Proceedings of the Court of Justice in 1998
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The judicial activity of the Court of Justice in 1998 was significant in terms of both the number of cases disposed of and the legal issues dealt with.

During this period, the Court delivered 254 judgments (compared with 242 in 1997) and made 120 orders (135 in 1997). It thus brought 374 cases to a close, corresponding to a gross figure, before joinder, of 420 cases. In 1997, a net total of 377 cases were disposed of (456 before joinder).

The number of cases brought in 1998 (485 before joinder) was slightly higher than in 1997 (445 before joinder).

On 31 December 1998, there were 664 cases pending (623 in 1997, in net figures).

A brief overview of the most important case-law developments in 1998 is set out below.

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1. First, there were a number of judgments concerning the admissibility of applications to the Court of Justice and the Court of First Instance.

As regards *the fourth paragraph of Article 173 of the EC Treaty*, which governs applications for annulment by natural or legal persons other than the Member States and the institutions, the judgments in *Greenpeace, Glencore Grain and Others* and *Kruidvat* must be mentioned.

In its judgment of 2 April 1998 in Case C-321/95 P *Greenpeace Council and Others* v *Commission* [1998] ECR I-1651, the Court applied, *inter alia*, the conditions of admissibility laid down in the fourth paragraph of Article 173 to an action brought by an association for the protection of the environment. The applicant, together with certain private individuals, had brought an appeal against an order in which the Court of First Instance had declared inadmissible its application for annulment of a Commission decision approving Community financial assistance for the construction of power stations by a Member State. The Court of Justice upheld the judgment of the Court of First Instance. As regards more specifically the nature and specific character of the environmental interests on which the action was based, the Court first held that, in so far as it concerned the financing of the power stations and not their construction, the contested decision could have only an indirect effect on the rights invoked. It also pointed out that the rights afforded to the applicants by the Community environmental legislation were, in that instance, fully protected by the national courts, before which proceedings had been brought.

By contrast, in four judgments delivered on 5 May 1998 (Case C-386/96 P *Dreyfus* v *Commission* [1998] ECR I-2309; Case C-391/96 P *Compagnie Continentale (France)* v *Commission* [1998] ECR I-2377 and Cases C-403/96 P and C-404/96 P *Glencore Grain* v *Commission* [1998] ECR I-2405 and I-2435), the Court annulled the judgments by which the Court of First Instance had declared inadmissible applications by several companies for annulment of decisions of the Commission. The Commission had relations with financial bodies and agents in the Russian Federation and the Ukraine in connection with the implementation of loans granted by the European Economic Community to those countries. In that context, it had adopted measures addressed to those financial bodies and agents by

which it refused to recognize, for the purposes of the use of the Community loans, contracts for the purchase of wheat which had previously been entered into with the applicant undertakings. The Court of First Instance had considered that the Commission's decisions were not of direct concern to the undertakings since they had no legal relationship with it and the contested decisions were not addressed to them. That conclusion was not affected by the presence in the contracts at issue of a suspensory clause making performance of the contract and payment of the price subject to a positive decision by the Commission on the matter of financing.

On the basis of the socio-economic context in which the contracts were concluded, the Court held that those contracts had been entered into only subject to the obligations assumed by the Community, in its capacity as lender, and that the insertion into the contracts of that suspensory clause merely reflected the fact that the contracts were subject, for financial reasons, to the conclusion of the loan agreement with the Community. The Court held that the Commission'srefusals had deprived the applicants of any real possibility of performing the contracts awarded to them or of obtaining payment for supplies already made and had thus directly affected their legal situation. The cases were therefore referred back to the Court of First Instance for judgment on the substance.

Finally, in Case C-70/97 P *Kruidvat* v *Commission*, not yet published in the ECR, the Court held that the Court of First Instance had not misconstrued the fourth paragraph of Article 173 in declaring inadmissible, in the absence of any individual interest, the application by a distributor of cosmetic products against a Commission decision declaring the provisions of Article 85(1) of the EC Treaty inapplicable to the standard form selective distribution agreement between a producer of luxury cosmetic products or its exclusive agents, on the one hand, and its specialized retailers, on the other.

The Court first supported the findings of the Court of First Instance, according to which, with regard to such a decision, the participation of a representative body in the administrative procedure before the Commission is not sufficient for one of its members to be individually distinguished for the purpose of Article 173 of the Treaty. According to the Court, the participation of such associations in the procedure cannot relieve their members of the need to establish a link between their individual situation and the action of the association. Second, the Court confirmed that the existence of national proceedings was not sufficient to distinguish the applicant individually. In the case heard, the applicant had been summoned to appear on the basis of the national legislation on business practices and had submitted in its defence that the selective distribution network at issue was unlawful under Article 85 of the Treaty. The Court pointed out that the fact that an action has consequently been brought against a trader by a party who benefits from, or is responsible for, the organization of the distribution network, before the expiry of the time-limit for challenging a Commission decision relating to the network, is a matter of pure chance and not directly linked to that decision.

Finally, another aspect of that case was that the Court refused to establish an analogy between the position of the applicant, as an interested third party under Article 19(3) of Regulation No 17, and that of undertakings which are parties concerned, within the meaning of Article 93(2) of the EC Treaty, in the field of State aid, as assessed by the Court in, *inter alia*, Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487. Whilst the legal interest of the latter in bringing proceedings was justified by the absence of any procedural guarantee, that was not the case as regards an undertaking such as the applicant, which had the opportunity to exercise its right to make its views known to the Commission, following the Commission's invitation to do so, but did not take advantage of that opportunity).

As regards *the procedure for obtaining preliminary rulings*, provided for in Article 177 of the EC Treaty, the judgments delivered by the Court in 1998 continued the trend of the

preceding years. The Court thus confirmed that, in order for a body to be able to refer questions for a preliminary ruling, it must perform a judicial function, which excludes a body such as the Skatterättsnämnden (Swedish Revenue Board), which acts in an administrative capacity when giving preliminary binding decisions, which serve the taxpayers' interests inasmuch as they are better able to plan their activities, but is not called upon to hear and determine cases (Case C-134/97 *Victoria Film*, not yet published in the ECR). Furthermore, 1998 saw the application, by the Court, for the first time of Article 104(3) of its Rules of Procedure, which provides that, where a question referred to the Court for a preliminary ruling is manifestly identical to a question on which the Court has already ruled, the Court may give its decision by reasoned order in which reference is made to its previous judgment. It used that simplified procedure for questions relating both to the interpretation (Joined Cases C-405/96 to C-408/96 *Béton Express and Others* v *Direction Régionale des Douanes de la Réunion* [1998] ECR I-4253) and to the validity of Community law (order in Joined Cases C-332/96 and C-333/96 *Conata and Agrindustria* v *AIMA*, not yet published in the ECR).

The Court partially annulled a judgment of the Court of First Instance by upholding a plea put forward in the context of an appeal, according to which the *duration of the Court proceedings* had been excessive. The case involved a judgment in which the Court of First Instance had partially annulled a Commission decision relating to a proceeding under Article 85 of the Treaty in the welded steel mesh sector. Approximately five and a half years had elapsed between the date on which the application for annulment was lodged and the date on which the Court of First Instance delivered its judgment. Referring, by analogy, to the judgments of the European Court of Human Rights, the Court assessed the reasonableness of such a period in the light of the circumstances specific to the case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the applicant and of the competent authorities. The Court also took account, first, of the fact that in some respects the structure of the Community judicial system justifies allowing the Court of First Instance - which must find the facts and undertake a substantive examination of the case - a relatively longer period to investigate actions entailing an examination of complex facts and, second, of the constraints inherent in proceedings before the Community judicature, associated in particular with the language regime and the obligation to publish judgments in all the official languages of the Community. Bearing in mind all those factors, the Court concluded that, notwithstanding the relative complexity of the case, the proceedings before the Court of First Instance did not satisfy the requirements concerning disposal of cases within a reasonable time. For reasons of economy of procedure and in order to ensure an immediate and effective remedy regarding a procedural irregularity of that kind, the Court decided to hold that the plea was well founded for the purposes of setting aside the contested judgment, but only in so far as it set the amount of the fine imposed on the appellant. In the absence of any indication that the length of the proceedings affected the outcome of the case in any way, it could not, however, be a ground for setting aside the contested judgment in its entirety. The Court considered that a sum of ECU 50 000 constituted reasonable satisfaction and reduced the amount of the fine accordingly.

In the same judgment, the Court also considered, and subsequently rejected, a whole series of pleas relating to the regularity of proceedings before the Court of First Instance. The appellant submitted that the Court of First Instance had infringed the general principle requiring prompt determination of judicial proceedings in giving judgment 22 months after the close of the oral procedure, the delay involved being such that the effect of that procedure was negated by the judges' reduced recollection of it. The Court held that no provision required the judgments of the Court of First Instance to be delivered within a specified period after the oral procedure and, furthermore, that it had not been established that the duration of the procedure had any impact on the outcome of the proceedings, in particular as far as any loss of evidence was concerned. The Court also considered that the general principles of Community law governing the right of access to the Commission's file did not, as such, apply to court proceedings, the latter being governed by specific provisions.

A party asking the Court of First Instance to order the opposite party to produce certain documents had to identify those documents and provide at least minimum information indicating the utility of those documents for the purposes of the proceedings (Case C-185/95 P *Baustahlgewebe* v *Commission*, not yet published in the ECR).

