

A — The Court of Justice in 2008: changes and proceedings

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The structure of the Annual Report follows that of previous years. The first part gives an overview of the activity of the Court of Justice of the European Communities in 2008. It describes, first, how the institution evolved during that year, with the emphasis on the institutional changes affecting the Court and developments relating to its internal organisation and working methods (Section 1). It includes, second, an analysis of the statistics in relation to developments in the Court's workload and the average duration of proceedings (Section 2). It presents finally, as each year, the main developments in the case-law, arranged by subject matter (Section 3).

1. The outstanding event for the Court of Justice in 2008 was the inauguration of the new buildings of the Court, 'the new *Palais*', which consolidates and extends the existing buildings. The new *Palais* is of an innovative architectural design and has been constructed in a way that respects and builds on the structure of the original *Palais*. It is made up of the original *Palais*, remodelled so as to accommodate the courtrooms, the *Anneau* ('Ring' in English), a two-storey building which is so called, despite its rectangular form, because it completely encircles the original *Palais*, and which houses the offices of the Members of the Court and staff working directly with them, two Towers intended for the translation service and the Gallery, a long luminous passage by way of an architectural link connecting not only the original and new buildings with each other but also the institution's various activities.

At the formal sitting for the inauguration of the new *Palais*, which took place on 4 December 2008 in the presence of Their Royal Highnesses the Grand Duke and Grand Duchess of Luxembourg, speeches were given by Ms Diana Wallis, Vice-President of the European Parliament, Ms Rachida Dati, Minister for Justice of the French Republic, Mr José Manuel Barroso, President of the European Commission, and Mr Jean-Claude Juncker, Prime Minister of the Grand Duchy of Luxembourg.

With regard to the provisions governing the institution's operation, the amendment of the Rules of Procedure of the Court of Justice on 8 July 2008 involved the insertion of Title IVa, which contains the provisions designed to introduce the procedure, provided for in Article 62 of the Statute of the Court of Justice, for review of decisions of the Court of First Instance on appeal. The most noteworthy element of these new provisions (Articles 123a to 123e) is the creation of a special chamber entrusted with the task of determining, upon a proposal of the First Advocate General, whether a decision of the Court of First Instance should be reviewed. This chamber is to be composed of the President of the Court of Justice and of four Presidents of five-judge chambers.

2. The statistics concerning the Court of Justice's judicial activity in 2008 reveal, first, a very significant reduction in the duration of preliminary ruling proceedings compared with preceding years and, second, a continuation of the upward trend in the volume of litigation.

The Court completed 495 cases in 2008 (net figures, that is to say, taking account of the joinder of cases). Of those cases, 333 were dealt with by judgments and 161 gave rise to orders. The number of judgments delivered and orders made is lower than in the previous year (379 judgments and 172 orders). It should nevertheless be noted that the number of preliminary ruling cases completed in 2008 (238 cases in net figures, 301 cases in gross figures) is markedly higher than in 2007 (218 cases in net figures, 235 in gross figures).

The Court had 592 new cases brought before it, a number which exceeds even the number in 2007, which had been the highest in the Court's history ⁽¹⁾. The number of cases pending at the end of 2008 did not, however, increase substantially (767 cases, gross figures) beyond the number at the end of 2007 (741 cases, gross figures).

The duration of proceedings in 2008 showed a considerable change. In the case of references for a preliminary ruling, the average duration of proceedings was 16.8 months, as against 19.3 months in 2007 and 19.8 months in 2006. A comparative analysis covering the entire period for which the Court has reliable data shows that the average time taken to deal with references for a preliminary ruling reached its shortest in 2008. The average time taken to deal with direct actions and appeals was 16.9 months and 18.4 months respectively (18.2 months and 17.8 months in 2007).

In addition to the reforms in working methods that have been initiated in recent years, the improvement in the institution's efficiency in dealing with cases can also be explained by the wider use of the various procedural instruments at its disposal to expedite the handling of certain cases, in particular the urgent preliminary ruling procedure, priority treatment, the accelerated or expedited procedure, the simplified procedure and the possibility of giving judgment without an opinion of the Advocate General.

In 2008 use of the urgent preliminary ruling procedure was requested in six cases and the designated chamber considered that the conditions under Article 104b of the Rules of Procedure were met in three of them. These new provisions relating to the urgent preliminary ruling procedure enabled the Court in 2008 to complete those cases in an average period of 2.1 months.

Use of the expedited or accelerated procedure was requested eight times, but the conditions under the Rules of Procedure were met in only two cases, which were completed in an average period of 4.5 months. Following a practice established in 2004, requests for the use of the expedited or accelerated procedure are granted or refused by reasoned order of the President of the Court. Priority treatment, on the other hand, was granted in one case.

