A – **Proceedings of the Court of Justice in 2001**
by Mr G.C. Rodríguez Iglesias, President of the Court of Justice

1. This part of the annual report is intended to give a clear picture of the activity of the Court of Justice of the European Communities over the year which has just ended. It does not cover Opinions of the Advocates General, which are of undeniable importance for a detailed understanding of the issues at stake in certain cases but would increase considerably the length of a report which must provide a brief description of the cases.

Apart from a rapid statistical appraisal (section 2) and a survey of application of the new procedural instruments in the course of the year (section 3), this part of the report summarises the main developments in the case-law in 2001, which are arranged as follows:

jurisdiction of the Court and procedure (section 4); general principles and constitutional and institutional cases (section 5); free movement of goods (section 6); freedom to provide services (section 7); right of establishment (section 8); competition rules (section 9); State aid (section 10); harmonisation of laws (section 11); social law (section 12); law concerning external relations (section 13); environmental law (section 14); transport policy (section 15); tax law (section 16); common agricultural policy (section 17); and law relating to Community officials (section 18).

A selection of this kind is necessarily limited. It includes only 53 of the 397 judgments and orders pronounced by the Court during the period in question and refers only to their essential points. The full texts of those decisions, of all the other judgments and orders and of the Opinions of the Advocates General are available, in all the official Community languages, on the Court's internet site (*www.curia.eu.int*). In order to avoid any confusion and to assist the reader, this report refers, unless otherwise indicated, to the numbering of EC Treaty articles established by the Treaty of Amsterdam.

2. As regards statistics, the Court brought 398 cases to a close. Of those cases, 244 were dealt with by judgments, one case concerned an opinion delivered under Article 300(6) EC and 153 cases gave rise to orders. Although these figures show a certain decrease compared with the previous year (463 cases brought to a close), they are slightly above the average for the years 1997-99 (approximately 375 cases brought to a close). On the other hand, the number of new cases arriving at the Court has stayed at the same level (504 in 2001, 503 in 2000). Consequently, the number of cases pending has increased to 839 (net figure, taking account of joinder), compared with 803 in 2000.

The duration of proceedings remained constant so far as concerns references for preliminary rulings and direct actions (approximately 22 and 23 months respectively). However, the average time taken to deal with appeals was reduced from 19 months in 2000 to 16 months in 2001.

As regards the distribution of cases between the Court in plenary session and Chambers of Judges, the former disposed of one case in five (in 2000 it disposed of one case in four), while the remaining judgments and orders were pronounced by Chambers of five Judges (60% of cases) or of three Judges (almost one case in four).

For further information with regard to the statistics for the 2001 judicial year, reference should be made to Chapter IV of this report.

3. Some general trends can already be identified from the use made by the Court of certain *new procedural instruments* which were inserted into its Rules of Procedure by amendments adopted on 16 May and 28 November 2000. [1]

The Court has made frequent use of its increased ability to give its decision on references for a preliminary ruling by means of a simplified procedure, in accordance with Article 104(3) of the Rules of Procedure (previously that procedure could be used only where a question was 'manifestly identical' to a question on which the Court had already ruled). The Court may now resort to the simplified procedure in three situations, namely where the question referred to it is identical to a question on which it has already ruled, where the answer to such a question may be clearly deduced from existing case-law or where the answer to the question admits of no reasonable doubt. In such circumstances, the Court must first inform the court or tribunal which referred the question to it of its intentions and hear any observations submitted by the interested parties. The case may then be brought to a close by reasoned order, thus enabling, where it appears justified, a ruling to be given without presentation of oral argument and delivery of a written Opinion by the Advocate General.

Two orders made in 2001 illustrate the two very different uses which the Court may make of the simplified procedure where the question referred to it is identical to a question on which it has already ruled. First, the simplified procedure sometimes enables an answer to be given to the national court very quickly. Thus, in its order of 19 June 2001 in Joined Cases C-9/01 to C-12/01 *Monnier and Others* (not published in the ECR), the Court reiterated its previous case-law a mere five months or so after the national court had made the reference. Second, the simplified procedure is sometimes used to bring to a speedy close cases which have been stayed pending the outcome of a 'test' case. For example, in its order of 12 July 2001 in Case C-256/99 *Hung* (not published in the ECR), the Court replied to questions which it had been asked more than two years earlier, in April 1999. The explanation for the length of time taken is that the Court had stayed proceedings pending the conclusion of *Kaur* (judgment of 20 February 2001 in Case C-192/99 [2001] ECR I-1237), a case identical to *Hung*. The national court, although duly informed of the judgment delivered in the 'test' case, did not withdraw its questions, which led the Court to make an order with the same content.

The Court has also made getting on for 10 orders in circumstances where it considered that the answer to the questions submitted could be clearly deduced from existing case-law. Experience has shown that this power proves very useful when the Court intends to confirm that even though there may be slight differences in the factual or legal context general solutions previously reached by it remain valid. Thus, the Court held that, since it had previously found that the provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), which is in Annex 1C to the Agreement establishing the World Trade Organisation (WTO), are not such as to create rights on which individuals may rely directly before the courts by virtue of Community law, the same applies, for the same reasons, to the provisions of the 1994 General Agreement on Tariffs and Trade (GATT), which is also annexed to the WTO Agreement (order in Case C-307/99 *OGT Fruchthandelsgesellschaft* [2001] ECR I-3159).

In 2001 the Court had recourse for the first time to the expedited or accelerated procedure available to it in the event of particular urgency (expedited procedure under Article 62a of the Rules of Procedure in respect of direct actions) or exceptional urgency (accelerated procedure under Article 104a in respect of references for a preliminary ruling).

---

[1] A codified version of the Rules of Procedure of the Court of Justice was published in the *Official Journal of the European Communities* of 1 February 2001 (OJ 2001 C 34, p. 1). See also the amendments of 3 April 2001 (OJ 2001 L 119, p. 1).

The case in question concerned a reference from a Netherlands court relating to the policy pursued by the Community in connection with eradication of the foot-and-mouth epidemic. The national court made the reference on 27 April 2001 and the Court of Justice was able to provide it with an answer on 12 July 2001 (Case C-189/01 *Jippes and Others* [2001] ECR I-5689; see also section 17 below).

In all the other cases where use of the expedited or accelerated procedure was sought (five references for a preliminary ruling and two appeals), the request was answered in the negative. The references for a preliminary ruling most often concerned disputes relating to the award of public contracts. It is difficult at the moment to draw general lessons from these few cases. It appears, however, that the Court intends to use the expedited and accelerated procedures with caution only, where it appears properly justified in the event of particular or exceptional urgency, in order to avoid excessive disruption to other cases whose handling could be slowed down by a proliferation of expedited or accelerated proceedings. That implies in particular that, with regard to references for a preliminary ruling, the accelerated procedure is not designed to replace the obligation of referring courts to grant litigants interim judicial protection where it is felt necessary.

It may also be noted that the Court makes regular, albeit relatively restrained, use of the possibility available to it under Article 104(5) of its Rules of Procedure of requesting clarification from a national court which has referred questions to it for a preliminary ruling. Recourse to this power is liable to lengthen the time required to deal with cases, but sometimes proves invaluable in enabling the Court to assess correctly the legal problems which are raised. When the Court seeks such clarification, it ensures that the parties to the main proceedings and the other interested parties are given the opportunity to submit written or oral observations on the response of the national court.

Finally, with a view to facilitating and accelerating the conduct of proceedings before it, the Court will endeavour in the course of 2002 to issue practice directions for litigants, in accordance with Article 125a of the Rules of Procedure.

4. With regard to the *jurisdiction of the Court and procedure*, several interesting developments will be noted, concerning the preliminary reference procedure (4.1), the appeal procedure (4.2) and the interim relief procedure (4.3).

4.1. In Case C-239/99 *Nachi Europe* [2001] ECR I-1197, the case-law laid down in Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833 was applied in the field of anti-dumping measures. The question at issue was whether an undertaking which failed to bring an action for annulment of an anti-dumping duty affecting it could none the less plead that the anti-dumping duty was invalid before a national court. The anti-dumping regulation had been annulled so far as concerns the anti-dumping duties affecting the undertakings which brought an action for annulment. The Court held that an undertaking which had a right of action before the Court of First Instance to seek the annulment of the anti-dumping duty but which did not exercise it cannot plead the invalidity of that anti-dumping duty before a national court.

In Case C-1/99 *Kofisa Italia* [2001] ECR I-207, the Court's jurisdiction was contested in relation to a dispute where the Community legislation did not apply directly but the application of Community law resulted from the fact that national legislation conformed to Community law for the purpose of resolving an internal matter. The Court confirmed the case-law laid down by it in Case C-130/97 *Giloy* [1997] ECR I-4291, according to which ‘a reference by a national court can be rejected only if it appears that the procedure laid down by Article [234 EC] has been misused and a ruling from the Court elicited by means of a contrived dispute, or it is obvious that Community law cannot apply, either directly or indirectly, to the circumstances of the case referred to the Court' (paragraph 22). The Court asserted its jurisdiction to give a ruling in disputes of the kind at issue where a question has been referred to it.

4.2. In its judgment in Joined Cases C-302/99 P and C-308/99 P *Commission and France* v *TF1* [2001] ECR I-5603, the Court interpreted the conditions under which an *appeal* may be brought against a judgment of the Court of First Instance. The Commission and the French Republic had brought appeals against the judgment of the Court of First Instance in Case T-17/96 *TF1* v *Commission* [1999] ECR II-1757 in so far as it declared TF1's action to be admissible. At first instance, that undertaking had brought an action against a failure on the part of the Commission to reach a decision under Article 86 EC. During the course of those proceedings, the Commission sent a letter to TF1 which constituted the definition of a position. The Court of First Instance therefore decided, after holding the action admissible, that there was no longer any need to adjudicate the claim for a declaration of failure to act pursuant to Article 86 EC. In its judgment, the Court of Justice held that the grounds set out by the Court of First Instance were sufficient to establish that the action ceased to have any purpose once the Commission expressed its position. Since those grounds were such as to justify the decision of the Court of First Instance, any errors in the grounds of the judgment under appeal concerning the admissibility of the claim of failure to act had 'no effect on the operative part of that judgment'. Accordingly, the appeals were dismissed.

4.3. So far as concerns the *interim relief procedure*, it is worth drawing attention to the order of 14 December 2001 in Case C-404/01 P(R) *Commission* v *Euroalliages and Others* (not yet published in the ECR). Here, the Court of Justice annulled an order of the Court of First Instance which, in concluding that pecuniary loss was irreparable, relied on the fact that its reparation at a later stage in an action for damages was uncertain, given the wide discretion which the Commission had in the case in point.