Finally, as regards the conditions under which suspension of application of an act or interim measures are granted, under Articles 185 and 186 of the EC Treaty, the orders in Case C-363/98 P (R) *Emesa Sugar* v *Council*, not yet published in the ECR and Case C-364/98 P (R) *Emesa Sugar* v *Commission*, not yet published in the ECR) are of interest. It is apparent from those cases, that, when he bases a decision to dismiss an application for suspension of execution of a measure or for interim measures on the absence of the requisite urgency, the judge hearing the application for interim measures cannot require that the applicant be able to plead incontestable urgency on the sole ground that the author of the contested measure acted in the exercise of a discretion. The mere fact that a discretion exists, in the absence of any consideration of *fumus boni juris* and any balancing of the interests at stake, does not determine the nature of the requirements relating to the condition of urgency. Otherwise, the effectiveness of provisional legal protection would be removed or at any rate reduced, since it would be a matter of calling into question a measure adopted in the exercise of a broad discretion. In particular, there would be a risk of refusal of interim measures which might be necessary to preserve the effectiveness of the judgment on the substance of the case in circumstances where the *prima facie* case was particularly strong and the balance of interests tilted towards the party seeking the measure, and all because the urgency was not incontestable.

2. The scope of *certain general principles of Community law* has also been defined more precisely by the recent case-law of the Court concerning the primacy of Community law, the principle of effective judicial protection and the limits to the procedural autonomy which, in the absence of harmonization, Member States have in implementing Community law, and the question of the abusive exercise of rights conferred by Community law.

It is settled case-law that, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided that such rules are not less favourable than those governing similar domestic actions (*principle of equivalence*) and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (*principle of effectiveness*). The Court has therefore recognized that national rules laying down reasonable limitation periods for bringing proceedings in the interests of legal certainty are compatible with Community law.

Several cases referred to the Court concerned the detailed rules relating to repayment of an Italian administrative tax for the registration of companies in the Italian Register of Companies, the incompatibility of which with Directive 69/335/EEC was apparent from the judgment which the Court had given in Joined Cases C-71/91 and C-178/91 *Ponente Carne* and *Cispadana Costruzioni* [1993] ECR I-1915.

In three judgments delivered on 15 September 1998, which were sequels to the judgment in Case C-188/95 *Fantask and Others* [1997] ECR I-6783, the Court interpreted Community law in order to enable national courts to evaluate the detailed rules governing such repayments. The Court first stated that the right to impose a time-limit for bringing proceedings was not affected by the fact that the temporal effect of a judgment such as that in *Ponente Carne* had not been limited. Whilst the effects of a Court judgment providing an interpretation normally go back to the time at which the rule interpreted came into force, it is also necessary, if that interpretation is to be applied by the national court to facts predating the Court's judgment, for the detailed procedural rules governing legal proceedings under

national law to have been observed as regards matters of form and substance. Second, the time-limit under national law may be reckoned from the date of payment of the charges in question, even if, at that date, the directive concerned had not yet been properly transposed into national law. To justify that conclusion, the Court pointed out that it did not appear that the conduct of the national authorities, in conjunction with the existence of the contested time-limit, had had the effect in that case, in contrast to the situation in Case C-208/90 *Emmott* v *Minister for Social Welfare and the Attorney General* [1991] ECR I-4269, of depriving the applicants of all opportunity of enforcing their rights before the national courts. Thirdly, as regards observance of the principle of equivalence, the Court held that a Member State could not be obliged to extend its most favourable rules governing recovery to all actions for repayment of charges or dues levied in breach of Community law. On the contrary, it could derogate from the ordinary rules governing actions between private individuals for the recovery of sums paid but not due by imposing a shorter time-limit or providing for less favourable rules for the payment of interest, provided that those rules applied in the same way to all actions for repayment of such charges, whether based on Community law or national law (Case C-231/96 *Edis* v *Ministero delle Finanze* [1998] ECR I-4951; Case C-260/96 *Ministero delle Finanze* v *Spac* [1998] ECR I-4997 and Joined Cases C-279/96 to C-281/96 *Ansaldo Energia and Others* v *Amministrazione delle Finanze dello Stato* [1998] ECR I-5025; to the same effect, see also Case C-228/96 *Aprile* v *Amministrazione delle Finanze dello Stato*, not yet published in the ECR, concerning the repayment of charges levied in breach of Community law in respect of customs transactions).

In national proceedings concerning the repayment of the same Italian tax, the Court also had to define the scope of its judgment in Case 106/77 *Simmenthal* [1978] ECR 629, in which it had held that incompatibility of a domestic charge with Community law had the effect "[of precluding] the valid adoption" of new national legislative measures (paragraph 17). In Joined Cases C-10/97 to C-22/97 *Ministero delle Finanze* v *IN.CO.GE. '90and Others*, not yet published in the ECR, the Court reconsidered the judgment in *Simmenthal*, recalling that it had, essentially, held that every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which Community law confers on individuals, setting aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule. The Court held that it could not be inferred from that judgment that the incompatibility with Community law of a subsequently adopted rule of national law had the effect of rendering that rule of national law non-existent. Furthermore, Community law did not require that any non-application, following a judgment given by the Court, of legislation introducing a levy contrary to Community law should deprive that levy retroactively of its character as a charge and divest the legal relationship, established when the charge in question was levied between the national tax authorities and the parties liable to pay it, of its fiscal nature. Any such reclassification was a matter for national law.

By contrast, in another case in which the Court was called upon to interpret 119 of the EC Treaty and Directive 75/117/EEC on equal pay for men and women, the Court held that the principle of effectiveness precluded an employer from relying on a two-year time-limit for bringing proceedings against a female employee, in a situation where the employer's deceit caused the delay in the bringing of proceedings for enforcement of the principle of equal pay. To hold otherwise would be to facilitate the breach of Community law by the employer. The situation would be different only if another remedy, enabling the employee to claim full compensation for the damage suffered, was available and it did not entail procedural rules or other conditions less favourable by comparison with those provided for in relation to similar domestic actions. On the latter point, the Court held that it would be appropriate for the national court concerned to consider whether the other possible remedy involved additional costs and delays by comparison with an action concerning what could be regarded as a similar right under domestic law (Case C-326/96 *Levez* v *T.H. Jennings (Harlow Pools) Ltd*, not yet published in the ECR).

The same principles of effectiveness and equivalence served to guide the Court in determining the extent to which a Member State could set off an amount due to the beneficiary of aid under a Community measure against outstanding debts to that Member State (Case C-132/95 *Jensen and Korn- og Foderstofkompagniet* v *Landbrugsministeriet, EF-Direktorat* [1998] ECR I-2975). In a case pending before the national court, the national authorities had withheld the full amount of area aid payable to a farmer on the basis of a Community regulation in order to discharge his VAT debt. Taking formal note that Community law, as it then stood, contained no general rules on the right of national authorities to effect such set-off, the Court held that such a practice was permissible, provided that it did not impair the effectiveness of Community law and provided that the set-off was not made subject to less favourable conditions or procedures than those applicable to cases in which purely domestic claims were set off. Furthermore, it was for each Member State to define the conditions under which its national authorities could apply set-off and to regulate all incidental issues. Under Community law, neither the legal basis of the debt to the State nor the fact that the amount set off against it may derive from the Community's own resources in any way affects the Member State's right to effect such set-off. Finally, the Court clearly distinguished that question from the problem of national authorities claiming payments from beneficiaries of Community aid to cover administrative costs relating to applications made by them (on this question, see also Joined Cases C-36/97 and C-37/97 *Kellinghusen and Ketelsen* v *Amt für Land- und Wasserwirtschaft* [1998] ECR I-6337.

Finally, in a case relating to company law, the Court confirmed its earlier case-law according to which Community law does not preclude national courts from applying a provision of national law in order to assess whether a right arising from a provision of Community law *is being exercised abusively*, provided however, that when assessing the exercise of that right they do not alter the scope of that provision or compromise the objectives pursued by it. The question to be decided in the case before the national court was whether there was an abusive exercise of rights in a situation where a shareholder opposed an increase in a company'sshare capital, decided upon by derogating procedure, by relying on Article 25 of the Second Company Law Directive 77/91/EEC, which reserves the power to decide on increases of share capital to the general meeting. The Court explained that the abusive nature of any recourse to Article 25 could not be established simply in the light of the fact that the contested increase in share capital resolved the financial difficulties threatening the existence of the company concerned and clearly enured to the shareholder's economic benefit, or that the shareholder did not exercise his preferential right to acquire new shares issued on the increase in share capital. Such considerations, ostensibly aimed at controlling an abuse of rights, would alter the scope of the decision-making power of the general meeting as provided for by Article 25 of the Second Directive 77/91 (Case C-367/96 *Kefalas and Others* v *Ellinikio Dimosio* [1998] ECR I-2843).

3. In the *institutional* field, besides the traditional issues of choice of legal basis for Community measures, there were, in 1998, issues relating to the procedures for the adoption of Commission decisions (comitology and collegiality) and to the financing of Community actions. As regards the choice of *legal basis*, a judgment delivered on 28 May 1998 annulled a Council decision on the ground that, since it involved measures falling within the first, second and third indents of Article 129c(1) of the EC Treaty (trans-European networks), the procedure for the adoption of which is laid down in Article 129d, the decision could not be adopted on the basis of Article 235 of the EC Treaty (Case C-22/96 *Parliament* v *Council* [1998] ECR I-3231). That judgment is consistent with the settled case-law according to which the use of Article 235 of the Treaty as the legal basis for a measure is justified only where no other provision of the Treaty gives the Community institutions the necessary power to adopt the measure in question.

The judgment in Case C-170/96 *Commission* v *Council* [1998] I-2763 was considerably more novel since it was the first case in which a party had sought annulment of a measure adopted

within the framework of the "third pillar" of the Treaty on European Union (EU Treaty) relating to cooperation in the fields of justice and home affairs and raised the question of the scope of the jurisdiction of the Court under the provisions of Article L of the EU Treaty. The Commission was seeking annulment of the joint action of 4 March 1996 adopted by the Council on the basis of Article K.3 of the EU Treaty on airport transit arrangements.