Also, the Court continued to use the simplified procedure laid down in Article 104(3) of the Rules of Procedure to answer certain questions referred to it for a preliminary ruling. A total of 39 cases were brought to a close by orders made on the basis of that provision, double the number in 2007.

⁽¹⁾ With the exception of the 1 324 cases brought in 1979. That exceptionally high figure can be explained by the huge flood of actions for annulment with the same subject matter that were brought.

Finally, the Court made frequent use of the possibility offered by Article 20 of its Statute of determining cases without an opinion of the Advocate General where they do not raise any new point of law. About 41 % of the judgments delivered in 2008 were delivered without an opinion (compared with 43 % in 2007).

As regards the distribution of cases between the various formations of the Court, it may be noted that the Grand Chamber dealt with approximately 14 %, chambers of five judges with 58 %, and chambers of three judges with slightly over 26 %, of the cases brought to a close in 2008. Compared with the previous year, a slight increase may be noted in the proportion of cases dealt with by the Grand Chamber (11 % in 2007) and by five-judge chambers (55 % in 2007), while the number of cases dealt with by three-judge chambers declined (33 % in 2007).

Part C of this chapter should be consulted for more detailed information regarding the statistics for the 2008 judicial year.

Constitutional or institutional issues

As regards the fundamental principles underpinning Community integration, the principle of equality has, once again, featured largely in the case-law of the Court.

The three judgments highlighted below demonstrate the implications of this principle in different spheres.

In Case C-54/07 *Feryn* (judgment of 10 July 2008), the question arose whether the fact that an employer states publicly that it will not recruit employees of a certain ethnic or racial origin amounts to direct discrimination in respect of recruitment within the meaning of Article 2(2)(a) of Council Directive 2000/43 ⁽²⁾.

The Court held that it does, such statements being likely strongly to dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market. The existence of such direct discrimination is not dependent on the identification of a complainant who claims to have been the victim of discrimination.

The Court went on to rule on the issue of the proof of discrimination. It held that the public statements at issue are sufficient for a presumption of the existence of a recruitment policy which is directly discriminatory within the meaning of Article 8(1) of Directive 2000/43. It is then for the employer to prove that there was no breach of the principle of equal treatment, which it can do by showing that the undertaking's actual recruitment practice does not correspond to those statements. It is for the national court to verify that the facts alleged are established and to assess the sufficiency of the evidence submitted in support of the employer's contentions that it has not breached the principle of equal treatment.

⁽²⁾ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22).

Finally, the Court held with regard to the sanctions appropriate for the employment discrimination at issue that Article 15 of Directive 2000/43 requires that rules on sanctions applicable to breaches of national provisions adopted in order to transpose that directive must be effective, proportionate and dissuasive, even where there is no identifiable victim.

Equal treatment from the point of view of the prohibition of age discrimination formed the subject matter of Case C-427/06 *Bartsch* (judgment of 23 September 2008). The Court held in that case that the application, which the courts of Member States must ensure, of the prohibition under Community law of discrimination on the ground of age is not mandatory where the allegedly discriminatory treatment contains no connecting link with Community law. No such link arises either from Article 13 EC, or, in the case of an occupational pension scheme excluding the right to a pension of a spouse more than 15 years younger than the deceased former employee, from Directive 2000/78 ⁽³⁾ before the time limit allowed to the Member State concerned for its transposition has expired.

In Case C-164/07 *Wood* (judgment of 5 June 2008), a question was referred to the Court for a preliminary ruling on the compatibility with Community law, in the light of the general principle of non-discrimination on grounds of nationality, of French legislation which has the effect of excluding from the grant of compensation awarded by the Fonds de garantie des victimes des actes de terrorisme et d'autres infractions (Guarantee Fund for the Victims of Acts of Terrorism and Other Crimes), on the sole ground of his nationality, a citizen of the European Community who is residing in France and is the father of a child having French nationality who died in consequence of a crime which was not committed on the territory of that State. The Court held that Community law precludes such legislation.

As regards the general principles of Community law and observance of those principles by national authorities when implementing Community law, Case C-455/06 *Heemskerk and Schaap* (judgment of 25 November 2008), concerning export refunds and the protection of cattle during transport, allowed the Court to adjudicate on the national rule of *reformatio in pejus*. The Court decided that Community law does not require national courts to apply, of their own motion, a provision of Community law where such application would lead them to deny the principle, enshrined in the relevant national law, of the prohibition of *reformatio in pejus*. Such an obligation would not only be contrary to the principles of respect for the rights of the defence, legal certainty and protection of legitimate expectations, which underlie the prohibition, but would expose an individual who brought an action against an act adversely affecting him to the risk that such an action would place him in a less favourable position than he would have been in, had he not brought that action.