The Court of Justice held in its order that the uncertainty as to reparation of pecuniary loss in any action for damages cannot be regarded in itself as a circumstance capable of establishing that such a loss is irreparable within the meaning of the Court's case-law. Proceedings for interim relief are not intended as a replacement for such an action for damages in order to eliminate that uncertainty. Their purpose is solely to ensure the full effectiveness of the definitive decision to be reached in the main proceedings, in this instance an action for annulment, to which the application for interim relief is an adjunct. That conclusion was not affected by the link, established by the order under appeal, between the wide discretion which the Commission had in the case in point and the uncertainty as to whether any action for damages would be successful. If that criterion were applied systematically, the irreparability of the loss would depend on the characteristics of the contested measure and not on the applicant's particular circumstances.

5. Among the cases relating to *general principles of Community law* or with *constitutional or institutional* implications, the most important concern the concept of citizenship of the Union, the legal basis for measures of secondary law adopted by the Community institutions and the principle of access to documents of the Community institutions. A judgment concerning observance by the Court of Auditors of the right to a hearing should also be noted.

5.1. The Court delivered two judgments which contain clarification of the effect of the concept of *citizenship of the Union*, introduced into Community law by the Maastricht Treaty.

Case C-184/99 *Grzelczyk* [2001] ECR I-6193 concerned the position of a French national who was studying in Belgium and had obtained entitlement to the 'minimex' (a minimum subsistence allowance paid by the Belgian State). Payment of that allowance to him was stopped because Belgian legislation made its grant conditional, in the case of nationals of other Member States, on their falling within the scope of Regulation (EEC) No 1612/68, [2] although that condition did not apply to Belgian nationals. In view of that disparity in treatment, the national tribunal before which Mr Grzelczyk challenged the decision stopping payment referred a question to the Court for a preliminary ruling. It inquired whether Articles 12 EC and 17 EC, relating to the principles of non-discrimination and of citizenship of the Union respectively, precluded the disparity in treatment.

In its judgment, the Court found first of all that the treatment accorded to Mr Grzelczyk constituted discrimination solely on the ground of nationality because the only bar to grant of the minimex was the fact that he was not a Belgian national. The Court then continued as follows: 'Within the sphere of application of the Treaty, such discrimination is, in principle, prohibited by Article [12 EC]. In the present case, Article [12 EC] must be read in conjunction with the provisions of the Treaty concerning citizenship of the Union in order to determine its sphere of application' (paragraph 30). It then stated that 'Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for' (paragraph 31).

Having set out those principles, the Court considered Case 197/86 *Brown* [1988] ECR 3205, in which it had held that assistance given to students for their maintenance and training fell in principle outside the scope of the Treaty. It decided that certain changes subsequent to *Brown*, in particular the fact that the Maastricht Treaty introduced citizenship of the Union and a chapter devoted to education into the EC Treaty, and the adoption of Directive 93/96/EEC, [3] meant that there is no longer anything 'to suggest that students who are citizens of the Union, when they move to another Member State to study there, lose the rights which the Treaty confers on citizens of the Union' (paragraph 35). It then considered the possible impact of the limitations and conditions placed by Directive 93/96 on the right of residence of students; it interpreted the directive as allowing the host Member State to take the view that a student who has recourse to social assistance no longer fulfils the conditions of his right of residence and thus to take measures to withdraw his residence permit or not to renew it. However, the Court added that 'in no case may such measures become the automatic consequence of a student who is a national of another Member State having recourse to the host Member State's social assistance system' (paragraph 43).

In *Kaur*, cited above, the Court had to answer questions referred to it for a preliminary ruling which related to the relevant criteria for determining whether a person has the nationality of a Member State for the purposes of Article 17 EC and to the effect of the declarations made by the United Kingdom in 1972 and 1982 concerning the concept of a national of a Member State. So far as concerns the first point, the Court recalled its judgment in Case C-369/90 *Micheletti and Others* [1992] ECR I-4239, according to which 'under international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality' (paragraph 19). As to the effect of the declarations, the Court held that the 1972 declaration, which was made by the United Kingdom when it acceded to the European Communities in order to clarify the categories of citizens to be regarded as its nationals for the purposes of Community law, must be taken into consideration as an

2 Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition, 1968 (II), p. 47).

3 Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students (OJ 1993 L 317, p. 59).

interpretative instrument for determining the persons to whom the Treaty applies. The 1982 declaration is merely an adaptation of the declaration made in 1972.

5.2. As regards the *cases relating to legal basis* which are to be noted, one concerns the legal basis for conclusion of an international Convention and the other relates to the legal basis for the directive on the legal protection of biotechnological inventions.

In Case C-36/98 *Spain* v *Council* [2001] ECR I-779, the Court dismissed an action brought by the Kingdom of Spain for annulment of a Council decision concerning the conclusion of the Convention on cooperation for the protection and sustainable use of the river Danube,[4] adopted on the basis of Article 175(1) EC. In the applicant's submission, the decision should have been based exclusively on Article 175(2) EC, under which the Council is to act unanimously, because it approved a Convention relating to the management of water resources in the basin of the river Danube.

The Court upheld the choice of legal basis and dismissed the action. It determined first of all the respective scope of Article 175(1) EC and Article 175(2) EC, concluding that the concept of 'management of water resources' referred to in the latter 'does not cover every measure concerned with water, but covers only measures concerning the regulation of the use of water and the management of water in its quantitative aspects' (paragraph 55). It then recalled that where a measure pursues a twofold purpose or has a twofold component, it must be founded on the basis required by the main or predominant purpose or component. The Court deduced from a detailed examination of the international Convention that its 'primary purpose ... is the protection and improvement of the quality of the waters of the catchment area of the river Danube, although it also refers, albeit incidentally, to the use of those waters and their management in its quantitative aspects'. Accordingly, it concluded that the legal basis adopted by the Council was correct.

In the second case (judgment of 9 October 2001 in Case C-377/98 *Netherlands* v *Parliament and Council*, not yet published in the ECR), the Kingdom of the Netherlands sought the annulment of Directive 98/44/EC on the legal protection of biotechnological inventions.[5] This directive was adopted on the basis of Article 95 EC and its purpose is to require the Member States to protect biotechnological inventions through their patent laws. The Netherlands put forward a number of pleas, including the allegedly incorrect choice of Article 95 EC as the legal basis for the directive, breach of the principle of subsidiarity and breach of the fundamental right to respect for human dignity.

Its action was dismissed. So far as concerns the plea alleging that the legal basis chosen was incorrect, the Court recalled its previous case-law according to which Article 95 EC may be used as a legal basis where it is necessary to prevent the likely emergence of future obstacles to trade resulting from multifarious development of national laws (see the judgment in Case C-376/98 *Germany* v *Parliament and Council* [2000] ECR I-8419, paragraph 86). It held that that condition was met here. With regard to the argument that the directive should have been founded on Articles 157 EC and 163 EC, relating to industrial policy and research policy respectively, the Court observed that harmonisation of the legislation of the Member States 'is not an incidental or subsidiary objective of the Directive but is its essential purpose' (paragraph 28). Therefore, Article 95 EC constituted the correct legal basis. The Court held with regard

---

4 Council Decision 97/825/EC of 24 November 1997 concerning the conclusion of the Convention on cooperation for the protection and sustainable use of the river Danube (OJ 1997 L 342, p. 18).

5 Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions (OJ 1998 L 213, p. 13).

to the plea concerning the principle of subsidiarity that the objective pursued by the directive could not have been achieved by action taken by the Member States alone. In view of the effects of the protection of biotechnological inventions on intra-Community trade, the objective could be better achieved by the Community. Furthermore, the directive gave sufficient reasons with regard to the principle of proportionality.

As to the plea concerning fundamental principles, the Court stated that it is for it, 'in its review of the compatibility of acts of the institutions with the general principles of Community law, to ensure that the fundamental right to human dignity and integrity is observed' (paragraph 70). It noted the various provisions of the directive and concluded that the latter frames the law on patents in a manner sufficiently rigorous to ensure that the human body effectively remains unavailable and inalienable and that human dignity is thus safeguarded.

5.3. So far as concerns transparency and the principle of access to documents of the institutions, the judgment of 6 December 2001 in Case C-353/99 P *Council* v *Hautala* (not yet published in the ECR) should be noted. This judgment was delivered on an appeal brought by the Council against the judgment of the Court of First Instance in Case T-14/98 *Hautala* v *Council* [1999] ECR II-2489 which had annulled a Council decision refusing Ms Hautala access to a report of the Council Working Group on Conventional Arms Exports on the ground that its disclosure would undermine the public interest. The judgment of the Court of Justice upheld both the outcome reached and the approach adopted by the Court of First Instance, accordingly rejecting all the pleas raised by the Council. The judgment underlined that Decision 93/731/EC [6] on public access to Council documents derives from Declaration No 17 of the Final Act of the Treaty on European Union, on the right of access to information. That decision thus does not concern only access to documents as such, but also access to the information contained in them. The Court stated that 'the principle of proportionality also requires the Council to consider partial access to a document which includes items of information whose disclosure would endanger one of the interests protected by Article 4(1) of Decision 93/731' (paragraph 27). In determining this appeal, the Court did not consider it necessary to decide whether the Court of First Instance had been wrong in relying on the existence of a 'principle of the right to information' (paragraph 31). It founded its reasoning simply on an interpretation of Decision 93/731, in the light of its objective and the principle of proportionality.

5.4. In Case C-315/99 P *Ismeri Europa* v *Court of Auditors* [2001] ECR I-5281, the company Ismeri Europa brought an appeal against the judgment of the Court of First Instance in Case T-277/97 *Ismeri Europa* v *Court of Auditors* [1999] ECR II-1825, in which the Court of First Instance had dismissed its application for damages for the loss allegedly suffered by it as a result of criticisms made against it by the Court of Auditors in Special Report No 1/96. [7] In its appeal, Ismeri Europa put forward six pleas for annulment, all rejected by the Court of Justice which upheld the judgment of the Court of First Instance.