In its judgment, the Court found first of all that under Article L in conjunction with Article M of the EU Treaty it is the task of the Court to ensure that acts which the Council claims fall within the scope of Article K.3(2) of the EU Treaty do not encroach upon the powers which the EC Treaty confers on the Community. Since the Commission claimed that the contested act should have been based on Article 100c of the EC Treaty, the Court concluded that it had jurisdiction to review the content of that act in the light of that provision.

As regards the substance, Article 100c of the EC Treaty sets out the procedure for establishing the list of third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States. The Commission submitted that transit through the international area of an airport in a Member State must be regarded as entry into the territory of that Member State, so that the Community had the power to draw up rules on airport transit arrangements. The Court rejected that argument, considering that Article 100c interpreted in the light of Article 3(d) of the EC Treaty, related only to the entry into and movement within the internal market by nationals of third countries and did not therefore concern mere passage by them through the international areas of airports situated in the Member States, without entering the internal market.

By its judgment in Case C-263/95 *Germany* v *Commission* [1998] ECR I-441, the Court annulled a Commission decision adopted in implementation of Council Directive 89/106/EEC on construction products on the ground that procedural requirements had been breached. It held that the Commission had breached certain aspects of the specific procedure, as provided for by the directive, according to which a standing committee, made up of representatives of the Member States and of the Commission, is involved in the adoption of decisions implementing the directive. In this case, the German version of the draft decision had not been sent to the two separate addressees within the national authorities within the time-limit laid down by the directive and the vote within the Committee had not subsequently been postponed despite a request from the Member State concerned. In finding that there was an infringement of essential procedural requirements, the Court pointed out that the strict formal requirements laid down by the directive was a sufficient indication of the intention to ensure that Member States should have the time necessary to study the documents concerned, which might be particularly complex and require considerable contact and discussion between different administrative authorities or consultation of experts in various fields or of professional organizations.

The internal functioning of the Commission was considered in another judgment in which the Court examined the principle of *collegiality* (Case C-191/95 *Commission* v *Germany* [1998] ECR I-5449). This principle governs the functioning of the Commission and in Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555 the Court had established that, as regards decisions which are adopted for the purpose of ensuring observance of the competition rules and in which the Commission finds that there has been an infringement of those rules, issues directions to undertakings and imposes pecuniary penalties upon them, the undertakings or associations of undertakings addressed by such decisions must be confident that the operative part and the statement of reasons had actually been adopted by the College of Commissioners.

In proceedings for failure to fulfil obligations brought against Germany under Article 169 of the EC Treaty, Germany submitted that the same principles applied in relation to the adoption of a reasoned opinion and the commencement of infringement proceedings before the Court.

The Court held that the decisions to issue a reasoned opinion and to commence proceedings were subject to the principle of collegiality and, since they were not measures of administration or management, could not be delegated. However, it considered that the formal requirements for effective compliance with the principle of collegiality vary according to the nature and legal effects of the acts concerned. The issue of a reasoned opinion is a preliminary step, which does not have any binding legal effect for the addressee. The same is also true of a decision to commence proceedings before the Court of Justice, which does not *per se* alter the legal position in question. The Court concluded that it was not necessary for the College itself formally to decide on the wording of the acts which give effect to those decisions and put them in final form. It was sufficient that those decisions be the subject of collective deliberation by the College of Commissioners and that the information on which they were based be available to the members of the College. The plea of inadmissibility raised by Germany was therefore dismissed.

The sensitive question of *the relationship between budgetary powers and legislative powers* was at the centre of an action brought by the United Kingdom for annulment of a Commission decision to award grants for projects for overcoming social exclusion. The United Kingdom submitted that the Commission did not have competence to commit such expenditure under a budget heading, in the absence of the prior adoption of an act of secondary legislation authorising the expenditure in question (basic act). The Court held that such a basic act was necessary, except with regard to the implementation of budgetary appropriations for non-significant Community action. However, no definition of significant Community action was contained in any act of secondary legislation. In those circumstances, given that implementation of expenditure on the basis of the mere entry of the relevant appropriations in the budget is an exception to the fundamental rule that a basic act must first be adopted, the Court held that there could be no presumption that Community action is non-significant. The Commission must therefore clearly demonstrate that a planned measure is not significant Community action. In the instant case, the Court found that the purpose of the projects at issue was not to prepare future Community action or to launch pilot projects. Rather, it was clear from the actions envisaged, the aims pursued and the persons benefiting from them that they were intended to continue the initiatives of an earlier legislative programme, at a time when it was clear that the Council was not going to adopt a legislative proposal for continuing and extending the Community action in question. In response to the Commission's arguments, the Court set out a number of negative criteria to assist in defining "significant Community action". It made clear, firstly, that there is nothing to prevent significant Community action from entailing limited expenditure or having effects for only a limited period and, secondly, that the degree of coordination to which action is subject at Community level cannot determine whether it is significant or not (Case C-106/96 *United Kingdom* v *Commission* [1998] ECR I-2729).

4. As regards *the free movement of goods*, the judgments in *Chevassus-Marche, Decker, Lemmens and Generics* are worth noting.

To the large number of judgments concerning the levying of "*octroi de mer*" (dock dues) in the French overseas departments have now been added the judgments in Case C-212/96 *Chevassus-Marche* v *Conseil Régional de la Réunion* [1998] ECR I-743 and in Joined Cases C-37/96 and C-38/96 *Sodiprem and Others* v *Direction Générale des Douanes* [1998] I-2039. Originally, the "*octroi de mer*" was charged only on imports into the French overseas departments (the "old" *octroi de mer*). The Council had adopted Decision 89/688/EEC in which it permitted the old "*octroi de mer"* to be maintained until 31 December 1992 and required that, from that date, the charge should apply to all products whether imported into or produced in the French overseas departments, whilst at the same time permitting a system of exemptions for the latter ("new" *octroi de mer*). The Court had ruled that the old *octroi de mer* was incompatible with the Treaty in so far as it constituted a charge having an effect equivalent to a customs duty on imports (judgment in *Legros*) and that the Council could not

permit a charge such as the old *octroi de mer* to be maintained in force, even for a limited period (judgment in *Lancry*).
In the cases decided in 1998, the Court had to rule on the "new" *octroi de mer*. After examining the new charge, it accepted that the system of exemption for local production provided for in the decision was valid, considering that it was subject to sufficiently stringent conditions. In order to reach that conclusion, the Court started from the assumption that, although the Council could not introduce charges having an effect equivalent to a customs duty, it could, by contrast, by virtue of Articles 226 and 227(2) of the EC Treaty, derogate in particular from Article 95, provided that those derogations were strictly necessary and for limited periods and that priority was given to measures least disruptive of the functioning of the common market. The Court held that the system put in place by the Council satisfied those conditions.

The two judgments delivered on the same day in Case C-120/95 *Decker* v *Caisse de Maladie des Employés Privés* [1998] ECR I-1831 and Case C-158/96 *Kohll* v *Union des Caisses de Maladie* [1998] ECR I-1931, concerning, respectively, the free movement of goods and the freedom to provide services, can be considered together, since they raised the same question of principle, namely of determining the compatibility with Community law of a national rule under which reimbursement of the cost of spectacles acquired or out-patient medical services provided in another Member State is subject to specific prior authorization at the tariffs in force in the State of insurance.

The Court noted that, although Community law does not affect the Member States' powers to organise their social security systems, the Member States must nevertheless, when exercising those powers, comply with Community law and, in particular, with Articles 30, 59 and 60 of the EC Treaty. It went on to hold that the national rules at issue constituted a barrier to the free movement of goods since they encourage insured persons to purchase those products in the State of insurance rather than in other Member States, and were thus liable to curb the import of spectacles assembled in other States. They also represented a barrier to freedom to provide services since they deterred insured persons from approaching providers of medical services established in another Member State. The Court concluded that those barriers were not justified. Although it did not exclude the possibility that a risk of serious undermining of the financial balance of the social security system might constitute valid justification, it held that not to be the case in the case in point, in so far as flat-rate reimbursements were involved which had no effect on the financing or balance of the social security system. Nor was it established, as regards, in particular, the provision of services, that the contested rules were necessary in order to maintain a balanced medical and hospital system open to all.

The Court also had to clarify the scope of its judgment in Case C-194/94 *CIA Security International* [1996] ECR I-2201, concerning Directive 83/189/EEC, which provides for preventive control, at Community level, of national technical standards and regulations. The aim of that system is to avoid the creation of new obstacles to trade in goods between Member States. The Court had held in that judgment that breach by a Member State of its obligation to notify the Commission in advance of its technical standards constituted a substantive procedural defect such as to render the technical regulations in question inapplicable, and thus unenforceable against individuals.

In *Lemmens*, the Court stated that, while failure to notify renders technical regulations inapplicable inasmuch as they hinder the use and marketing of a product which is not in conformity with them, failure to notify does not have the effect of rendering unlawful any use of a product which is in conformity with the unnotified regulations. The same applies where such a product is used by the public authorities in proceedings against an individual, provided that the use is not liable to create an obstacle to trade which could have been avoided if the notification procedure had been followed. In the case before the national court

which referred the case to the Court of Justice, that meant, in practice, that breach of the obligation to notify a technical regulation on breath-analysis apparatus did not have the effect of rendering evidence obtained by means of such apparatus, authorised in accordance with regulations which had not been notified, unusable against an individual charged with driving while under the influence of alcohol (Case C-226/97 *Lemmens* [1998] ECR I-3711).

