (in this case, the Federal Republic of Germany) and the obligation to pay motor vehicle tax there are compatible with that regulation and Directive 93/89/EEC. [22]

The Court noted that 'to require the carrier to register the vehicle in the host Member State would be the very negation of the freedom to provide the cabotage service by road, the exercise of which presupposes, as the second subparagraph of Article 3(3) of Regulation No 3118/93 provides, that the motor vehicle is registered in the Member State of establishment' (paragraph 55). 'Similarly', the Court went on, 'to require a carrier to pay a tax on the motor vehicles in the host Member State, even though he has already paid such a tax in the Member State of establishment, would be contrary to the objective of Regulation No 3118/93, which, according to the second recital in its preamble, is aimed at removing all restrictions against the person providing the services on the grounds of his nationality or the fact that he is established in a different Member State from the one in which the service is to be provided' (paragraph 56). It concluded that 'Article 6 of Regulation No 3118/93 precludes national provisions of a host Member State which entail the latter levying vehicle tax on the use of motor vehicles for the carriage of goods by road on the ground that those vehicles have their regular base in the territory of that host Member State, when they are registered in the Member State of establishment and are used in the host Member State to carry out cabotage by road, in accordance with authorisations lawfully issued by the Member State of establishment' (paragraph 59).

The Court also found that it is incompatible with Directive 93/89 for the host Member State to levy the tax on motor vehicles. It observed first of all that the dispute in the main proceedings arose from a positive conflict of laws concerning the registration of vehicles, and thus concerning their taxation. Although Directive 93/89 does not contain any conflict of law rule to determine which Member State is competent as regards registration, the Court nevertheless found that the objective of encouraging the development of cabotage services by road, combined with the harmonisation of taxes on certain commercial vehicles effected by Directive 93/89, could not be achieved if the host Member State were able to require payment of the tax in question. It held that 'Article 5 of Directive 93/89 precludes national provisions of a host Member State, within the meaning of Article 1(1) of Regulation No 3118/93, which entail the levying by the latter of vehicle tax on the use of motor vehicles for the carriage of goods by road on the ground that those vehicles have their regular base in the territory of that host

21 Council Regulation (EEC) No 3118/93 of 25 October 1993 laying down the conditions under which non-resident carriers may operate national road haulage services within a Member State (OJ 1993 L 279, p. 1).

22 Council Directive 93/89/EEC of 25 October 1993 on the application by Member States of taxes on certain vehicles used for the carriage of goods by road and tolls and charges for the use of certain infrastructures (OJ 1993 L 279, p. 32).

Member State, when they are registered and the tax referred to in Article 3(1) of that directive has been paid in the Member State of establishment and those vehicles are used in the host Member State for cabotage by road, in accordance with authorisations lawfully issued by the Member State of establishment' (paragraph 72).

16. So far as concerns *tax law*, it is worth noting Case C-427/98 *Commission* v *Germany* [2002] ECR I-8315 in which the Court held that, by not adopting the measures necessary to allow adjustment of the taxable amount of a taxable person who has effected reimbursement where money-off coupons are reimbursed, the Federal Republic of Germany had failed to fulfil its obligations under Article 11 of the Sixth Council Directive (77/388/EEC) on value added tax. [23]

The Commission's action concerned the situation in which one or more wholesalers intervene in the distribution chain between the manufacturer and the retailers, and vouchers are reimbursed directly by the manufacturer to the retailers without any intervention by the wholesalers. In that situation the German legislation did not allow deduction from the manufacturer's taxable amount of the amount indicated on the vouchers, such a reduction being allowed only if the manufacturer had delivered the product directly to the retailer presenting the voucher to him. Under the approach adopted by the Commission, on the other hand, the manufacturer is entitled to reduce his taxable amount in the amount of the voucher reimbursed by him. The Court confirmed that approach, which it had already followed in Case C-317/94 *Elida Gibbs* [1996] ECR I-5339. The Court rejected, among others, the arguments advanced by the German and United Kingdom Governments to the effect that the fiscal treatment of money-off coupons in *Elida Gibbs* is incompatible with the principles on which the system of value added tax is based. The Court also concluded that in the situations which may give rise to over-deduction of input tax, mentioned by those two governments, the Sixth Directive (77/388) allows adequate measures to be taken to prevent any claim for deduction which is unjustified and thus any loss of tax revenue.

17. Finally, two cases concerning the *Brussels Convention* (Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters) should be mentioned.

Case C-80/00 *Italian Leather* [2000] ECR I-4995 concerned the interpretation of Article 27(3) of the Brussels Convention which includes, among the possible grounds for refusing to recognise judgments given in another Contracting State, the situation where

[23] Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), in the version resulting from Council Directive 95/7/EC of 10 April 1995 amending Directive 77/388/EEC and introducing new simplification measures with regard to value added tax — scope of certain exemptions and practical arrangements for implementing them (OJ 1995 L 102, p. 18).

the judgment at issue is 'irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought'.

Since that provision refers to 'judgments' without further precision, the Court drew the conclusion that decisions on interim measures are covered by it. So far as concerns the concept of 'irreconcilable' judgments, the Court referred to its case-law which establishes that it should be examined whether the judgments in question entail legal consequences that are mutually exclusive. As regards a case such as the one at issue in the main proceedings, the Court held that, 'on a proper construction of Article 27(3) of the Brussels Convention, a foreign decision on interim measures ordering an obligor not to carry out certain acts is irreconcilable with a decision on interim measures refusing to grant such an order in a dispute between the same parties in the State where recognition is sought' (paragraph 47).

In Case C-334/00 *Tacconi* [2002] ECR I-7357, the Court held that in a situation characterised by the absence of obligations freely assumed by one party towards another on the occasion of negotiations with a view to the formation of a contract and by a possible breach of rules of law, in particular the rule which requires the parties to act in good faith in such negotiations, an action founded on the pre-contractual liability of the defendant is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Brussels Convention. The Court pointed out, in particular, that the concept of 'matters relating to tort, delict or quasi-delict' within the meaning of that provision covers all actions which seek to establish the liability of a defendant and which are not related to a 'contract' within the meaning of Article 5(1) of the Convention.