Of those pleas, that relating to infringement of *the right to a hearing* merits particular attention. The Court observed that this right is a general principle of law whose observance is ensured by it and which applies to any procedure that may result in a decision by a Community institution perceptibly affecting a person's interests. Although the adoption and publication of reports of the Court of Auditors are not decisions directly affecting the rights of persons

---

6 Council Decision 93/731/EC of 20 December 1993 on public access to Council documents (OJ 1993 L 340, p. 43).

7 Special Report No 1/96 of the Court of Auditors on the MED programmes, adopted on 30 May 1996 (OJ 1996 C 240, p. 1).

mentioned in such reports, they are capable of having consequences for those persons such that those concerned must be able to make observations on the points in the reports which refer to them by name, before the reports are definitively drawn up. However, the Court found that, in the present case, it followed from the flagrant and serious failure to observe the rules of sound management that if Ismeri Europa had been given a hearing that would not have altered the view taken by the Court of Auditors as to the expediency of naming that company in its report. The Court also held that there may be specific circumstances, such as the gravity of the facts or the risk of confusion liable to harm the interests of third parties, allowing the Court of Auditors to mention by name in its reports persons who in principle are not subject to its supervision, provided that such persons have the right to a hearing. In such a case it is for the Community judicature to assess whether the naming of persons is necessary and proportionate to the objective pursued by publication of the report.

6. Case C-379/98 *PreussenElektra* [2001] ECR I-2099 relates to the *free movement of goods*, while also having a State aid dimension which will be dealt with in section 10 below. In this case, a German court was unsure as to the compatibility with Community law of German legislation which obliged electricity supply undertakings to purchase the electricity produced in their area of supply from renewable energy sources and to pay for it in accordance with a statutory minimum price. The national court sought a preliminary ruling on the interpretation of Articles 28 EC and 87 EC.

So far as concerns the free movement of goods, the Court found first of all that the German legislation constituted, at least potentially, an obstacle to intra-Community trade. However, it then stated that, 'in order to determine whether such a purchase obligation is nevertheless compatible with Article [28 EC], account must be taken, first, of the aim of the provision in question, and, second, of the particular features of the electricity market' (paragraph 72). Such a provision is designed to protect the environment and the health and life of humans, animals and plants. In addition, the Court observed that the nature of electricity is such that, once it has been allowed into the transmission or distribution system, it is difficult to determine its origin and in particular the source of energy from which it was produced. It also referred to a proposal for a directive in which the Commission had taken the view that the implementation in each Member State of a system of certificates of origin for electricity produced from renewable sources, capable of being the subject of mutual recognition, was essential in order to make trade in that type of electricity both reliable and possible in practice. The Court concluded from all those considerations that, 'in the current state of Community law concerning the electricity market', the German legislation was not incompatible with Article 28 EC (paragraph 81).

In Case C-405/98 *Gourmet International Products* [2001] ECR I-1795, the Court ruled that the Treaty provisions relating to the free movement of goods and the freedom to provide services do not preclude a prohibition, imposed by Swedish legislation, on the advertising of alcoholic beverages in periodicals, unless it is apparent that the protection of public health against the harmful effects of alcohol can be ensured by measures having less effect on intra-Community trade. The Court had to decide whether the case-law laid down in Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097 was applicable in the case in point. The Court stated that, if national provisions restricting or prohibiting certain selling arrangements are to avoid being caught by Article 28 EC, they must not be of such a kind as to prevent access to the market by products from another Member State or to impede access any more than they impede the access of domestic products. It held that, in the case of products like alcoholic beverages, the consumption of which is linked to traditional social practices and to local habits and customs, a prohibition of all advertising directed at consumers in the form of advertisements in the press is liable to impede access to the market by products from other Member States more than it impedes access by domestic products.

The Court's interpretation of the rules concerning the freedom to provide services was broadly similar. In concluding that there was an obstacle to that freedom, the Court took account of the international nature of the advertising market.

7. So far as concerns the *freedom to provide services*, Case C-368/98 *Vanbraekel and Others* [2001] ECR I-5363 and Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473 should be mentioned. These cases follow on from the judgments in Case C-120/95 *Decker* [1998] ECR I-1831 and Case C-158/96 *Kohll* [1998] ECR I-1931, where the Court had explained the effects of the provisions relating to the free movement of goods and the freedom to provide services with regard to the reimbursement by national social security schemes of medical costs incurred in another Member State.

In *Vanbraekel and Others*, a Belgian national had sought authorisation from her sickness insurance fund to undergo surgery in France. Authorisation was initially refused, but the Belgian court subsequently ordered the sickness insurance fund to reimburse the costs to her. The question arose as to whether those costs had to be reimbursed in accordance with the French scheme or in accordance with the Belgian scheme and whether a limitation on the amount reimbursed was compatible with Regulation (EEC) No 1408/71. [8] The question also arose with regard to Article 49 EC (freedom to provide services).

The Court stated first of all that, in accordance with Article 22(1)(c) of Regulation No 1408/71, the legislation of the Member State in which the treatment is given is to be applied as regards the basis on which costs are borne, while the competent institution remains responsible for subsequently reimbursing the institution of the place of stay, as provided for in Regulation No 1408/71. Since the Belgian reimbursement scale was more favourable than the scale applicable in France, the Court then observed that the regulation does not have the effect of preventing or requiring additional reimbursement when the system in the State in which the person concerned is insured is more beneficial (a principle which follows from *Kohll*, cited above, paragraph 27). The Court finally founded its analysis on the provisions governing the freedom to provide services. Within this framework, the Court held that national legislation which does not guarantee a person covered by its social insurance scheme who has been authorised to receive hospital treatment in another Member State a level of payment equivalent to that to which he would have been entitled if he had received hospital treatment in the Member State in which he was insured entails a restriction of freedom to provide services. That restriction is not justified by overriding reasons in the general interest linked to the financial balance of a social security system, to the objective of maintaining a balanced medical and hospital service open to all, or to the need to maintain treatment capacity or medical competence on national territory.

In *Smits and Peerbooms*, two Netherlands nationals who had received medical treatment abroad sought reimbursement of the medical costs from their respective sickness insurance funds, under the social security system in force in the Netherlands. They were refused a refund, in accordance with Netherlands social security legislation, on the grounds that satisfactory and adequate treatment was available in the Netherlands, that the specific clinical treatment provided abroad had no additional advantage, that there was no medical necessity justifying the treatment and that, owing to the experimental nature of the treatment and the absence of scientific evidence of its effectiveness, it was not regarded as normal within the professional circles concerned.

---

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

The Court stated first of all that the provision of hospital services does constitute the provision of services within the meaning of Article 49 EC. Legislation which makes reimbursement of costs subject to prior authorisation and provides for such reimbursement to be refused in certain circumstances thus constitutes a barrier to freedom to provide services. So far as concerns the possibility of justifying that barrier, the Court examined the same grounds of justification as in the judgment in *Vanbraekel and Others*. It held that the requirement of prior authorisation for access to hospital treatment provided in another Member State is 'both necessary and reasonable' (paragraph 80), in order to safeguard the planning and accessibility of hospital treatment in a Member State. However, the conditions imposed by the Netherlands legislation for obtaining authorisation are compatible with Community law only in so far as the requirement for the treatment to be regarded as 'normal' is interpreted by reference to international medical science. Furthermore, authorisation can be refused on the ground of lack of medical necessity only if the same or equally effective treatment can be obtained without undue delay at an establishment having a contractual arrangement with the insured person's sickness insurance fund.

8. So far as concerns the *right of establishment*, Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727 should be noted. Here, the Court ruled on the interpretation of freedom of establishment in relation to United Kingdom legislation. The legislation afforded companies resident in the United Kingdom the possibility of benefiting from a taxation regime which allowed them to pay dividends to their parent company without having to pay advance corporation tax where the parent company was also resident in the United Kingdom but denied them that possibility where the parent company had its seat in another Member State. The Court held that such legislation is contrary to Article 43 EC and cannot be justified by reasons of public interest. Furthermore, Community law requires that resident subsidiaries and their non-resident parent companies should have an effective legal remedy in order to obtain reimbursement or reparation of the loss which they have sustained as a result of the advance payment of tax by the subsidiaries. In accordance with well-established case-law, the rules relating to that legal remedy must not render practically impossible or excessively difficult the exercise of rights conferred by Community law. The Court also held that it is contrary to Community law for a national court to refuse or reduce a claim brought before it by a resident subsidiary and its non-resident parent company for reimbursement or reparation of the financial loss which they have suffered as a consequence of the advance payment of corporation tax by the subsidiary, on the sole ground that they did not make use of the legal remedies available to them to challenge the decisions of the tax authorities, where national law denied resident subsidiaries and their non-resident parent companies the benefit of the taxation regime in question.

In Case C-108/96 *Mac Quen and Others* [2001] ECR I-837, the Court was required to rule on the interpretation of Article 43 EC in relation to a judicial interpretation of national legislation which had the effect of prohibiting opticians from carrying out certain optical examinations. It held that Article 43 does not in principle preclude such a prohibition, which could be justified by reasons relating to the protection of public health.

9. With regard to *competition law*, some developments in the case-law have arisen from *references for a preliminary ruling* (9.1), others from direct actions or appeals (9.2).

9.1. Case C-453/99 *Courage and Crehan* [2001] ECR I-6297 concerns the question whether a party to a contract which is contrary to Article 81 EC can rely on the breach of that provision before a national court to obtain compensation for loss which results from the unlawful contractual clause.

The Court founded its judgment on its case-law relating to the nature and effect of Community law, recalling Case 26/62 *Van Gend en Loos* [1963] ECR 1, Case 6/64 *Costa* [1964] ECR 585 and Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, and on the consideration that Article 81 constitutes 'a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market' (paragraph 20).

The Court deduced from the nature of the Community legal order, the particularly important position of the competition rules in that order and other more specific considerations that 'any individual can rely on a breach of Article [81(1) EC] before a national court even where he is a party to a contract that is liable to restrict or distort competition within the meaning of that provision' (paragraph 24). That right entails, *inter alia*, the right to seek compensation for the loss caused. Accordingly, there cannot be any absolute bar to an action for damages being brought by one of the parties to a contract which violates Article 81(1) EC. Moreover, the bringing of such actions strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, that are liable to restrict or distort competition. However, if it is established that the party relying on the breach of Article 81 EC bears significant responsibility for the distortion of competition, Community law does not preclude a rule of national law barring him from relying on his own unlawful actions to obtain damages.

In its judgment of 25 October 2001 in Case C-475/99 *Ambulanz Glöckner* (not yet published in the ECR), the Court interpreted Articles 81 EC, 82 EC and 86 EC. Questions were referred for a preliminary ruling in connection with a dispute between an undertaking and a German administrative body concerning a refusal to renew authorisation for the provision of patient transport services by ambulance. The national court was uncertain whether reasons related to the pursuit of a task of general economic interest were sufficient to justify the exclusion of all competition for that type of services.