Finally, another judgment worth noting in the field of free movement of goods was delivered in Case C-368/96 *The Queen* v *The Licensing Authority, ex parte Generics (UK) and Others*, not yet published in the ECR. It concerned Directive 65/65/EEC on the approximation of national provisions relating to medicinal products, which provides that a medicinal product may be placed on the market only if marketing authorisation has been obtained for that purpose.

The questions raised related to the conditions to be satisfied by an applicant for marketing authorisation if the applicant is to be able to follow the *abridged procedure* for authorisation provided for by the directive, on the ground that the medicinal product concerned is essentially similar to a product which has been authorised within the Community, in accordance with the Community provisions in force, for not less than six (or ten) years and is marketed in the Member State in respect of which the application is made. That abridged procedure, which exempts the applicant from the obligation to provide pharmacological, toxicological and clinical data, also enables the applicant to save the time and expense necessary for gathering that data. In order to determine the meaning of "essentially similar medicinal products", the Court took into consideration a statement in the minutes of the Council according to which similarity is determined on the basis of three criteria: identical qualitative and quantitative composition in terms of active principles, possession of the same pharmaceutical form and bio-equivalence of the products. Furthermore, it must be apparent, in the light of scientific knowledge, that the medicinal product concerned does not differ significantly from the original product as regards safety or efficacy. The Court ruled that a product which had benefitted from the abridged procedure could be authorised in respect of all the therapeutic indications already authorised for that product, including those that have been authorised for less than six (or ten) years. In so ruling, the Court did not follow the arguments of the Commission, which proposed that, in the exceptional circumstances of major therapeutic innovation - essentially where there is an entirely new therapeutic indication - the results of new tests should be protected in their turn in the same way as for any new medicinal product.

5. In the field of *agriculture*, the three most important judgments concerned once again the banana sector and the measures adopted to check the effects of "mad cow" disease. In both cases, the Court had to reply to questions referred for a preliminary ruling concerning the validity of a Community measure and also rule on an application for annulment lodged by a Member State in respect of the same measure.

In Case C-122/95, Germany sought annulment of the Council's approval of the conclusion of the framework agreement on *bananas* with four Central and South American States, included within the agreements reached in the Uruguay Round multilateral negotiations (1986 - 1994). That framework agreement was an arrangement concluded by the Community following the condemnation, under the GATT, of the Community arrangements for importing bananas. Germany criticized, in particular, the discriminatory treatment accorded to the different categories of traders marketing bananas in the Community. The Court held that some of those differences in treatment accorded to traders within the Community were acceptable, since they were merely an automatic consequence of the different treatment accorded by the Community to third countries with which such traders had entered into commercial relations. That was not the case, however, with the quite manifest difference in treatment whereby certain traders were exempted from the export-licence system. That difference in treatment was on top of the already unequal treatment of

the different categories of traders and the Court held that the Council had not established the need for that measure. The Court therefore partially granted the application (Case C-122/95 *Germany* v *Council* [1998] ECR I-973. In response to a question from a German court, the Court followed the same reasoning in concluding, in a separate judgment delivered on the same day, that a Commission implementing regulation was partially invalid (Joined Cases C-364/95 and C-365/95 *T. Port* v *Hauptzollamt Hamburg-Jonas* [1998] ECR I-1023).

In the cases concerning "mad cow" disease the Court had to consider the Commission's exercise of its powers relating to animal health and their balancing with the requirements of the common market. By the contested decision, the Commission had adopted certain emergency measures to check the effects of mad cow disease and had, in particular, prohibited the United Kingdom, which was particularly affected by that disease, from exporting to the other Member States and to third countries live or dead bovine animals and all products obtained from them. In view of the Commission's discretionary powers in this field, the Court conducted a limited judicial review and concluded that the decision was valid in the light of the arguments put forward in the two cases. It considered, in particular, that the Commission was entitled to react to the publication of new information concerning the disease and that confinement of the animals and products within a specific territory constituted an appropriate measure, even if it affected exports to third countries. In dismissing the plea that the measures adopted were disproportionate, the Court held in particular that, where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks becomes fully apparent. In response to a plea of illegality raised by the United Kingdom, the Court, referring to its previous case-law, ruled that the two directives on the basis of which the contested decision had been adopted had properly been based on Article 43 of the EC Treaty, even though those directives authorised the Commission incidentally to adopt safeguard measures covering products which were not included in Annex II to the EC Treaty (Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211 and Case C-180/96 *United Kingdom* v *Commission* [1998] ECR I-2265).

6. *Freedom of movement for persons* within the Union was the subject of numerous judgments in 1998, addressing a wide range of issues. Besides the usual questions relating to social security for migrant workers, the judgments of the Court touched upon the principle of citizenship of the Union, the use of languages, national public service, direct taxation of natural persons and, finally, the special rules relating to the Channel Islands and the Isle of Man.

Questions submitted for a preliminary ruling by a German court obliged the Court to consider, for the first time, the meaning and scope of the concept of *citizenship of the Union* introduced by the Maastricht Treaty. The reference concerned the situation of a Community national residing in Germany who was refused a social security benefit on the ground that she had no residence permit. The Court held that, compared with the treatment granted to nationals, her treatment entailed discrimination prohibited by Article 6 of the EC Treaty. However, the German Government submitted, *inter alia*, that the facts of the case did not fall within the scope *ratione personae* of the Treaty so that the claimant could not rely on Article 6. In reply, the Court held that, even if the claimant did not have the status of a worker within the meaning of Community law, her situation was such that, as a national of a Member State lawfully residing in the territory of another Member State, she nonetheless came within the scope *ratione personae* of the Treaty provisions on European citizenship. Since Article 8(2) of the EC Treaty attached to the status of citizen of the Union the rights and duties laid down by the Treaty, such a citizen lawfully resident in the territory of the host Member State could therefore rely on Article 6 of the Treaty in all situations which fell within the scope *ratione materiae* of Community law (Case C-85/96 *Martínez Sala* v *Freistadt Bayern* [1998] ECR I-2691).

Still on the matter of Article 6 of the Treaty, the Court received a reference inquiring about the compatibility with Community law of national legislation intended to protect a linguistic minority in the Member State concerned. The reference came from Italy and concerned the Italian rules protecting the German-speaking community of the Province of Bolzano. Those rules provide that the German language is to be on an equal footing with Italian, in particular in relation to criminal proceedings. The question referred was whether it was compatible with Community law to refuse to allow those rules to be applied in favour of German-speaking Community nationals travelling and staying in Bolzano. The Court replied that Article 6 of the Treaty precludes any such refusal, since it involves discrimination, or at least indirect discrimination, on the grounds of nationality, which impedes the right of Community nationals to go to the Member State concerned to receive services or the option of receiving services there. Furthermore, that discrimination did not appear to be justified with regard to the objective pursued, since it did not appear from the case-file that the objective of protecting the ethno-cultural minority would be undermined if the rules in issue were extended to cover German-speaking nationals of other Member States exercising their right to freedom of movement (Case C-274/96 *Bickel and Franz*, not yet published in the ECR).

In *Schöning-Kougebetopoulou*, the question was whether a clause contained in a collective agreement applicable to the public service of a Member State, which, in determining promotions of employees of that public service, did not take account of previous periods of comparable employment completed in the public service of another Member State, was compatible with Community law. The Court held that such a clause manifestly worked to the detriment of migrant workers who had spent part of their careers in the public service of another Member State and so contravened the principle of non-discrimination. Without prejudice to the derogation provided for by Article 48(4) of the EC Treaty, it also held that that clause was not justified (Case C-15/96 *Schöning-Kougebetopoulou* v *Freie und Hansestadt Hamburg* [1998] ECR I-47 and, to the same effect, Case C-187/96 *Commission* v *Greece* [1998] ECR I-1095).

As regards *direct taxation*, in the absence of Community rules the Member States have concluded many bilateral conventions in order, in particular, to avoid double taxation of frontier workers. Under such a convention between France and Germany, Mrs Gilly, who resided in France but worked in the public sector in Germany, was taxed in Germany on her public service pay because she was a German national. That pay was also taxed as part of the household'stotal income in France, but the fact that it was taxed in Germany entitled her to a tax credit equal to the amount of the French tax on the relevant income. Before the national court, Mr and Mrs Gilly claimed that they were subject to discriminatory and excessive taxation. Asked to interpret Community law, the Court held that differentiations resulting from the allocation of fiscal jurisdiction between two Member States could not be regarded as constituting discrimination prohibited under Article 48 of the Treaty. In the absence of any unifying or harmonising measures adopted in the Community context, they arose from the contracting parties' competence to define the criteria for allocating their powers of taxation as between themselves, with a view to eliminating double taxation. For the purposes of the allocation of fiscal jurisdiction, it was not unreasonable for the Member States to look to international practice and the model convention drawn up by the OECD, in particular as regards the choice of the connecting factors. Strictly speaking, whether the tax treatment of the taxpayers concerned is favourable or unfavourable is determined not by the choice of the connecting factor but by the disparities between the tax scales of the Member States concerned and, in the absence of any Community legislation in this field, the determination of those scales is a matter for the Member States (Case C-336/96 *Gilly* v *Directeur des Services Fiscaux du Bas-Rhin* [1998] ECR I-2793).

As regards *social security benefits for migrant workers*, the judgments in *Molenaar*, *Gómez Rodríguez* and *Commission* v *France* are worth highlighting.