There are a number of judgments of particular interest in relation to proceedings before the Community judicature. One of these concerns the very jurisdiction of the Community judicature.

In Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* (judgment of 3 September 2008), although the Court upheld the judgments of the Court of First Instance under appeal (in Case T-315/01 *Kadi v Council and Com-*

⁽³⁾ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

mission [2005] ECR II-3649 and Case T-306/01 *Yusuf and Al Barakaat International Foundation v Council and Commission* [2005] ECR II-3533) so far as concerns the Council's competence to adopt a regulation ordering the freezing of funds and other economic assets of the individuals and entities whose names appear in a list annexed to that regulation ⁽⁴⁾, which had been adopted in order to give effect in the European Community to resolutions of the United Nations Security Council, the Court considered that the Court of First Instance erred in law when it held that the Community judicature does not, in principle, have any jurisdiction to review the internal lawfulness of that regulation. According to the Court of Justice, the review of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee, stemming from the EC Treaty as an autonomous legal system, which cannot be prejudiced by an international agreement. The review of lawfulness ensured by the Community judicature applies to the Community act intended to give effect to the international agreement at issue, and not to the latter as such. The Community judicature must ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of fundamental rights, which form an integral part of the general principles of Community law, including review of Community measures which, like the regulation in question, are designed to give effect to resolutions adopted by the Security Council.

Moreover, the Court found that, in the light of the actual circumstances surrounding the inclusion of Mr Kadi and Al Barakaat in the list of persons and entities covered by the freezing of funds, it had to be held that the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights were patently not respected. In regard to that point, the Court observed that the effectiveness of judicial review means that the Community authority is bound to communicate to the persons or entities concerned the grounds on which the measure in question is founded, so far as possible, either when that measure is decided on or, at the very least, as swiftly as possible after that decision in order to enable those persons or entities to exercise, within the periods prescribed, their right to bring an action.

While the Court annulled the Council regulation insofar as it froze the funds of Mr Kadi and of Al Barakaat, it acknowledged that the annulment of the regulation with immediate effect would be capable of seriously and irreversibly prejudicing the effectiveness of the restrictive measures because, in the interval preceding its replacement, the person and the entity referred to might take steps seeking to prevent measures freezing funds from being applied to them again, and it could not be excluded that, on the merits of the case, the imposition of those measures on Mr Kadi and on Al Barakaat might for all that prove to be justified. Having regard to those considerations, the Court maintained the effects of the regulation for a period not exceeding three months running from the date of the judgment, to allow the Council to remedy the infringements found.

Another judgment of particular interest is that of 16 December 2008 in Case C-47/07 P *Masdar (UK) v Commission*, which deals with the procedures to be followed in order to obtain access to the Community judicature.

⁽⁴⁾ Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Regulation (EC) No 467/2001 (OJ 2002 L 139, p. 9).

This case concerned unjust enrichment. The Court held that, according to the principles common to the laws of the Member States, a person who has suffered a loss which increases the wealth of another person without there being any legal basis for that enrichment has the right, as a general rule, to restitution from the person enriched, up to the amount of the loss. Legal redress for undue enrichment, as provided for in the majority of national legal systems, is not necessarily conditional upon unlawfulness or fault with regard to the defendant's conduct. On the other hand, it is essential that there be no valid legal basis for the enrichment. Given that unjust enrichment is a source of non-contractual obligation common to the legal systems of the Member States, the Community cannot be dispensed from the application to itself of the same principles where a natural or legal person alleges that the Community has been unjustly enriched to the detriment of that person.

The Court added that actions for unjust enrichment do not fall under the rules governing non-contractual liability in the strict sense, which, to be invoked, require a number of conditions to be satisfied, relating to the unlawfulness of the conduct imputed to the Community, the fact of the damage alleged and the existence of a causal link between that conduct and the damage complained of. They differ from actions brought under those rules in that they do not require proof of unlawful conduct — indeed, of any form of conduct at all — on the part of the defendant, but merely proof of enrichment of the defendant for which there is no valid legal basis and of impoverishment of the applicant which is linked to that enrichment. However, despite those characteristics, the possibility of bringing an action for unjust enrichment against the Community cannot be denied to a person solely on the ground that the EC Treaty does not make express provision for a means of pursuing that type of action. If Article 235 EC and the second paragraph of Article 288 EC were to be construed as excluding that possibility, the result would be contrary to the principle of effective judicial protection laid down in the case-law of the Court and confirmed in Article 47 of the Charter of Fundamental Rights of the European Union.