The Court found first of all that the German legislation conferred on medical aid organisations a special or exclusive right within the meaning of Article 86(1) EC, which was therefore applicable in the case in point. With regard to Article 86(1) EC in conjunction with Article 82 EC, the Court found, in its analysis of the relevant market, that patient transport was a service distinct from that of emergency transport, and that the *Land* of Rhineland-Palatinate (Germany) constituted a substantial part of the common market, given its surface area and population. The Court nevertheless left it to the national court to determine the geographical extent of the market and whether a dominant position was occupied. According to the Court, there was potentially an abuse of a dominant position in that the legislation of the *Land* reserved to certain medical aid organisations an ancillary transport activity which could be carried on by independent operators. Finally, the Court concluded that such legislation was justified under Article 86(2) EC provided that it did not bar the grant of an authorisation to independent operators where the authorised medical aid organisations were unable to satisfy demand existing in the area of medical transport services.

9.2. So far as concerns *direct actions* and *appeals*, two judgments will be noted, one concerning air traffic and the other concerning the concept of Community interest in the context of Regulation No 17 [9] relating to implementation of the competition rules.

In Case C-163/99 *Portugal* v *Commission* [2001] ECR I-2613, the Court dismissed an action brought by the Portuguese Republic for annulment of a Commission decision relating to a

---

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

proceeding pursuant to Article 86 EC. [10] In the contested decision, the Commission had found that the system of discounts on landing charges differentiated according to the origin of the flight, provided for by Portuguese legislation, was incompatible with Article 86(1) EC, in conjunction with Article 82 EC. The Portuguese Republic pleaded, *inter alia*, breach of the principle of proportionality. However, the Court held that the decision was not disproportionate, having regard to the wide discretion enjoyed by the Commission under Article 86(3) EC. The Portuguese Republic also contended that there had been no abuse of a dominant position with regard to discounts granted on the basis of the number of landings. The Court stated, however, that the system of discounts appeared to favour certain airlines, in the present case the national airlines.

In Case C-449/98 P *IECC* v *Commission* [2001] ECR I-3875 and Case C-450/98 P *IECC* v *Commission* [2001] ECR I-3947, the Court dismissed two appeals in the competition field. One of the pleas raised merits particular attention. The appellant maintained that the Court of First Instance had committed an error of law with regard to the scope, the definition and the application of Article 3 of Regulation No 17 [11] and the legal concept of Community interest.

The Court of Justice upheld the judgment of the Court of First Instance. It stated that, in the context of competition policy, the Commission is entitled to give differing degrees of priority to the complaints brought before it. The discretion which it thus enjoys in that regard does not depend on the more or less advanced stage of the investigation of a case, which is only one of the circumstances that the Commission is required to take into consideration. The Court stated, however, that the Court of First Instance did not confer *unlimited* discretion on the Commission, because the Court of First Instance drew attention to the existence and scope of the review of the legality of a decision rejecting a complaint. The Court of Justice found that the Commission, in the exercise of its discretion, must take into consideration all the relevant matters of law and of fact in order to decide what action to take in response to a complaint, particularly those which the complainant brings to its attention. The number of criteria of assessment should not be limited, nor should the Commission be required to have recourse exclusively to certain criteria.

10. In the field of *State aid*, the most significant cases related to the concept of ‘State resources’, to the Commission's powers in the monitoring procedure and to the relationship between State aid and public service obligations imposed on undertakings by State rules.

The facts of *PreussenElektra* have been noted in section 6 of this review. From the point of view of State aid, the main issue was whether legislation such as the German legislation could be categorised as State aid. The Court pointed out that the concept of State aid has been defined by it as covering ‘advantages granted directly or indirectly through State resources’. It then stated that ‘the distinction made in [Article 87(1) EC] between “aid granted by a Member State” and aid granted “through State resources” does not signify that all advantages granted by a State, whether financed through State resources or not, constitute aid but is intended merely to bring within that definition both advantages which are granted directly by the State and those granted by a public or private body designated or established by the State’ (paragraph 58). In the case in point, the Court found that the obligation imposed on private electricity supply undertakings to purchase electricity produced from renewable energy sources at fixed minimum prices did not involve any direct or indirect transfer of State resources to

---

10 Commission Decision 1999/199/EC of 10 February 1999 relating to a proceeding pursuant to Article 90 of the EC Treaty (now Article 86 EC) (IV/35.703 Portuguese airports) (OJ 1999 L 69, p. 31).

11 Cited in footnote 9 above.

undertakings which produce that type of electricity. Accordingly, there was no State aid for the purposes of Article 87 EC. The Court also rejected the Commission's argument, put forward in the alternative, that in order to preserve the effectiveness of the State aid rules, read in conjunction with Article 10 EC, it is necessary for the concept of State aid to be interpreted in such a way as to include support measures which are decided upon by the State but financed by private undertakings. The Court held that the Treaty articles concerning State aid refer directly to measures emanating from the Member States. Article 10 EC cannot be used to extend the scope of Article 87 EC to conduct by States that does not fall within it.

In Case C-400/99 *Italy* v *Commission* (judgment of 9 October 2001, not yet published in the ECR), the Italian Republic had sought the annulment of a Commission decision to initiate the procedure under Article 88(2) EC in so far as that decision ruled on the suspension of the aid in question. The Commission asked the Court to declare the action inadmissible. It submitted that the suspension of the aid flowed directly from Article 88 EC rather than from its decision. That decision was only a preparatory measure and therefore not open to an action for annulment.

In its judgment, the Court dismissed the objection of inadmissibility put forward by the Commission. It underlined the differences between the set of rules applicable to existing aid and that applicable to new aid. So far as concerns aid in the course of implementation the payment of which is continuing and which the Member State regards as existing aid, a contrary classification as new aid, even if provisional, adopted by the Commission in a decision to initiate the procedure under Article 88(2) EC in relation to that aid, has independent legal effects. The fact that, unlike the case of an injunction addressed to a Member State to suspend aid, it is for the Member State and, in appropriate cases, the economic operators concerned to draw the appropriate consequences from the decision themselves, does not affect the scope of its legal effects. The Court accordingly declared the action admissible. It also held the action admissible, for similar reasons, in relation to the measures which did not constitute aid in the Italian Government's submission but whose suspension had none the less been ordered by the contested decision.

Case C-53/00 *Ferring* (judgment of 22 November 2001, not yet published in the ECR) concerned the relationship between the State aid rules and public service obligations imposed on undertakings by State rules. Here, the French company Ferring sought the reimbursement of tax which it had been obliged to pay to the Agence centrale des organismes de sécurité sociale (central agency for social security bodies) by way of a direct sales tax on medicines. Ferring contended that restricting the tax to sales by pharmaceutical laboratories amounted to a grant of State aid to wholesale distributors and infringed the obligation to give advance notice laid down in Article 88(3) EC.

So far as concerns whether the measure at issue was to be classified as aid, the Court stated that the fact that undertakings are treated differently does not automatically imply the existence of an advantage for the purposes of Article 87 EC. There is no such advantage where the difference in treatment is justified by reasons relating to the logic of the system. It accordingly held that the set of tax rules at issue amounted to State aid to wholesale distributors only to the extent that the advantage in not being assessed to the tax exceeded the additional costs that they bore in discharging the public service obligations imposed on them by national law. The Court then considered the effect of Article 86(2) EC in the event that the tax constituted State aid. It observed that, if the advantage for wholesale distributors in not being assessed to the tax exceeded the additional costs imposed on them, that advantage, to the extent that it exceeded the additional costs, could not be regarded as necessary to enable them to carry out the particular tasks assigned to them, within the meaning of that provision.

11. In the field of *harmonisation of laws*, cases on *the law of trade marks* will be noted, concerning both the directive relating to trade marks (11.1) and the regulation on the Community trade mark (11.2). Attention must also be drawn to a case on public procurement law (11.3) and to a case on liability for defective products (11.4).

11.1. Case C-517/99 *Merz & Krell* (judgment of 4 October 2001, not yet published in the ECR) concerned a question referred for a preliminary ruling as to the interpretation of Article 3 of Directive 89/104/EEC relating to trade marks. [12] In this case, Merz & Krell had filed an application for registration of the word mark Bravo in respect of writing implements. The application was refused by the Deutsches Patent- und Markenamt (German Patent and Trade Mark Office) on the ground that the word Bravo is purely a term of praise, devoid of any distinctive character. The national court referred for a preliminary ruling a question, divided into two parts, on the interpretation of Directive 89/104.

As regards the first part of the question, the Court held, in the light of the objectives of the directive, that 'it is through the use made of it that such a sign acquires the distinctive character which is a prerequisite for its registration ... However, whether a sign does have the capacity to distinguish as a result of the use made of it can only be assessed in relation to the goods or services covered by it' (paragraph 30). The Court therefore ruled that Article 3(1)(d) of the directive must be interpreted as 'only precluding registration of a trade mark where the signs or indications of which the mark is exclusively composed have become customary in the current language or in the bona fide and established practices of the trade to designate the goods or services in respect of which registration of that mark is sought' (paragraph 31).

The second part of the question was designed to ascertain whether Article 3(1)(d) of Directive 89/104 precludes registration of a trade mark where the signs or indications are advertising slogans, indications of quality or incentives to purchase even though they do not describe the properties or the characteristics of the goods and services. The Court held that, where the signs or indications concerned have become customary, it is of little consequence that they are used as advertising slogans, indications of quality or incitements to purchase the goods or services. However, registration of a trade mark is not excluded by that mere fact. It is for the national court to determine whether the signs or indications have become customary in the current language or in the bona fide and established practices of the trade to designate the goods or services covered by the mark.

In its judgment of 20 November 2001 in Joined Cases C-414/99 to C-416/99 *Zino Davidoff and Levi Strauss*, not yet published in the ECR, the Court clarified the interpretation of Directive 89/104 [13] with regard to exhaustion of the rights conferred by a trade mark. The case concerned the marketing in the United Kingdom of products previously placed on the market outside the European Economic Area (EEA). Article 7(1) of the directive provides that a trade mark 'shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the Community under that trade mark by the proprietor or with his consent'.

The Court clarified a number of points, of which the following should be noted. First, consent to the marketing of goods *may also be implied*, where it is to be inferred from facts and circumstances prior to, simultaneous with or subsequent to the placing of the goods on the market outside the EEA which unequivocally demonstrate that the proprietor has renounced his right to oppose marketing of the goods within the EEA. However, applying that criterion,

---

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

13 Cited in the preceding footnote.

consent cannot be inferred from the fact that the proprietor of the trade mark has not communicated his opposition to all subsequent purchasers, from the fact that the goods carry no warning of the prohibition on their being placed on the market within the EEA or from the particular features of the law governing the contract by which ownership of the products bearing the trade mark has been transferred.