Like Mrs Gilly, Mr and Mrs Molenaar lived in France but worked in Germany, where they challenged the requirement to join a German social care insurance scheme, since they had been informed that, despite that requirement, they were not entitled to benefits under the scheme while they resided in France. In response to a question from the national court, the Court of Justice considered, in turn, the nature of the benefit concerned and the consequences to be drawn in relation to a situation such as that of the Molenaars. It held that the social care insurance scheme involved cash sickness benefits for the purposes of Regulation (EEC) No 1408/71 and, consequently, that entitlement to those allowances could not be made dependent upon the insured person's residence in the Member State in which he was insured. Since that was an established principle, the Court considered that Community law did not confer upon persons in the same situation as Mr and Mrs Molenaar the right to be exempted from the payment of contributions for the financing of social care insurance (Case C-160/96 *Molenaar* v *Allgemeine Ortskrankenkasse Baden-Württemberg* [1998] ECR I-843).

The *Gómez Rodríguez* case concerned the grant of orphans' pensions by a German body to Spanish residents. The claimants had received German orphans' pensions in the period preceding Spain's accession to the Communities, on the basis of a bilateral convention between the two States. After accession, the Spanish institution had sole competence. When they reached the age of 18, the age at which their entitlement to orphans' pensions came to an end under Spanish law, the claimants re-applied for the pensions under German law, which provides for a higher age limit, but their application was refused. In response to a question from the national court before which that refusal was challenged, the Court considered, *inter alia*, whether Articles 48 and 51 of the EC Treaty precluded the loss of social security advantages as a result of the inapplicability, following the entry into force of Regulation No 1408/71, of a bilateral social security convention. It recalled that it had declared such an effect to be incompatible with Community law in Case C-227/89 *Rönfeldt* v *Bundesversicherungsanstalt für Angestellte* [1991] ECR I-323. In this case, however, the Court restricted the scope of that judgment, by declaring that that principle could not apply in so far as, when the benefits are set under the regulation for the first time, a comparison has already been made of the advantages resulting from Regulation No 1408/71 and from a bilateral social security convention, with the result that it was more advantageous to apply the Regulation than the convention. The Court pointed out that the opposite conclusion would mean that any migrant worker in the same position as the claimants could at any time ask for either the arrangements under the Regulation or those under the convention to be applied, depending on the most advantageous outcome at that given time, which would cause considerable administrative difficulties despite there being no basis for this approach in Regulation No 1408/71 (Case C-113/96 *Gómez Rodríguez* v *Landesversicherungsanstalt Rheinprovinz* [1998] ECR I-2461).

In another case, the Court granted an application by the Commission for a declaration that, by not allowing frontier workers residing in Belgium to qualify for supplementary retirement pension points after being placed in early retirement, the French Republic had failed to fulfil its obligations under the Treaty. The Court held that the scheme in question constituted a condition of dismissal which was indirectly discriminatory towards migrant workers, prohibited by Article 7 of Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community. The Court refused to grant the French Government's request that the effects of the judgment be limited in time, holding that there was nothing to justify departure from the principle that interpretative judgments have retroactive effect (Case C-35/97 *Commission* v *France* [1998] ECR I-5325).

Finally, still on the subject of freedom of movement for persons, the special rules applicable to the Channel Islands and the Isle of Man were the subject of a judgment delivered on 16 July 1998 in response to an order for reference from the Royal Court of Jersey (Case C-171/96 *Pereira Roque* v *His Excellency the Lieutenant Governor of Jersey* [1998] ECR I-4607).

This was the first time that a court of the Island of Jersey had used the preliminary ruling procedure.

7. Articles 52 and 59 of the EC Treaty, governing *freedom of establishment* and *freedom to provide services*, did not give rise to many judgments during the period under review. Besides the *Kohll* case, which has already been considered above, two important cases, both concerning the restrictions which those two freedoms may entail for the Member States' sovereignty in fiscal matters, should none the less be mentioned.

The *ICI* case related to allegedly discriminatory fiscal treatment in the matter of corporation tax. The national court essentially asked the Court whether Article 52 of the Treaty precludes legislation of a Member State which, in the case of companies established in that State belonging to a consortium through which they control a holding company, makes a particular form of tax relief subject to the requirement that the holding company's business consist wholly or mainly in the holding of shares in subsidiaries that are established in the Member State concerned. The Court first recalled that the provisions concerning freedom of establishment prohibit, in particular, the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation. That was the case in this instance since, under the United Kingdom legislation, consortium relief was available only to companies controlling, wholly or mainly, subsidiaries whose seats were in the national territory. The Court also rejected the reasons put forward by the United Kingdom Government in justification of that discrimination, based on the risk of tax avoidance and the diminution of tax revenue resulting from the fact that revenue lost through the granting of tax relief on losses incurred by resident subsidiaries could not be offset by tax on the profits of non-resident subsidiaries. On the latter point, the Court considered that the discrimination was not necessary to protect the cohesion of the tax system at issue (Case C-264/96 *ICI* v *Kenneth Hall Colmer* (*Her Majesty's Inspector of Taxes*) [1998] ECR I-4695).

The *Safir* case concerned the effect of national rules governing taxation of savings in the form of capital life insurance on the freedom to provide services within the Community of companies offering that type of savings product. The Swedish legislation provided for taxation arrangements which were technically quite different depending on whether the insurance company was established in Sweden or abroad. If the company was established in Sweden, the tax, calculated on the basis of the company's share capital, was levied on that company, whereas if the company was established abroad it was the person who had taken out life insurance who had to pay a tax on the premiums paid, after registering himself and declaring the payment of the premium. The Court held that the Swedish legislation had a number of aspects liable to dissuade individuals from taking out insurance with companies not established in Sweden and liable to dissuade insurance companies from offering their services on the Swedish market (obligation to take specific steps, greater surrender costs after a short period, obligation to provide precise information concerning the revenue tax to which the company is subject and uncertainty created by differences of assessment on the part of the Swedish authorities). In view of the fact that the legislation also lacked transparency when other more transparent systems were conceivable, the Court came to the conclusion that Article 59 of the Treaty precluded the application of the system under consideration (Case C-118/96 *Safir* v *Skattemyndigheten i Dalarnas Län* [1998] ECR I-1897).

8. *Competition law*, in the broad sense, comprising both competition between undertakings and the control of concentrations and State aid, held the attention of the Court in many cases, brought to it through references for preliminary rulings, through direct actions by the Member States or by the institutions or through appeals against judgments of the Court of First Instance. The main cases disposed of in 1998 came to it through all those avenues.

First, as regards the *prohibition of restrictive agreements* laid down in Article 85 of the Treaty, questions were referred to the Court of Justice by a national court which had to appraise the validity, under Article 85, of a contract containing an obligation to export luxury cosmetics to a non-member country and a prohibition of reimporting and marketing those products in the Community. The Court held that such stipulations were to be construed not as being intended to exclude parallel imports and marketing of the contractual product within the Community but as being designed to enable the producer to penetrate the market in the third country concerned. That means that it is not an agreement which, by its very nature, is prohibited by Article 85(1). As regards the question whether such an agreement falls within the scope of that provision on the ground that it has the *effect* of preventing, restricting or distorting competition within the common market and is liable to affect the pattern of trade between Member States, that is a question for the national court to determine. In order to assist it in that task, the Court indicated that that might be the case where the Community market in the products in question is characterised by an oligopolistic structure or by an appreciable difference between the prices charged for the contractual product within the Community and those charged outside the Community and where, in view of the position occupied by the supplier of the product at issue and the extent of the supplier's production and sales in the Member States, the prohibition entails a risk that it might have an appreciable effect on the patterns of trade between Member States such as to undermine attainment of the objectives of the common market. Finally, the Court explained that such agreements do not escape the prohibition laid down in Article 85(1) on the ground that the Community supplier concerned distributes his products within the Community through a selective distribution network covered by an exemption decision under Article 85(3) (Case C-306/96 *Javico* v *Yves Saint Laurent Parfum SA* [1998] ECR I-1983).

The *Bronner* case, concerning *Article 86 of the EC Treaty*, raised the question of the application in Community law of the doctrine of "essential facilities". The Court had to determine whether the refusal by a press undertaking holding a very large share of the daily newspaper market in a Member State and operating the only nationwide newspaper home-delivery scheme in that Member State to allow the publisher of a rival newspaper to have access to the scheme in return for appropriate remuneration constituted an abuse of a dominant position. The question was based on the premise that, by reason of the small circulation of its newspaper, the second publisher was unable, either alone or in cooperation with other publishers, to set up and operate its own home-delivery scheme.

In order to answer that question, the Court explained that it was for the national court first to determine whether home-delivery schemes were indeed a separate market in relation to other methods of distributing daily newspapers. If so, the existence of a dominant position within the meaning of Article 86 would seem to be established. It was also necessary to determine whether the refusal to allow the publisher of the rival newspaper access to the scheme did constitute an actual abuse. On this point, the Court stated that, in order for that to be the case, it was necessary not only for the refusal of the service comprised in home delivery to be likely to eliminate all competition on the daily newspaper market on the part of the person requesting the service and for such refusal to be incapable of being objectively justified, but also for the service in itself to be indispensable for carrying on that person's business, in that there was no actual or potential substitute for the home-delivery scheme. According to the Court, that was not the situation in a case such as that before it, for two reasons. In the first place, other methods of distributing daily newspapers existed and were used, even though they might be less advantageous for the distribution of some of them. Second, there were no obstacles to make it impossible, or even unreasonably difficult, for any other publisher of daily newspapers to establish, alone or in cooperation with other publishers, its own nationwide home-delivery scheme and use it to distribute its own daily newspapers. On the latter point, the Court pointed out that, for access to the existing system to be capable of being regarded as indispensable, it would be necessary at the very least to establish that it was not economically viable to create a second home-delivery scheme for the distribution of daily newspapers *with a circulation comparable* to that of the daily

newspapers distributed by the existing scheme (Case C-7/97 *Bronner* v *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co GmbH and Others* not yet published in the ECR).