Joined Cases C-120/06 P and C-121/06 P *FIAMM and FIAMM Technologies v Council and Commission* (judgment of 9 September 2008) are worthy of particular note in relation precisely to that area of actions for non-contractual liability. They concern the problem of Community liability for a legislative measure. The Dispute Settlement Body (DSB) of the World Trade Organisation (WTO) ruled that the Community regime governing the import of bananas was incompatible with WTO agreements and authorised the United States of America to impose an increased customs duty on certain Community imports. Six companies established in the European Union sought compensation from the Commission and the Council for the damage suffered by them in consequence of the application of American retaliatory measures to their exports to the United States.

The Court observed that the Community does not incur liability on account of a legislative measure which involves choices of economic policy unless a sufficiently serious breach of a superior rule of law for the protection of individuals, and conferring rights on them, has occurred. It also noted that, while the principle of liability of the Community in the case of an unlawful act of the institutions constitutes an expression of the general principle familiar to the legal systems of the Member States that an unlawful act gives rise to an obligation to make good the damage caused, no such convergence of the legal systems of the Member States has been established as regards the existence of a principle of liability in the case of a lawful act of the public authorities, in particular where such an act is of a legislative nature. The Court concluded

that, as it currently stands, Community law does not lay down a regime under which the Community's liability for its legislative conduct can be put in issue in a situation where any failure of such conduct to comply with WTO agreements cannot be relied upon before the Community judicature. It added that a Community legislative measure whose application leads to restrictions of the right to property and the freedom to pursue a trade or profession could give rise to non-contractual liability on the part of the Community where it impairs the very substance of those rights in a disproportionate and intolerable manner, perhaps because no provision has been made for compensation calculated to avoid or remedy that impairment.

Other, more standard, judgments have added to the wealth of case-law of the Court on the admissibility of actions for annulment.

Thus, in Case C-125/06 P *Commission v Infront WM* (judgment of 13 March 2008), the Court held that, for the purposes of the conditions governing admissibility of an action for annulment, a Commission decision approving measures aimed at regulating the exercise of exclusive television broadcasting rights to events of major importance for society, which are taken by a Member State pursuant to Article 3a of Directive 89/552 ⁽⁵⁾, directly affects the legal situation of the holder of those rights. Since the restrictions imposed by those measures are linked to the circumstances in which broadcasters acquire the television broadcasting rights to designated events from the holder of the exclusive broadcasting rights, the effect of the measures adopted by that Member State and the decision approving them is to subject the rights held by a company which has acquired television broadcasting rights to new restrictions which did not exist when it acquired those rights and which render their exercise more difficult. Furthermore, the Court held, the prejudice to the legal situation of the holder of the rights is due only to the requirement to attain the result determined by those measures and by the Commission's decision, without national authorities having any discretion in the decision's implementation that could affect that situation.

As regards the condition that the applicant must be individually concerned, the Court held that, where the decision affects a group of persons who were identified or identifiable when that measure was adopted by reason of criteria specific to the members of the group, those persons might be individually concerned by that measure inasmuch as they form part of a limited class of traders. That can be the case particularly when the decision alters rights acquired by the individual prior to its adoption.

In Case C-521/06 P *Athinaiki Techniki v Commission* (judgment of 17 July 2008), the concept of 'act open to challenge' for the purposes of Article 230 EC required clarification.

An appeal was brought before the Court of Justice against an order of the Court of First Instance dismissing as inadmissible an action seeking annulment of a Commission decision, of which the appellant was made aware by letter, to take no further action on a complaint concerning alleged State aid granted in connection with a public contract. The Court held that, to determine whether an act in matters of State aid constitutes a decision within the meaning of

⁽⁵⁾ Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23), as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 (OJ 1997 L 202, p. 60).

Article 4 of Regulation No 659/1999 ⁽⁶⁾, it is necessary to ascertain whether, taking account of the substance of that act and the Commission's intention, that institution has, at the end of the preliminary examination stage, definitively established its position — by way of the act under consideration — on the measure under review and, therefore, whether it has decided that that measure constitutes aid or not and whether or not the measure raises doubts as regards its compatibility with the common market.