11.2. In Case C-383/99 P *Procter & Gamble* v *OHIM* [2001] ECR I-6251, relating to Regulation (EC) No 40/94, [14] the Court annulled on appeal the judgment of the Court of First Instance in Case T-163/98 *Procter & Gamble* v *OHIM (BABY-DRY)* [1999] ECR II-2383 and the decision by the OHIM (Office for Harmonisation in the Internal Market), upheld by the Court of First Instance, to refuse to register 'BABY-DRY' as a Community trade mark in respect of disposable diapers made out of paper or cellulose and diapers made out of textile. The Court of Justice essentially held that 'the purpose of the prohibition of registration of purely descriptive signs or indications as trade marks is ... to prevent registration as trade marks of signs or indications which, because they are no different from the usual way of designating the relevant goods or services or their characteristics, could not fulfil the function of identifying the undertaking that markets them and are thus devoid of the distinctive character needed for that function' (paragraph 37). The Court added that, 'as regards trade marks composed of words ... descriptiveness must be determined not only in relation to each word taken separately but also in relation to the whole which they form. Any perceptible difference between the combination of words submitted for registration and the terms used in the common parlance of the relevant class of consumers to designate the goods or services or their essential characteristics is apt to confer distinctive character on the word combination enabling it to be registered as a trade mark' (paragraph 40). Applying those principles to the case in point, the Court found that word combinations like 'BABY-DRY' cannot be regarded as exhibiting, as a whole, descriptive character; they are lexical inventions bestowing distinctive power on the mark so formed and may not be refused registration under Article 7(1)(c) of Regulation No 40/94.

11.3. With regard to *public procurement law*, the judgment in Case C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409 must be given a brief mention. This judgment concerned the interpretation of Directive 93/37/EEC on public works contracts. [15] The Court ruled that the directive precludes national urban development legislation under which, without the procedures laid down in the directive being applied, the holder of a building permit or approved development plan may execute infrastructure works directly, by way of total or partial set-off against the contribution payable in respect of the grant of the permit, in cases where the value of that work is the same as or exceeds the ceiling fixed by the directive. In reaching that conclusion, the Court found that the direct execution of infrastructure works in the circumstances provided for by the Italian legislation on urban development constitutes a 'public works contract' within the meaning of the directive. The necessary conditions for concluding that there is a public contract (a contracting authority, the execution of works or of a work, the existence of a contract for pecuniary interest concluded in writing, the tenderer's status as contractor) were met here. In paragraphs 57 to 97 of the judgment, the Court provided clarification concerning those elements of the concept of a public contract. Municipal authorities are under an obligation to comply with the procedures laid down in the directive whenever they award a contract which is found to be a public works contract. However, the directive is still given full effect if the national legislation allows the municipal authorities to

---

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

[15] Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54).

require the developer holding the building permit to carry out the work contracted for in accordance with the procedures laid down in the directive.

11.4. In Case C-203/99 *Veedfald* [2001] ECR I-3569, the Court gave a ruling on the interpretation of Directive 85/374/EEC[16] which concerns liability for defective products. Here, it was necessary, in particular, to clarify the conditions for exemption from liability which are laid down in Article 7 of the directive. Mr Veedfald was due to undergo a kidney transplant operation. After a kidney had been removed from the donor, it was prepared for transplantation through flushing with a fluid. The fluid was defective and a kidney artery became blocked during the flushing process, making the kidney unusable for any transplant. The Court ruled that the exemption in Article 7(a) was inapplicable to the facts of the case: a defective product is put into circulation when it is used during the provision of a specific medical service, consisting in preparing a human organ for transplantation, and the damage caused to the organ results from that preparatory treatment. It also stated that the exemption from liability where an activity has no economic purpose does not extend to the case of a defective product which has been manufactured and used in the course of a medical service, even if that service is financed entirely from public funds and the patient is not required to pay any consideration.

12. So far as concerns *Community social law*, it is necessary to record one case on equal treatment for men and women (12.1), four cases relating to social security (12.2) and two cases concerning the interpretation of two different employment-related directives (12.3).

12.1. Case C-366/99 *Griesmar* (judgment of 29 November 2001, not yet published in the ECR) concerned the interpretation of Article 141 EC, which deals with equal treatment for men and women, in relation to French civil and military retirement pension rules which awarded only female civil servants a service credit for each of their children.

In the first part of its judgment, the Court applied the criteria laid down in Case C-7/93 *Beune* [1994] ECR I-4471 in order to establish whether the French retirement scheme for civil servants constitutes pay within the meaning of Article 141 EC. According to that judgment, the only decisive criterion is whether the pension is paid to the worker by reason of the employment relationship between him and his former employer, that is to say, the *criterion of employment*. The Court concluded that Article 141 applies: since the pension is 'determined directly by length of service and ... its amount is calculated on the basis of the salary which the person concerned received during his or her final six months at work', it satisfies the criterion of employment.

In the second part of the judgment, the Court found a difference in treatment on grounds of sex. The Court stated that the credit is linked to the bringing-up of children. It then observed that 'the situations of a male civil servant and a female civil servant may be comparable as regard the bringing-up of children' (paragraph 56). However, the French scheme does not permit a male civil servant to receive the credit, even if he can prove that he assumed the task of bringing up his children. Accordingly, the scheme introduces a difference in treatment on grounds of sex which cannot be justified under Article 6(3) of the Agreement on Social Policy, a provision which permits the Member States to help women conduct their professional life on an equal footing with men. Such a credit merely grants female civil servants who are mothers a service credit at the date of their retirement, without providing a remedy for the problems which they may encounter in the course of their career.

---

16 Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ 1985 L 210, p. 29).

12.2. Case C-215/99 *Jauch* [2001] ECR I-1901 concerned frontier-zone workers, in the case in point a German national who had worked in Austria. The matter at issue was whether the care allowance which he had claimed constituted a special non-contributory benefit within the meaning of Article 10a of Regulation No 1408/71, [17] whose grant Member States could make subject to a residence condition. The allowance was included on the list of special non-contributory benefits which forms Annex IIa to that regulation. The Austrian Government contended that its inclusion on the list was sufficient for it to be classified as such a benefit.

Faced with that argument, the Court recalled that Regulation No 1408/71 was adopted to give effect to Article 42 EC and that it must be interpreted in the light of the objective of that provision, which is to establish the greatest possible freedom of movement for migrant workers. That freedom of movement would not be attained if, as a consequence of the exercise of their right to freedom of movement, workers were to lose the social security advantages which represent the counterpart of contributions which they have paid. Accordingly, provisions which derogate from the principle of the exportability of social security benefits must be interpreted strictly. This means that, in addition to being listed in Annex IIa to Regulation No 1140/71, those benefits must be both special and non-contributory.

The question whether the allowance at issue could be regarded as special had already been decided in Case C-160/96 *Molenaar* [1998] ECR I-843, according to which it constituted a sickness benefit. Furthermore, the allowance was contributory since there was an indirect link between it and sickness insurance contributions. Accordingly, the Court ruled that the allowance must be provided irrespective of the Member State in which a person reliant on care, who satisfies the other conditions for receipt of the benefit, is resident.

In its judgment in Case C-33/99 *Fahmi and Esmoris Cerdeiro-Pinedo Amado* [2001] ECR I-2415, the Court gave a preliminary ruling on the interpretation of Articles 39 EC and 43 EC, Regulation No 1408/71, [18] Regulation No 1612/68 [19] and the EEC-Morocco Cooperation Agreement. [20] Mr Fahmi, a Moroccan national, and Mrs Esmoris Cerdeiro-Pinedo Amado, a Spanish national, had worked in the Netherlands. After becoming unfit for work, they returned to Morocco and Spain respectively and continued to receive an allowance for incapacity for work. By virtue of that allowance, they were both also entitled to allowances for dependent children. However, they were refused payment of those allowances, on the ground that in each case their child had already reached the age of 18 years, following a decision by the Netherlands legislature gradually to abolish the allowances from that age and to replace them with study finance paid directly to students. The questions asked by the national court were essentially designed to ascertain whether the respective rules applicable to Mr Fahmi and Mrs Esmoris Cerdeiro-Pinedo Amado precluded such a refusal.

The Court found first of all that neither the EEC-Morocco Cooperation Agreement nor the Community provisions invoked preclude a national measure which gradually abolishes an

---

17 Cited in footnote 8 above, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1).

18 Cited in footnote 8 above, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), as amended by Council Regulation (EEC) No 1247/92 of 30 April 1992 (OJ 1992 L 136, p. 1).

19 Cited in footnote 2 above.

20 Cooperation Agreement between the European Economic Community and the Kingdom of Morocco signed at Rabat on 27 April 1976 and approved on behalf of the Community by Council Regulation (EEC) No 2211/78 of 26 September 1978 (OJ 1978 L 264, p. 1).

allowance for dependent children aged between 18 and 27 years pursuing studies provided that, as was the case with the legislation at issue in the main proceedings, abolition of the allowance does not involve discrimination based on nationality. So far as concerns the Spanish national, the Court, interpreting Regulation No 1408/71, ruled that a person entitled to a pension payable under the legislation of a single Member State and residing on the territory of another Member State cannot rely on that regulation in order to obtain study finance from the State from which he receives his pension. The Court reached the same conclusion in relation to Regulation No 1612/68 and Article 39 EC. As regards the latter provision in particular, the Court held that where a worker has ceased work and returned to his Member State of origin, where his children also live, the conditions to which the grant of study finance is subject are not capable of impeding the right to freedom of movement which that worker enjoys under Article 39 EC. So far as concerns the case of a Moroccan national, the Court concluded that, where his dependent children do not reside in the Community, it follows from the wording of Article 41(1) and (3) of the EEC-Morocco Cooperation Agreement, which imposes a residence condition, that neither he nor his children can rely, in relation to study finance such as that at issue in the main proceedings, on the provision of that agreement laying down the prohibition of discrimination on the basis of nationality.

In Case C-43/99 *Leclere and Deaconescu* [2001] ECR I-4265, Mr Leclere, a frontier-zone worker of Belgian nationality, and his wife brought proceedings against a Luxembourg institution which had refused to award them maternity, childbirth and child-raising allowances on the ground that they did not reside in Luxembourg. The national court referred questions to the Court of Justice for a preliminary ruling on the interpretation of several provisions of Regulation No 1408/71 [21] and of Regulation No 1612/68. [22] It also raised the issue of whether certain articles of, and annexes to, Regulation No 1408/71 are compatible with Articles 39 EC and 42 EC.

The questions as to validity concerned the compatibility with the Treaty of the provisions of the regulation which, as an exception, permit a residence condition to be imposed for the award of Luxembourg childbirth and maternity allowances. The Court stated first of all that, having regard to the wide discretion which the Council enjoys in implementing Articles 39 EC and 43 EC, the exclusion of childbirth allowances from the scope of Regulation No 1408/71 does not infringe those provisions. However, that exclusion does not have the effect of dispensing Member States from the need to comply with other rules of Community law, in particular Regulation No 1612/68. On the other hand, the Court held that the inclusion of the maternity allowance in the scheme of derogations provided for in Article 10a of Regulation No 1408/71, relating to special non-contributory benefits paid exclusively in the territory of the Member State of residence, was contrary to Articles 39 EC and 42 EC, since that allowance does not amount to a special non-contributory benefit of that kind.