In Joined Cases C-68/94 and C-30/95, which concerned applications for annulment of a decision concerning *the control of concentrations between undertakings*, the Court addressed, *inter alia*, the theory of the failing company defence and the question of collective dominant positions (*France and Others* v *Commission* [1998] ECR I-1375).

As regards the theory of the failing company defence, the Commission had stated, in the contested decision, that a concentration which would normally be considered as leading to the creation or reinforcement of a dominant position on the part of the acquiring undertaking may be regarded as not being the cause of the dominant position if, in the event of the concentration being prohibited, that undertaking would inevitably achieve or reinforce a dominant position. According to the Commission, that was normally the case if it was clear that (1) the acquired undertaking would in the near future be forced out of the market if not taken over by another undertaking; (2) the acquiring undertaking would gain the market share of the acquired undertaking if it were forced out of the market (absorption of market shares test); and (3) there was no less anti-competitive alternative purchase. The Court broadly approved that approach and, in particular, upheld the absorption of market shares test, which helps to ensure that the concentration has a neutral effect in relation to the deterioration of the competitive structure of the market.

The Court also had to determine whether the merger regulation applied to cases involving a collective dominant position and so allowed the Commission to prevent any concentration leading to the creation or strengthening of a dominant position, whether held by one or more undertakings. The Court answered that question in the affirmative, on the basis of both the purpose and the general scheme of the regulation in point. A concentration which created or strengthened a dominant position on the part of the parties concerned with an entity not involved in the concentration was liable to prove incompatible with the objective pursued by the regulation, namely a system of undistorted competition.

According to the Court in order to establish that a collective dominant position exists in a given case, the Commission must assess, using a prospective analysis of the reference market, whether the concentration which has been referred to it leads to a situation in which effective competition on the relevant market is significantly impeded by the undertakings involved in the concentration and one or more other undertakings which together are able, in particular because of correlating factors existing between them, to adopt the same conduct on the market and act to a considerable extent independently of their competitors, their customers and also of consumers. Such an approach necessitates a close examination of, in particular, the circumstances which, in each individual case, are relevant for assessing the effects of the concentration on competition in the reference market. As regards the decision in point, the Court considered that the Commission's analysis had certain flaws which affected the economic assessment of the concentration in question and that it had not been proved in law that the concentration would entail a collective dominant position liable to act as a significant barrier to effective competition on the relevant market.

In the *State aid* field, an appeal by the Commission against a judgment given by the Court of First Instance in 1995 in Case T-95/94 *Sytraval and Brink's France* v *Commission* [1995] ECR II-2651 gave the Court the opportunity to define more precisely the Commission's obligations in examining a complaint and in stating the reasons for its dismissal (Case C-367/95 P) *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719). The Court explained that decisions adopted by the Commission in this field are always addressed to the Member States concerned. Since neither the Treaty nor Community legislation lays down the procedure for dealing with complaints objecting to State aid, the position is the same

where such decisions concern State measures objected to in complaints on the ground that they constitute State aid contrary to the Treaty and the Commission refuses to initiate the procedure provided for in Article 93(2) because it considers that the measures complained of do not constitute State aid within the meaning of Article 92 of the Treaty or that they are compatible with the common market. Where the Commission adopts such a decision and proceeds, in accordance with its duty of sound administration, to inform the complainants of its decision, it is the decision addressed to the Member State, and not the letter to the complainant informing him of that decision, which must be challenged in any action for annulment which the complainant may bring.

The Court also examined the extent of the Commission's obligations when it receives a complaint alleging that national measures provide State aid. First, it ruled that there was no basis for imposing on the Commission, as the Court of First Instance had done, a duty to conduct in certain circumstances an exchange of views and arguments with the complainant. Contrary to what had been held by the Court of First Instance, the Commission was under no duty to examine on its own initiative objections which the complainant would certainly have raised if the information obtained by the Commission during its investigation had been disclosed to it. According to the Court, that criterion, which would require the Commission to put itself in the complainant'sshoes, is not an appropriate criterion for defining the scope of the Commission's duty to investigate. However, the Court went on to hold that the Commission was required, in the interests of sound administration of the fundamental rules of the Treaty relating to State aid, to examine complaints diligently and impartially, which might make it necessary for it to examine matters not expressly raised by a complainant. Finally, as regards the stating of reasons for a Commission decision finding that there is no State aid as alleged by a complainant, the Court stated that the Commission must at least provide the complainant with an adequate explanation of the reasons for which the facts and points of law put forward in the complaint have failed to demonstrate the existence of State aid. The Commission is not required, however, to define its position on matters which are manifestly irrelevant or insignificant or plainly of secondary importance.

9. Two judgments merit a detour into the field of *indirect taxation*.

In *Outokumpu* the Court was, *inter alia*, asked about the compatibility with *Article 95 of the Treaty* of a tax which is levied on electricity of domestic origin at rates which vary according to its method of production, whereas on imported electricity it is levied at a flat rate which is higher than the lowest rate but lower than the highest rate applicable to electricity of domestic origin. In so far as that differentiation was based on environmental considerations, the Court acknowledged that it pursued an objective which was compatible with Community law and even constituted one of the essential objectives of the Community. It held, however, that those considerations did not affect the settled case-law according to which Article 95 of the Treaty is infringed where the taxation on the imported product and that on the similar domestic product are calculated in a different manner on the basis of different criteria which lead, if only in certain cases, to higher taxation being imposed on the imported product. The Court therefore concluded that the national tax was incompatible with Article 95, after having pointed out that the national legislation at issue did not give the importer even the opportunity of demonstrating that the electricity imported by him has been produced by a particular method in order to qualify for the rate applicable to electricity of domestic origin produced by the same method (Case C-213/96 *Outokumpo* [1998] ECR I-1777).

As regards *excise duties*, a national court referred a question to the Court concerning a situation in which cigarettes and tobacco were released for consumption in Luxembourg where they were acquired from a company for the use of private individuals in the United Kingdom through another company acting, in return for payment, as agent for those individuals. Transportation of the goods was also arranged by the second company on behalf of those individuals and effected by a professional carrier charging for his services. The Court held that Directive 92/12/EEC on products subject to excise duty did not preclude the

levying of excise duty in the United Kingdom (Case C-296/95 *The Queen* v *Commissioners of Customs and Excise, ex parte EMU Tabac and Others* [1998] ECR I-1605).

10. The Community legislation on *public procurement* is the source of an increasing number of cases before the Court, mainly as a result of questions referred for a preliminary ruling by national courts. Two important judgments have helped to clarify the concept of "contracting authority" for the purposes of the directives coordinating the procedures for the award of public works contracts (Case C-44/96 *Mannesmann Anlagenbau Austria and Others* v *Strohal Rotationsdruck GesmbH* [1998] ECR I-73) and contracts for services (Case C-360/96 *Gemeente Arnhem and Gemeente Rheden* v *BFI Holding*, not yet published in the ECR). The concept of "contracting authority" is important since it designates those bodies whose participation in the conclusion of a contract for works or services determines the application to that contract of the Community public procurement rules. In interpreting that concept the Court therefore referred to the objective of the directives concerned, which is to avoid the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities.

According to the directives, "contracting authorities" is to mean the State, regional or local authorities, bodies governed by public law and associations formed by one or more of such authorities or bodies governed by public law. It is primarily the concept of "body governed by public law" which raises difficulties of interpretation in practice. According to the directives, that category applies to any body (1) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, (2) having legal personality, and (3) financed, for the most part, by the State or regional or local authorities, or other bodies governed by public law; or subject to managerial supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law. The Court confirmed that those three conditions are cumulative.

As regards the first condition, the Court held, as regards public service contracts, that the absence of an industrial or commercial character is a criterion intended to clarify the meaning of the term "needs in the general interest" and does not mean that all needs in the general interest are not industrial or commercial in character (*BFI Holding*). As regards public works contracts, the Court thus held that that condition is satisfied where a body is established in order to produce, on an exclusive basis, official administrative documents, some of which require secrecy or security measures, whilst others are intended for the dissemination of legislative, regulatory and administrative documents of the State. Those documents are closely linked to public order and the institutional operation of the State and require guaranteed supply and production conditions which ensure that standards of confidentiality and security are observed (*Mannesmann*). In the field of services, the removal and treatment of household refuse may also be regarded as constituting a need in the general interest (*BFI Holding*).

Again as regards the concept of needs in the general interest, not having an industrial or commercial character, the Court held that that term does not exclude needs which are also met or could be met by private undertakings. However, although the absence of competition is not a condition necessarily to be taken into account in defining a body governed by public law, the existence of significant competition may none the less be indicative of the absence of a need in the general interest, not having an industrial or commercial character (*BFI Holding*).

The Court also made it clear that the condition that the body must have been established for the "*specific*" purpose of meeting needs in the general interest, not having an industrial or commercial character, does not mean that it should be entrusted *only* with meeting such

needs. It may therefore pursue other activities, which may even represent the major part of its activities, without losing the character of a contracting authority (*Mannesmann*, *BFI Holding*). Furthermore, since the directive on public works contracts makes no distinction between public works contracts awarded by a contracting authority for the purposes of fulfilling its task of meeting needs in the general interest and those which are unrelated to that task, all works contracts, of whatever nature, entered into by such an entity, are to be considered to be public works contracts (*Mannesmann*).