The Court held with regard to the child-raising allowance that it is not one of the family allowances which, pursuant to Regulation No 1408/71, are to be paid to persons receiving pensions irrespective of the Member State in whose territory they are residing, since the amount of the allowance is fixed irrespective of the number of children raised in the same home and the allowance therefore does not correspond to the definition of ‘family allowances’ in the regulation. In addition, the Court held that a person in receipt of an invalidity pension who resides in a Member State other than the State providing his pension is not a worker within the meaning of Regulation No 1612/68 and does not enjoy rights attaching to that status unless they derive from his previous professional activity. Such an interpretation results from

---

[21] Cited in footnote 17 above.

[22] Cited in footnote 2 above.

the fact that Article 39 EC and Regulation No 1612/68 protect a former worker against any discrimination affecting rights acquired during the former employment relationship but, since he is no longer engaged in an employment relationship, he cannot acquire new rights having no links with his former activity.

Joined Cases C-95/99 to C-98/99 and C-180/99 *Khalil and Others* (judgment of 11 October 2001, not yet published in the ECR) concerned the right of a number of stateless persons and refugees, or their spouses, to child benefit and child-raising allowance in Germany. For a certain period the German Government had confined grant of those allowances to foreigners in possession of a residence entitlement or a residence permit, so that the grant of such benefits to those stateless persons and refugees was discontinued. Before the German courts they pleaded Articles 2 and 3 of Regulation No 1408/71. [23] The Bundessozialgericht (German Federal Social Court) asked the Court of Justice two questions of Community law. In its first question, it asked whether Regulation No 1408/71 is applicable to stateless persons and refugees when they do not have the right to freedom of movement. Should the answer to that question be in the affirmative, it asked whether that regulation remains applicable if the stateless persons and refugees in question have travelled directly to a Member State from a non-member country and have not moved within the Community.

The Court interpreted the first question as casting doubt on the validity of including stateless persons and refugees among the persons covered by Regulation No 1408/71. It pointed out that it was necessary to consider this question as at the date of their inclusion in the regulation, that is to say as at 1971, when the legal basis for the regulation was Article 7 of the EEC Treaty (now, after amendment, Article 12 EC) and Article 51 of the EEC Treaty (now, after amendment, Article 42 EC). Examining the international context at the time of their inclusion, the Court found that the Member States had entered into an obligation at international level to allow stateless persons and refugees to benefit from social security under the same conditions as apply to the nationals of other States. The inclusion of stateless persons and refugees among the persons covered by the regulation thus merely reflects the content of rules of international law. The Court stated that Article 42 EC provides for recourse to the technique of coordinating the national social security schemes. In effecting such coordination, the Council could use Article 42 EC in order to take account of the States' international obligations, by including stateless persons and refugees among the persons covered by the regulation. Their inclusion was accordingly valid.

So far as concerns the second question, the Court ruled that ‘workers who are stateless persons or refugees residing in the territory of one of the Member States, and members of their families, cannot rely on the rights conferred by Regulation No 1408/71 where they are in a situation which is confined in all respects within that one Member State’ (paragraph 72). The Court interpreted Regulation No 1408/71 in the light of Article 42 EC, which constitutes the basis for the inclusion of refugees and stateless persons among the persons covered by that regulation. According to the Court, it follows from Article 42 EC and the case-law relating to Regulation No 1408/71 that that regulation constitutes an instrument coordinating the social security schemes of the Member States and that it does not apply to activities which have no factor linking them with any of the situations governed by Community law and which are confined in all relevant respects within a single Member State.

---

[23] Cited in footnote 8 above.

12.3. In Case C-350/99 *Lange* [2001] ECR I-1061, the Court interpreted certain provisions of Directive 91/533 [24] which relates to an employer's obligation to inform employees of the conditions applicable to the employment relationship. The questions had been asked in proceedings concerning the validity of Mr Lange's dismissal on the ground that he refused to work overtime. The Court interpreted the directive as obliging an employer to notify an employee of a term requiring him to work overtime whenever requested to do so by his employer. That information may take the form of a mere reference to the relevant laws, regulations, administrative or statutory provisions or collective agreements. The Court stated that no provision of the directive requires an essential element of the contract or employment relationship to be regarded as inapplicable where it has not been mentioned in a written document delivered to the employee or has not been mentioned in such a document with sufficient precision. Finally, the Court ruled that the directive does not require the national court to apply or to refrain from applying, in the context of the directive, principles of national law under which the proper taking of evidence is deemed to have been obstructed where a party to the proceedings has not complied with his legal obligations to provide information.

In Case C-173/99 *BECTU* [2001] ECR I-4881, an English court referred a question to the Court of Justice for a preliminary ruling on the interpretation of Article 7 of Directive 93/104 [25] concerning certain aspects of the organisation of working time. The main question was whether this directive allows a Member State to make the accrual of rights to paid annual leave conditional on prior completion of a minimum period of 13 weeks' uninterrupted employment with the same employer.

The Court answered that question in the negative, after a detailed examination of the directive's context and objective. It stated in particular that 'the entitlement of every worker to paid annual leave must be regarded as a particularly important principle of Community social law from which there can be no derogations and whose implementation by the competent national authorities must be confined within the limits expressly laid down by Directive 93/104' (paragraph 43).

13. With regard to *law concerning the Community's external relations*, reference will be made to Opinion 2/00 (13.1), to certain questions concerning the interpretation of association agreements (13.2) and to a judgment relating to the interpretation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) (13.3).

13.1. Opinion 2/00 of 6 December 2001 (not yet published in the ECR) concerned the Cartagena Protocol on Biosafety, an international instrument which was drawn up within the framework of the Convention on Biological Diversity signed on 5 June 1992 by the European Economic Community and its Member States at the conference in Rio de Janeiro known as the 'Earth Summit'. The Commission's request for an Opinion was designed to ascertain whether the competence of the Community to approve the Protocol had to be founded on Article 133 EC, relating to common commercial policy, and Article 174(4) EC, relating to the environment, and whether the powers of the Member States were residual or preponderant in relation to those of the Community.

---

24 Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (OJ 1991 L 288, p. 32).

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

Certain governments and the Council contested the admissibility of the request on the ground that it concerned neither the compatibility of the Protocol with the Treaty nor the division of powers between the Community and the Member States under the Protocol. However, the Court stated: 'the choice of the appropriate legal basis has constitutional significance. Since the Community has conferred powers only, it must tie the Protocol to a Treaty provision which empowers it to approve such a measure' (paragraph 5). Recourse to an incorrect legal basis could invalidate the measure concluding the Protocol, a situation which would be liable to create complications that the special procedure laid down in Article 300(6) EC is specifically designed to forestall. On the other hand, that procedure involving a prior reference to the Court is not intended to solve difficulties associated with implementation of an envisaged agreement which falls within shared Community and Member State competence. The Court accordingly held the request for an Opinion admissible only as to the question whether the Protocol falls within exclusive Community competence or within shared Community and Member State competence.

On the substance, the Court declared that competence to conclude the Cartagena Protocol was shared between the European Community and the Member States. It rejected the Commission's argument that the Protocol essentially falls within the scope of Article 133 EC while certain more specific matters in the Protocol are covered by Article 174 EC. Its reasoning was founded on settled case-law concerning the legal basis for measures. In the light of the context, aim and content of the Protocol, the Court found that 'its main purpose or component is the protection of biological diversity against the harmful effects which could result from activities that involve dealing with [modified living organisms], in particular from their transboundary movement' (paragraph 34). That finding, and other considerations relating in particular to the fact that the Protocol is an instrument intended essentially to improve biosafety and not to promote, facilitate or govern trade, led the Court to declare that 'conclusion of the Protocol on behalf of the Community must be founded on a single legal basis, specific to environmental policy' (paragraph 42).

13.2. In Case C-63/99 *Gloszczuk* [2001] ECR I-6369, Case C-257/99 *Barkoci and Malik* [2001] ECR I-6557 and Case C-235/99 *Kondova* [2001] ECR I-6427, the Court interpreted identical provisions concerning the right of establishment which is provided for by the Europe Agreements establishing an association between the Community and its Member States and, respectively, the Republic of Poland, the Czech Republic and the Republic of Bulgaria.[26] Since the clarification provided by the Court is substantially similar in all three cases, reference will be made to the judgment in *Gloszczuk* only.

The Court found first of all that the provisions of the association agreement which lay down a prohibition preventing Member States from discriminating, on grounds of nationality, against Polish nationals wishing to pursue economic activities as self-employed persons within the territory of those States have direct effect, since such provisions establish a precise and unconditional principle which is sufficiently operational to be applied by a national court and which is therefore capable of governing the legal position of individuals. The direct effect of

[26] Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part, concluded and approved on behalf of the Community by Decision 93/743/Euratom, ECSC, EC of the Council and the Commission of 13 December 1993 (OJ 1993 L 348, p. 1); Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Czech Republic, of the other part, concluded and approved on behalf of the Community by Decision 94/910/ECSC, EC, Euratom of the Council and the Commission of 19 December 1994 (OJ 1994 L 360, p. 1); Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part, concluded and approved on behalf of the Community by Decision 94/908/ECSC, EC, Euratom of the Council and the Commission of 19 December 1994 (OJ 1994 L 358, p. 1).

those provisions means that individuals may invoke them before the courts of the host Member State. However, such direct effect does not prevent the authorities of the host State from applying national laws and regulations regarding entry, stay and establishment. Next, the Court stated that the right of establishment laid down by the association agreement presupposes a right to enter and remain. However, the interpretation of the right of establishment under Community law cannot be extended to similar provisions in the association agreement, which has a more limited aim than the EC Treaty. In the context of the association agreement, the right of establishment is not an absolute privilege, since its exercise may be limited by the legislation of the host Member State concerning entry, stay and establishment, subject to the condition that the benefits accruing to the Republic of Poland under the agreement are not nullified or impaired. Finally, the Court reviewed whether the restrictions imposed on the right of establishment were compatible with that condition. In this regard, the Court held compatible with the association agreement a system of prior control which makes the issue of leave to enter and remain subject to the condition that the applicant must show that he genuinely intends to take up an activity as a self-employed person without at the same time entering into employment or having recourse to public funds, and that he possesses, from the outset, sufficient financial resources and has reasonable chances of success. The association agreement does not preclude the host Member State from rejecting an application for establishment made by a Polish national pursuant to Article 44(3) of that agreement on the sole ground that the Polish national was residing illegally within the territory of that State because of false representations made for the purpose of obtaining initial leave to enter it or of non-compliance with the conditions attached to that entry. Thus, the host State may require the submission of a new application for establishment to the competent authorities in the State of origin or in another country.