Finally, the Court added that a contract cannot cease to be a public works contract when the rights and obligations of the contracting authority are transferred to an undertaking which is not a contracting authority. The aim of the directive, which is the effective realisation of freedom of establishment and freedom to provide services in the field of public works contracts, would be undermined if application of the regime established by the directive could be excluded in such a case. The situation would be different only if it were to be established that, from the outset, the whole of the project at issue fell within the objects of the undertaking concerned and the works contracts relating to that project were entered into by the contracting authority on behalf of that undertaking (*Mannesmann*).

11. The field of *intellectual property rights* was the subject of a number of interesting judgments during the period covered by this report, relating to Directive 89/104/EEC to approximate the laws of the Member States relating to trade marks and Directive 92/100/EEC on rental right and lending right and on certain rights related to copyright.

The Court was asked to interpret Article 4(1)(b) of Directive 89/104, according to which "[a] trade mark shall not be registered or, if registered, shall be liable to be declared invalid ... (b) if because of its identity with, or similarity to, the earlier trade mark and the identity or similarity of the goods or services covered by the trade marks, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark". The Court pointed out that the likelihood of confusion on the part of the public must be appreciated globally, taking into account all relevant factors and that that global assessment implies some interdependence between the relevant factors and in particular a similarity between the trade marks and between the goods and services covered by them. In that respect, the Court held that registration of a trade mark may have to be refused, despite a lesser degree of similarity between the goods or services covered, where the marks are very similar and the earlier mark, in particular its reputation, is highly distinctive. It followed that the distinctive character of the earlier trade mark, and in particular its reputation, must be taken into account when determining whether the similarity between the goods or services covered by the two trade marks is sufficient to give rise to the likelihood of confusion. The Court also stated that there may be a likelihood of confusion even where the public perception is that the goods or services have different places of production. By contrast, there can be no such likelihood where it does not appear that the public could believe that the goods and services come from the same undertaking or, as the case may be, from economically-linked undertakings (Case C-39/97 *Canon* v *Metro-Goldwyn-Mayer Inc* [1998] ECR I-5507).

Directive 89/104 contains, furthermore, a rule concerning "*Community* exhaustion", by virtue of which the right conferred by a trade mark is exhausted, with the result that the proprietor of the trade mark is no longer entitled to prohibit its use, where the products have been put on the market *in the EEA* by the proprietor or with his consent. In *Silhouette*, the Court was asked whether the directive left it open to the Member States to make provision in their national law for the principle of *international* exhaustion (the principle that the proprietor's rights are exhausted once the trade-marked product has been put on the market, *no matter where that occurs* and thus also in respect of products put on the market in a non-member country). The Court replied to that question in the negative, on the ground, in particular, that that is the only interpretation of the directive which is fully capable of ensuring that the

purpose of the directive is achieved, namely to safeguard the functioning of the internal market. A situation in which some Member States could provide for international exhaustion while others provided for Community exhaustion only would inevitably give rise to obstacles to the free movement of goods and the freedom to provide services (Case C-355/96 *Silhouette International Schmied* v *Hartlauer Handelsgesellschaft mbH* [1998] ECR I-4799).

Again as regards the principle of exhaustion, this time Community exhaustion, a national court asked the Court of Justice whether that principle was not breached by Directive 92/100, in so far as that directive provides for an *exclusive rental right*. On the one hand, the directive requires Member States to provide a right to authorise or prohibit the rental and lending of originals and copies of copyright works and, on the other, it provides that those rights are not to be exhausted by any sale or other act of distribution. The rental right remains one of the prerogatives of the author and producer notwithstanding sale of the physical recording. In order to assess the validity of that approach, the Court pointed out that literary and artistic works may be the subject of commercial exploitation by means other than the sale of the recordings made of them and that specific protection of the rental right may be justified on grounds of the protection of industrial and commercial property, pursuant to Article 36 of the EC Treaty. The introduction by the Community legislation of an exclusive rental right cannot therefore constitute a breach of the principle of exhaustion of the distribution right, the purpose and scope of which are different. After also holding that the general principle of freedom to pursue a trade or profession had not been impaired in a disproportionate manner, the Court concluded that the contested provision of the directive was valid (Case C-200/96 *Metronome Musik* v *Music Point Hokamp* [1998] ECR I-1953).

In a second judgment, the Court interpreted the same exclusive rental right, as regards video films, as meaning that that right can, by its very nature, be exploited by repeated and potentially unlimited transactions, each of which involves the right to remuneration. The specific right to authorise or prohibit rental would be rendered meaningless if it were held to be exhausted as soon as the object was first offered for rental. It follows that the holder of an exclusive rental right may prohibit copies of a film being offered for rental in a Member State even where the offering of those copies for rental has been authorised in the territory of another Member State (Case C-61/97 *FDV and Others* v *Laserdisken* [1998] ECR I-5171).

12. The first judgment of the Court of Justice disposing of an appeal brought against a judgment of the Court of First Instance in the field of *dumping* was delivered on 10 February 1998 in Case C-245/95 P *Commission* v *NTN and Koyo Seiko* [1998] ECR I-401. The main issue was the assessment of injury in the context of review of a regulation imposing anti-dumping duties. The Court of First Instance had stated that a regulation modifying existing anti-dumping duties after such a review should establish the existence of injury within the meaning of Article 4(1) of the basic regulation. In its appeal, the Commission submitted, to the contrary, that the initial investigation requires a finding of injury but the amendment of an anti-dumping measure does not and that anti-dumping duties may be adjusted even if no additional injury is found. The Court of Justice rejected that argument. According to the Court, even if no criterion relating to the risk of recurrence of injury is to be found in the basic regulation, it is nevertheless true that in the course of a review consideration must be given to the question whether the expiry of an anti-dumping measure previously imposed could once more lead to injury or to a threat of injury and such consideration must comply with the provisions of Article 4 of the basic regulation.

13. As in previous years, the principle of *equal treatment of men and women* resulted in numerous references to the Court for a preliminary ruling. In addition to a judgment of principle concerning the situation of homosexual couples, the Court provided certain interpretations of Council Directives 75/117/EEC, 76/207/EEC and 92/85/EEC.

In *Grant*, the national tribunal sought to ascertain whether an employer's refusal to grant travel concessions to the person of the same sex with whom an employee has a stable relationship constitutes discrimination prohibited by Article 119 of the Treaty and Directive 75/117, where such concessions are granted to an employee's spouse or the person of the opposite sex with whom an employee has a stable relationship outside marriage. The Court first pointed out that what was concerned was not discrimination directly based on sex, since the contested provision is applied regardless of the sex of the worker concerned (concessions are also refused to a male worker living with a person of the same sex). Second, the Court considered whether a stable relationship between persons of the same sex had to be treated as equivalent to marriage or to a stable relationship with a partner of the opposite sex, bearing in mind the current state of Community law, the laws of the Member States and the case-law of the European Court of Human Rights. It concluded that, in the present state of the law within the Community, such equivalence is not accepted and that therefore it is only the legislature which can, should it consider it appropriate, adopt measures which may affect that position. Furthermore, the Court held that its reasoning in Case C-13/94 *P* v *S* [1996] ECR I-2143 was limited to the case of a worker's gender reassignment and did not apply to differences of treatment based on a person's sexual orientation (Case C-249/96 *Grant* v *South West Trains Ltd* [1998] ECR I-621).

In addition to Article 119 of the Treaty, the principle of equal treatment of men and women finds expression in Community law *inter alia* in Directive 75/117, concerning equal pay, Directive 76/207, concerning access to employment, vocational training and promotion and working conditions and Directive 92/85, which is intended to improve the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (which was interpreted for the first time by the Court in *Boyle and Others*, discussed below).

In *Brown*, noting that, by virtue of Directive 76/207, a woman is protected against dismissal on the grounds of her absence, during maternity leave, the Court stated that the principle of non-discrimination required similar protection throughout the period of pregnancy. As regards direct discrimination on grounds of sex, Directive 76/207 therefore precluded dismissal of a female worker at any time during her pregnancy for absences due to incapacity for work caused by an illness resulting from that pregnancy. The Court expressly reversed its decision in Case C-400/95 *Larsson* v *Føtex Supermarked* [1997] ECR I-2757, paragraph 23 and concluded, in passing, that where a woman is absent owing to illness resulting from pregnancy or childbirth, and that illness arose during pregnancy and persisted during and after maternity leave, her absence not only during maternity leave but also during the period extending from the start of her pregnancy to the start of her maternity leave cannot be taken into account for the purpose of computing the period justifying her dismissal under national law (Case C-394/96 *Brown* v *Rentokil Initial UK Limited* [1998] ECR I-4185).

In order to enable a British court to assess the validity of a maternity scheme applied to staff of a public body, the Court provided it with a series of answers relating to the interpretation of Article 119 of the Treaty and the three aforementioned directives. Those replies determine the rights of female workers before, during and after their maternity leave and concern the payments to which they are entitled, the time when they must commence their maternity leave, the accrual of rights to annual leave and pension rights and the relationship between maternity leave and sick leave. The Court thus held that a clause in a contract of employment which makes the application of a maternity scheme that is more favourable than the statutory scheme conditional on the pregnant woman's returning to work after the birth of the child, failing which she is required to repay the difference between the contractual maternity pay and the statutory payments in respect of that leave, did not constitute discrimination on grounds of sex. The Court also held that, although the right to the minimum period of 14 weeks' maternity leave provided for by the directive is one which may be waived by workers (with the exception of the two weeks' compulsory maternity leave),

if a woman becomes ill during the period of statutory maternity leave and places herself under the (more favourable) sick leave arrangements, and the sick leave terminates before the expiry of the period of maternity leave, the period of sick leave does not affect the duration of the maternity leave, which continues until the end of the period of 14 weeks initially determined (Case C-411/96 *Boyle and Others* v *Equal Opportunities Commission* [1998] ECR I-6401).

According to Article 6 of Directive 76/207, Member States are to ensure effective judicial protection for persons who consider themselves wronged by a breach of the principle of equal treatment of men and women. In *Coote*, the Court held that that provision requires Member States to introduce into their national legal systems such measures as are necessary to ensure judicial protection for workers whose employer, after the employment relationship has ended, refuses to provide references as a reaction to legal proceedings brought to enforce compliance with the principle of equal treatment within the meaning of Directive 76/207. In the absence of that requirement, fear of such retaliatory measures on the part of the employer might deter workers who considered themselves the victims of discrimination from pursuing their claims by judicial process, and would consequently be liable seriously to jeopardise implementation of the aim pursued by the directive. (Case C-185/97 *Coote* v *Granada Hospitality Ltd* [1998] ECR I-5199).

14. The objective of *consumer protection* served as a criterion for the Court in the interpretation of two Council directives adopted in that field. As regards Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises, the Court held that a contract of guarantee concluded by a natural person who is not acting in the course of his trade or profession does not come within the scope of the directive where it guarantees repayment of a debt contracted by another person who, for his part, is acting within the course of his trade or profession (Case C-45/96 *Bayerische Hypotheken- und Wechselbank AG* v *Dietzinger* [1998] ECR I-1199). By contrast, the Court interpreted Directive 90/314/EEC on package travel, package holidays and package tours as meaning that the purchaser of a package holiday who has paid the travel organiser for the costs of his accommodation before travelling on his holiday and is compelled, following the travel organiser'sinsolvency, to pay the hotelier for his accommodation again in order to be able to leave the hotel and return home, is covered by the security for refund of money paid over (Case C-364/96 *Verein für Konsumenteninformation* v *Österreichische Kreditversicherungs AG* [1998] ECR I-2949).

15. In the field of *environmental protection* the Court declared, in response to an action for failure to fulfil obligations brought by the Commission, that by classifying as special protection areas (SPAs) territories whose number and total area are clearly smaller than the number and total area of the territories suitable for classification as SPAs within the meaning of Article 4(1) of Directive 79/409/EEC on the conservation of wild birds, the Kingdom of the Netherlands had failed to fulfil its obligations. The Court first stated that the classification as SPAs of the most suitable territories in number and size for the conservation of the species mentioned in Annex I to the directive constituted an obligation which it was not possible for the Member States to avoid by adopting other special conservation measures. Next, although the Member States have a margin of discretion in the application of ornithological criteria in order to identify the most suitable territories, they are none the less obliged to classify as SPAs all the sites which, applying those ornithological criteria, appear to be the most suitable for conservation of the species in question. Finally, the Netherlands having challenged the results of the inventory on which the Commission based its action, the Court held that it was the only document containing scientific evidence which had been produced to it and, in those circumstances, although not legally binding on the Member States concerned, the inventory could be used by the Court as a basis of reference (Case C-3/96 *Commission* v *Netherlands* [1998] ECR I-3031).

In response to questions referred for a preliminary ruling concerning, in particular, the validity of a Council regulation concerning substances which deplete the ozone layer, the Court found it necessary to set out a number of considerations concerning the scope of Article 130r of the EC Treaty, which concerns Community environmental policy. First, in view of the need to strike a balance between certain of the objectives and principles mentioned in Article 130r and of the complexity of the implementation of those criteria, review by the Court must necessarily be limited to the question whether the Council committed a manifest error of appraisal regarding the conditions for the application of Article 130r. Next, Article 130r(1) does not require the Community legislature, whenever it adopts measures to preserve, protect and improve the environment in order to deal with a specific environmental problem, to adopt at the same time measures relating to the environment as a whole. Finally, whilst it is undisputed that Article 130r(2) requires Community policy in environmental matters to aim for a high level of protection, such a level of protection, to be compatible with that provision, does not necessarily have to be the highest that is technically possible (Case C-284/95 *Safety Hi-Tech Srl* v *S & T Srl* [1998] ECR I-4301 and Case C-341/95 *Bettati* v *Safety Hi-Tech Srl* [1998] ECR I-4355).

16. As regards the interpretation of the *Brussels Convention* (Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters), the reader's attention is drawn to the judgment of 17 November 1998 in Case C-391/95 *Van Uden* v *Kommanditgesellschaft in Firma Deco-Line*, not yet published in the ECR, which concerns the rules of jurisdiction which apply to the grant of provisional and protective measures. The questions referred to the court related to the jurisdiction of a court hearing an application for interim relief under the Convention and, in particular, Article 24 thereof, pursuant to which "[a]pplication may be made to the courts of a Contracting State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the case".

As regards Article 24, the national court's questions related mainly to three aspects, namely: (1) the relevance of the fact that the dispute was subject, under the terms of the contract, to arbitration; (2) whether the jurisdiction of the court hearing the application for interim relief is subject to the condition that the measures sought must take effect or be capable of taking effect in the State of that court and (3) the relevance of the fact that the case relates to a claim for interim payment.

On the first point, the Court held that where the subject-matter of an application for provisional measures relates to a question falling within the scope *ratione materiae* of the Convention, the Convention is applicable and Article 24 thereof may confer jurisdiction on the court hearing that application even where proceedings have already been, or may be, commenced on the substance of the case and even where those proceedings are to be conducted before arbitrators. As regards the second point, it is apparent from the judgment that the granting of provisional or protective measures on the basis of Article 24 is conditional on, *inter alia*, the existence of a real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the Contracting State of the court before which those measures are sought. A court ordering measures on the basis of Article 24 must also take into consideration the need to impose conditions or stipulations such as to guarantee their provisional or protective character. Finally, on the third point, the Court held that, in view of the risk of circumvention by such a measure of the rules of jurisdiction laid down by the Convention, interim payment of a contractual consideration does not constitute a provisional measure within the meaning of Article 24 of the Convention unless, first, repayment to the defendant of the sum awarded is guaranteed if the plaintiff is unsuccessful as regards the substance of his claim and, second, the measure sought relates only to specific assets of the defendant located or to be located within the confines of the territorial jurisidiction of the court to which application is made.

17. Finally, to conclude this overview of the case-law of the Court in 1998, mention should be made of the two judgments delivered on 16 June 1998, which raised the question of the relationship between Community law and international law (Case C-53/96 *Hermès International* v *FHT Marketing Choice BV* [1998] ECR I-3603 and Case C-162/96 *Racke* v *Hauptzollamt Mainz* [1998] ECR I-3655). In the first case, the Court was called upon to interpret a provision of an international convention whilst, in the second, it had to assess the validity of a Community measure in the light of a rule of customary international law.

In respect of trade marks, the international registration of which designates the Benelux, Hermès had applied to a national court for an interim order requiring a third party to cease infringement of its copyright and trade mark. In order to determine the scope of the measure it was required to adopt, the court to which the application was made first considered whether the interim decision provided for under domestic law fell within the definition of provisional measure within the meaning of Article 50 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement, annexed to the WTO Agreement) and therefore applied to the Court for an interpretation of that provision.

In order to determine whether it had jurisdiction to provide the interpretation requested by the national court, the Court considered whether it was in the Community interest that the Netherlands provision in question should be interpreted in conformity with the TRIPS Agreement. In doing this, it pointed out, on the one hand, that the WTO Agreement had been concluded by the Community and ratified by its Member States without any allocation between them of their respective obligations towards the other contracting parties and, second, that the Council had adopted Regulation (EC) No 40/94 on the Community trade mark which provides, *inter alia*, that rights arising from that trade mark may be safeguarded by the adoption of provisional, including protective, measures under national law. The Court concluded that when the national courts adopted such measures in accordance with their domestic law, for the protection of rights arising under a Community trade mark, they were required to do so, as far as possible, in the light of Article 50 of the TRIPS Agreement. The Court therefore considered it had jurisdiction to interpret that provision. It is true that in this case the dispute concerned a national trade mark and not a Community trade mark but, according to the Court, since Article 50 of the TRIPS Agreement can always apply irrespective of the trade mark concerned, it is clearly in the Community interest that, in order to forestall future differences of interpretation, that article should be interpreted uniformly, whatever the circumstances in which it is to apply. On the substance, the Court held, next, that the decision referred to by the national court, which is expressly characterised in national law as an "immediate provisional measure" and must be adopted "on grounds of urgency" did indeed constitute a provisional measure within the meaning of the TRIPS Agreement. According to the Court, that conclusion was not affected either by the fact that the national measure must be adopted in accordance with the principle *audi alteram partem*, nor by the fact that a reasoned decision must be given in writing, nor the fact that it must be delivered after assessment by the judge of the substantive aspects of the case, nor the fact that an appeal may be brought against it nor, finally, the fact that it is, in practice, frequently accepted by the parties as a "final" resolution of their dispute.

In *Racke*, the Court held that its jurisdiction to give preliminary rulings under Article 177 of the Treaty concerning the validity of acts of the Community institutions could not be limited by the grounds on which the validity of those measures may be contested and that it was therefore required to take into account the fact that they might be contrary to a rule of international law. In this instance, the rule in question was a rule of customary international law, codified in the Vienna Convention on the Law of Treaties and concerning the conditions under which a party may terminate or withdraw from a Treaty as a result of a fundamental change of circumstances. The Court held that such rules of customary international law are binding upon the Community institutions and form part of the Community legal order. It also held that the plaintiff may, before a national court,

incidentally challenge the validity of a Community regulation under rules of customary international law in order to rely upon rights which it derives directly from an agreement of the Community with a non-Member country. In this instance, the Court concluded that the regulation at issue was valid in the light of the rules of customary international law invoked.