Case C-268/99 *Jany and Others* (judgment of 20 November 2001, not yet published in the ECR) concerned the right of establishment of several Polish and Czech nationals. The Netherlands authorities had refused them residence permits to enable them to work as self-employed prostitutes. So far as concerns the general interpretation (direct effect, limits and so forth) of the relevant provisions of the association agreements between the Community and its Member States and, respectively, the Republic of Poland and the Czech Republic, the Court referred to the case of *Gloszczuk*. The question then arose as to whether the activity of prostitution carried on in a self-employed capacity falls within the concept of 'economic activities as self-employed persons'.

The Court stated that this concept has the same meaning and scope as the concept of 'activities as self-employed persons' used in Article 43 EC. Prostitution carried on in a self-employed capacity falls within the scope of the right of establishment as provided for by the association agreements and by the EC Treaty itself.

Furthermore, as regards the possible limitations which a Member State might impose in view of the specific nature of the activity of prostitution, the Court ruled that prostitution is an economic activity carried on in a self-employed capacity provided that it is being carried on (i) outside any relationship of subordination as to the choice of that activity, working conditions and conditions of remuneration, (ii) under the relevant person's own responsibility and (iii) in return for remuneration paid to that person directly and in full.

In reaching this conclusion, the Court rejected an argument raised by the national court as possibly limiting application of the association agreements, namely the immorality of the activity of prostitution. The Court, relying on its case-law (Case C-159/90 *Society for the Protection of Unborn Children Ireland* [1991] ECR I-4685), pointed out that 'it is not for the Court to substitute its own assessment for that of the legislatures of the Member States where an allegedly immoral activity is practised legally' (paragraph 56). The Court then stated that, 'far from being prohibited in all Member States, prostitution is tolerated, even regulated, by most of those States, notably the Member State concerned in the present case' (paragraph 57). The Kingdom of the Netherlands could not have recourse to the public-policy derogation provided for by the association agreements because applicability of that derogation is subject to the condition that the State which relies on it has adopted effective measures to monitor and repress like activities pursued by its own nationals.

13.3. In Case C-89/99 *Schieving-Nijstad and Others* [2001] ECR I-5851, the Court confirmed its case-law (Case C-53/96 *Hermès* [1998] ECR I-3603 and Joined Cases C-300/98 and C-392/98 *Dior and Others* [2000] ECR I-11307) relating to Article 50 of TRIPs, an agreement set out in Annex 1 C to the WTO Agreement. That article is a procedural provision relating to provisional judicial protection of intellectual property rights which is to be applied by Community and national courts in accordance with obligations assumed both by the Community and by the Member States. As in *Dior and Others*, the Court held that that procedural provision of TRIPs does not have direct effect. Nevertheless, where the judicial authorities are called upon to apply national rules with a view to ordering provisional measures for the protection of intellectual property rights falling within a field to which TRIPs applies and in respect of which the Community has already legislated, they are required to do so as far as possible in the light of the wording and purpose of Article 50, so as to ensure that a balance is struck between the competing rights and obligations of the right holder and of the defendant.

14. In the *environmental* field, Case C-324/99 *DaimlerChrysler* (judgment of 13 December 2001, not yet published in the ECR) should be mentioned. This case concerned the interpretation of Regulation (EEC) No 259/93 [27] on shipments of waste in the Community. In proceedings between DaimlerChrysler and the *Land* of Baden-Württemberg, the Bundesverwaltungsgericht (German Federal Administrative Court) sought a preliminary ruling on a number of questions concerning the compatibility with Community law of a decree of the *Land* enacted pursuant to that regulation. The decree had been adopted on the basis of a provision in the regulation which permits the Member States, in certain cases, to adopt measures prohibiting generally the export of waste for disposal. That provision also requires the measures of prohibition to be taken 'in accordance with the Treaty'.

The national court was uncertain first of all whether that expression means that it is necessary to verify whether the prohibition is consistent with primary law, in particular Articles 28 EC, 29 EC and 30 EC. In this connection, the Court of Justice observed that the national court had not questioned the validity of Article 4(3)(a) of Regulation No 259/93 in the light of Articles 28 EC, 29 EC and 30 EC. It recalled the case-law according to which, 'where a matter is regulated in a harmonised manner at Community level, any national measure relating thereto must be assessed in the light of the provisions of that harmonising measure and not of Articles [28 EC, 29 EC and 30 EC]' (paragraph 32, which cites Case C-37/92 *Vanacker and Lesage* [1993] ECR I-4947, paragraph 9). The Court then conducted a detailed examination of Regulation No 259/93, concluding that it regulates in a harmonised manner the question of shipments of waste and that, accordingly, national measures must be assessed in the light of the provisions of the regulation and not of Articles 28 EC, 29 EC and 30 EC. In addition the expression 'in accordance with the Treaty' was interpreted by the Court 'as meaning that, in addition to being compatible with the Regulation, such ... measures must also comply with the general rules or principles of the Treaty to which no direct reference is made in the legislation adopted in the field of waste shipments' (paragraph 45).

---

[27] Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community (OJ 1993 L 30, p. 1).

By its other questions, the national court asked the Court of Justice whether certain aspects of the German waste disposal legislation were compatible with Regulation No 259/93. The Court ruled that that regulation does not authorise a Member State which has introduced an obligation to offer waste for disposal to an approved body to provide that any shipment of such waste to treatment installations in other Member States is authorised only on condition that the intended disposal satisfies the environmental requirements of the legislation of the State of origin. Likewise, the regulation precludes a Member State from applying to shipments of such waste its own procedure in relation to the notification, offer and allocation of waste separate from that laid down in the regulation.

15. In the field of transport policy, the cases of *Italy* v *Commission* and *Analir* will be noted.

In Case C-361/98 *Italy* v *Commission* [2001] ECR I-385, the Court dismissed an action brought by the Italian Government for annulment of a decision adopted by the Commission pursuant to Regulation (EEC) No 2408/92. [28] The contested decision prohibited the Italian Republic from applying certain rules distributing traffic between the Milan airports at Linate and Malpensa, on the ground that they had discriminatory effects in favour of Alitalia. The rules were also considered to be contrary to the principle of proportionality. The Italian Government contended that the Commission had exceeded the limits of the power conferred on it by Regulation No 2408/92: the regulation refers only to the principle of non-discrimination on the ground of the nationality of the air carrier, whereas the contested decision was based on the principle of proportionality.

The Court recalls in the judgment that, in interpreting a provision of Community law, it is necessary ‘to consider not only its wording but also the context in which it occurs and the objects of the rules of which it forms part’ (paragraph 31). The Court deduced from the recitals in the preamble to Regulation No 2408/92 that that regulation is intended to define the conditions for applying in the air transport sector the principle of the freedom to provide services which is enshrined in the Treaty. It found that the Italian measures declared by the Commission to be incompatible with the regulation constituted restrictions on the freedom to provide services. The Court concluded that, in order for those restrictions to be capable of being authorised under the regulation, they had to be proportionate to the purpose for which they were adopted. Consequently, the Commission had been fully entitled to examine whether the Italian measures were proportionate and appropriate for the purpose of achieving the objective pursued.

Case C-205/99 *Analir and Others* [2001] ECR I-1271 concerned freedom to provide services in the field of maritime transport within Member States. The Tribunal Supremo (Spanish Supreme Court) had referred for a preliminary ruling three questions on the interpretation of several articles of Regulation (EEC) No 3577/92, [29] which applies the principle of freedom to provide services to maritime transport within Member States (maritime cabotage). The questions were asked in connection with several actions brought by Spanish shipping companies for annulment of the Spanish legislation on regular maritime cabotage lines and public-interest shipping on the ground that it was contrary to Community legislation.

---

28 Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ 1992 L 240, p. 8).

29 Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (OJ 1992 L 364, p. 7).

By its first question, the national court asked whether it is compatible with Regulation No 3577/92 to make the provision of island cabotage services subject to prior administrative authorisation. The Court of Justice stated that the aim of the regulation is to apply the freedom to provide services to maritime cabotage. It recalled its case-law concerning the freedom to provide services and concluded that a system of prior authorisation constitutes a restriction of that freedom. That restriction may nevertheless be justified as a means of imposing public service obligations, provided that the scheme of prior authorisation complies with a number of conditions: (i) a real public service need arising from the inadequacy of the regular transport services under conditions of free competition can be demonstrated; (ii) the scheme is necessary and proportionate to the aim pursued; and (iii) the scheme is based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned. In its reply to the second question, the Court held that Regulation No 3577/92 permits a Member State to include in the conditions for granting and maintaining prior administrative authorisation a condition enabling account to be taken of the solvency of a Community shipowner, such as the requirement that he is to have no outstanding tax or social security debts, provided that such a condition is applied on a non-discriminatory basis. In answering the third question, the Court interpreted Article 4(1) of the regulation as permitting a Member State to impose public service obligations on some shipping companies and, at the same time, to conclude public service contracts with others for the same line or route, provided that a real public service need can be demonstrated and in so far as that application of the two methods concurrently is on a non-discriminatory basis and is justified in relation to the public-interest objective pursued.

16. In the field of *tax*, cases on value added tax (VAT) remain plentiful and, of these, Case C-34/99 *Primback* [2001] ECR I-3833 is to be noted. In this case, the Court interpreted the provisions of the Sixth Directive 77/388/EEC [30] which relate to the taxable amount. A retailer sold goods by means of interest-free credit granted to purchasers by a person other than the seller. The finance company subsequently paid to the vendor a sum lower than the price of the goods, the difference being the consideration for granting the credit. Consumers were not informed of that financial transaction entered into without their knowledge. The legal question was what amount (the net amount actually received by the seller or the full amount payable by the purchaser) should be regarded as the taxable amount for VAT purposes. The Court held that in such circumstances the taxable amount for the purposes of calculating VAT consists of the full amount payable by the purchaser.

In a case relating to tax law and insurance law (Case C-191/99 *Kvaerner* [2001] ECR I-4447), the Court gave a preliminary ruling on the interpretation of Directive 88/357/EEC concerning insurance, [31] in particular on the definition of establishment and of the State where the risk is situated. In its judgment, the Court ruled that Articles 2 and 3 of the directive permit a Member State to levy insurance tax on a legal person established in another Member State in respect of premiums which that legal person has paid to an insurer, also established in another Member State, to cover the business risks of its subsidiary or sub-subsidiary established in the Member State making the levy. The outcome is the same if the legal person which has paid the premiums and the legal person whose business risks are covered are two companies in the same group linked by a relationship other than that of parent and subsidiary company.

---

30 Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1).

31 Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 73/239/EEC (OJ 1988 L 172, p. 1).

17. Three cases relating to the *common agricultural policy* are to be noted, respectively concerning Community measures to combat foot-and-mouth disease, emergency measures to protect against bovine spongiform encephalopathy, and the protection of geographical indications and designations of origin.

Jippes and Others, cited above, is the first instance where the accelerated procedure under Article 104a of the Rules of Procedure in respect of references for a preliminary ruling has been applied. In this case, the Court was required to decide whether the ban on vaccination against foot-and-mouth disease provided for by Directive 85/311 and the Commission decision adopted pursuant to that directive [32] was valid in the light of the Treaty and in particular the principle of proportionality, given the need to safeguard animal welfare.

The Court held that the Community institutions are obliged to take account of the health and protection of animals in the formulation and implementation of the common agricultural policy, adding that fulfilment of that obligation can be verified in a review of the proportionality of the measure. After examining the proportionality of the measure imposing the ban on preventive vaccination, the Court concluded that, having regard to the Council's wide discretionary power in the matter, the ban did not exceed the limits of what was appropriate and necessary in order to attain the objective pursued by the Community rules. So far as concerns the decision adopted by the Commission pursuant to Directive 85/511, that is to say Decision 2001/246, the Court held that the directive constituted an adequate legal basis for its adoption. Finally, the Commission decision did not infringe the principle of equal treatment, since the animals which could be vaccinated under the Community rules were not in a situation comparable to that of Ms Jippes' animals.

In its judgment of 13 December 2001 in Case C-1/00 *Commission* v *France* (not yet published in the ECR), the Court declared that the French Republic had acted unlawfully by refusing to adopt the measures necessary in order to comply with Council Decision 98/256 and Commission Decision 1999/514, [33] relating to emergency measures to protect against bovine spongiform encephalopathy. Those decisions had lifted the export ban so far as concerns certain meat and meat products from cattle slaughtered in the United Kingdom, subject to the strict conditions of a date-based export scheme. Contrary to those decisions, the French Republic unilaterally decided to maintain the ban.

However, its failure to fulfil its obligations was not as extensive as the Commission claimed. The Commission did not establish that the French Government would have prevented the import of all beef and veal or all meat-based products from other Member States not bearing the distinct mark of products subject to the export scheme established by the decisions in question on the ground that certain consignments of meat or of cut, processed or rewrapped products could include beef, veal or products of United Kingdom origin which would not be

---

32 Council Directive 85/511/EEC of 18 November 1985 introducing Community measures for the control of foot-and-mouth disease (OJ 1985 L 315, p. 11), as amended by Council Directive 90/423/EEC of 26 June 1990 (OJ 1990 L 224, p. 13). Commission Decision 2001/246/EC of 27 March 2001 laying down the conditions for the control and eradication of foot-and-mouth disease in the Netherlands in application of Article 13 of Directive 85/511 (OJ 2001 L 88, p. 21), as amended by Commission Decision 2001/279/EC of 5 April 2001 (OJ 2001 L 96, p. 19).

33 Council Decision 98/256/EC of 16 March 1998 concerning emergency measures to protect against bovine spongiform encephalopathy, amending Decision 94/474/EC and repealing Decision 96/239/EC (OJ 1998 L 113, p. 32), in the version resulting from Commission Decision 98/692/EC of 25 November 1998 (OJ 1998 L 328, p. 28). Commission Decision 1999/514/EC of 23 July 1999 setting the date on which dispatch from the United Kingdom of bovine products under the date-based export scheme may commence by virtue of Article 6(5) of Decision 98/256 (OJ 1999 L 195, p. 42).

identifiable as such. Accordingly, the application for a finding of failure to fulfil obligations was dismissed in so far as it concerned that category of products. The Commission also sought a declaration that Article 28 EC, relating to free movement of goods, had been infringed. The Court observed with regard to this claim that the Commission had offered no justification for a finding of an infringement separate from that already found in relation to the decisions referred to above. It therefore dismissed this part of the Commission's application. It likewise rejected the Commission's claim relating to breach of Article 10 EC, which the French Republic had not infringed given the difficulties in interpreting and implementing Decision 98/256.

Case C-269/99 *Kühne and Others* (judgment of 6 December 2001, not yet published in the ECR) concerned a question referred for a preliminary ruling relating to the validity of the registration of the designation 'Spreewälder Gurken' as a geographical indication of origin under Regulation (EEC) No 2081/92. [34] The Court found it necessary to rule on the division of powers between the Member State which has submitted an application for registration and the Commission. The Court stated that it is for the Member State to check whether the application for registration is justified with regard to the conditions laid down by that regulation. It is for the Commission, in turn, to verify, in particular, whether the specification which accompanies the application complies with Regulation No 2081/92 and, on the basis of the information contained in the specification, whether the designation satisfies the requirements of Article 2(2)(a) or (b) of the regulation. That system of division of powers is attributable particularly to the fact that registration presupposes verification that a certain number of conditions have been met, a task which requires, to a great extent, detailed knowledge of matters particular to the Member State concerned, which the competent authorities of that State are best placed to check. Thus, questions such as whether a denomination is established by usage or concerning the definition of the geographical area fall within the checks which must be carried out by the competent national authorities. So far as concerns the argument that it was not possible to challenge at national level the measure consisting of the application for registration, the Court recalled the case-law according to which it is for the national courts to rule on the lawfulness of an application for registration of a designation and, consequently, to regard an action brought for that purpose as admissible, even if the domestic rules of procedure do not provide for this in such a case (Case C-97/91 *Oleificio Borelli* v *Commission* [1992] ECR I-6313, paragraph 13).

18. So far as concerns the *law relating to Community officials*, three cases will be mentioned. It should be noted that, in so far as they raised questions regarding fundamental rights, their interest is not limited to interpretation of the Staff Regulations of Officials of the European Communities but also relates to the Community legal order as a whole.

In Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611, the Court defined the scope of the freedom of expression of Community officials so far as concerns publications dealing with the work of the Community, which, under Article 17 of the Staff Regulations, must be submitted by them for prior permission. When Mr Connolly, a Commission official, published a book without having first requested permission as required by the Staff Regulations, disciplinary proceedings were brought against him. Following delivery of an opinion by the Disciplinary Board, Mr Connolly was dismissed. He brought proceedings before the Court of First Instance for annulment of the decision removing him from his post. That action was dismissed by the Court of First Instance's judgment in Joined Cases T-34/96 and T-163/96

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

Connolly v *Commission* [1999] ECR-SC I-A-87 and II-463. Mr Connolly appealed against that judgment to the Court of Justice.

The appeal was dismissed. In its judgment, the Court of Justice recalled that fundamental rights, which include freedom of expression, form an integral part of the general principles of Community law. In the same terms as those used by the European Court of Human Rights, the Court of Justice observed that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for the development of every man. Limitations on freedom of expression, such as those set out in Article 10(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms are to be interpreted strictly. The need to seek prior permission for the publication of any matter dealing with the work of the Communities forms part of the protection of the institutions' rights. Such rules requiring prior permission reflect the relationship of trust which must exist between employers and employees, particularly when they discharge high-level responsibilities in the public service. The Court pointed out that the Community judicature must ensure a fair balance between freedom of expression and the legitimate interests of the institutions and applied those principles to the specific facts. It concluded from the facts that Mr Connolly was dismissed not because he had failed to apply for prior permission or because he had expressed a dissentient opinion, but because he published material severely criticising members of the Commission and other superiors and challenging fundamental aspects of Community policies. Accordingly, he committed an irremediable breach of the trust which the Commission is entitled to expect from its officials and, as a result, made it impossible for any employment relationship to be maintained with the institution.

In its judgment of 13 December 2001 in Case C-340/00 P *Commission* v *Cwik* (not yet published in the ECR), the Court upheld on appeal the judgment delivered by the Court of First Instance in Case T-82/99 *Cwik* v *Commission* [2000] ECR-SC I-A-155 and II-713. The Court of First Instance had annulled a decision by the Commission refusing Mr Cwik, a European Communities official, permission to publish the text of a lecture that he had given. The Court recalled the principles which it had laid down in *Connolly* v *Commission*, cited above, and rejected the grounds of appeal put forward by the Commission. It held that the Court of First Instance did not fail to have regard to the preventive function of the prior permission procedure laid down by the Staff Regulations, but simply criticised the reasons put forward to substantiate the decision to refuse publication: those reasons had merely stated that there was a risk that the interests of the European Communities would be prejudiced where an official's opinion was different from the view expressed by the Commission. The Court stated that a refusal of permission to publish can be warranted only where there is a real risk of serious prejudice to the interests of the European Communities, established on the basis of specific, objective factors.

In Joined Cases C-122/99 P and C-125/99 P *D and Sweden* v *Council* [2001] ECR I-4319, the Court dismissed two appeals brought by D and the Kingdom of Sweden against the judgment of the Court of First Instance in Case T-264/97 *D* v *Council* [1999] ECR-SC I-A-1 and II-1, in which the Court of First Instance had dismissed D's action for annulment of the refusal by the Council of the European Union to award him the household allowance. The facts were as follows. D, a European Communities official of Swedish nationality working at the Council, had registered a partnership with another Swedish national of the same sex in Sweden. He applied to the Council for his status as a registered partner to be treated as being equivalent to marriage for the purpose of obtaining the household allowance provided for in the Staff Regulations of Officials of the European Communities. The Council rejected his application on the ground that the provisions of the Staff Regulations could not be construed as allowing a registered partnership to be treated as being equivalent to marriage. The Court of First Instance confirmed the legality of that decision and the Court of Justice dismissed the appeals brought against the Court of First Instance's judgment.

Among the grounds of appeal, the most important were those relating to interpretation of the Staff Regulations and to equal treatment. The Court stated that, having regard to the great diversity displayed by national rules in their legal treatment of couples of the same sex, the Community judicature could not interpret the Staff Regulations in such a way that legal situations distinct from marriage were treated in the same way as marriage. It added that ‘only the legislature can, where appropriate, adopt measures to alter that situation, for example by amending the provisions of the Staff Regulations’ (paragraph 38). So far as concerns application of the principle of equal treatment, the Court had to consider whether the situation of an official who has registered a partnership between persons of the same sex is comparable to that of a married official. It stated that those situations were not comparable, given the great diversity of relevant national laws and the absence of any general assimilation of marriage and other forms of statutory union.