A letter by which the Commission informs a complainant seeking a finding of infringement of Articles 87 EC and 88 EC that, 'in the absence of additional information to justify continuing the investigation, the Commission has, for the purposes of administrative action, closed the file on the case ...', indicates that the Commission has actually closed the file for the purposes of administrative action. It is apparent from the substance of that act and from the intention of the Commission that it has thus decided to bring to an end the preliminary examination procedure initiated by the complainant. By that act, the Commission has stated that the review initiated did not enable it to establish the existence of State aid within the meaning of Article 87 EC and it has implicitly refused to initiate the formal investigation procedure provided for in Article 88(2) EC. In such a situation, the persons to whom the procedural guarantees under that provision apply may ensure that those guarantees are observed only if they are able to challenge that decision before the Community judicature in accordance with the fourth paragraph of Article 230 EC. That principle applies both when a decision is taken on the ground that the Commission considers that the aid is compatible with the common market, and when it takes the view that the existence of aid should be ruled out.

Such an act cannot be classified as preliminary or preparatory since it cannot be followed, in the context of the administrative procedure which has been initiated, by any other decision amenable to annulment proceedings. It is not relevant, in that regard, that the interested party may still provide the Commission with additional information which might oblige the Commission to review its position on the State measure at issue, since the lawfulness of a decision taken at the end of the preliminary examination stage is examined only on the basis of the information which the Commission had at its disposal at the time when it made the decision, that is to say, in this particular case, at the time when it closed the file for the purposes of administrative action. If an interested party provides additional information after the closing of the file, the Commission can be obliged to open, if appropriate, a new administrative procedure. By contrast, that information has no effect on the fact that the first preliminary examination procedure is already closed. It follows that, by its act, the Commission did adopt a definite position on the complainant's request. The Court concluded from this that, by preventing a complainant from submitting its comments in the context of a formal investigation procedure as referred to in Article 88(2) EC, such an act produces legal effects which are capable of affecting its interests and does, therefore, constitute an act open to challenge for the purposes of Article 230 EC.

The body of — more recent and, therefore, less standard — case-law on the consequences for a Member State of failing to take action following a judgment establishing that it has failed to fulfil its obligations has also expanded.

⁽⁶⁾ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty (OJ 1999 L 83, p. 1).

Thus, in Case C-121/07 *Commission v France* (judgment of 9 December 2008), the Court recalled that the importance of immediate and uniform application of Community law means that the process of compliance with a judgment establishing that a Member State has failed to fulfil its obligations must be initiated at once and completed as soon as possible. It then held that while, in the context of the procedure provided for in Article 228(2) EC, the imposition of a periodic penalty payment seems particularly suitable for the purpose of inducing a Member State to put an end as soon as possible to a breach of obligations which, in the absence of such a measure, would tend to persist, the imposition of a lump sum is based more on the assessment of the effects on public and private interests of the failure of the Member State concerned to comply with its obligations, in particular where the breach has persisted for a long period since the judgment initially establishing it was delivered.

It is for the Court, in each case, in the light of the circumstances of the case before it and the degree of persuasion and deterrence which appears to it to be required, to determine the financial penalties appropriate for making sure that the judgment which previously established the breach is complied with as swiftly as possible and preventing similar infringements of Community law from recurring.

The Court also pointed out that the fact that the payment of a lump sum had hitherto not been imposed in situations in which the original judgment was fully complied with before the procedure laid down in Article 228 EC was concluded could not prevent such an order being made in another case, should that be necessary in the light of the details of the individual case and the degree of persuasion and deterrence required.

Lastly, the Court took the view that, while guidelines in the Commission's communications may indeed help to ensure that the Commission acts in a manner that is transparent, foreseeable and consistent with legal certainty, the fact nevertheless remains that such rules cannot bind the Court in the exercise of the broad discretion conferred on it by Article 228(2) EC.

Still in the sphere of judicial proceedings, it will be recalled that 2008 was the year in which the Court introduced the new urgent preliminary ruling procedure, established with effect from 1 March 2008. Three cases gave rise to that procedure: Case C-296/08 PPU *Santesteban Goicoechea* (judgment of 12 August 2008); Case C-388/08 PPU *Leymann and Pustovarov* (judgment of 1 December 2008) concerning the interpretation of Framework Decision 2002/584 on the European arrest warrant and the surrender procedures between Member States ⁽⁷⁾; and Case C-195/08 PPU *Rinau* (judgment of 11 July 2008) in relation to Community rules on the return of a child who has been unlawfully retained in another Member State.

Rinau gave the Court an opportunity to explain the conditions required in order for the urgent preliminary ruling procedure to be applied. Thus the Court held that a request from a referring court for a reference for a preliminary ruling relating to the interpretation of Regulation No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation

⁽⁷⁾ Council Framework Decision 2002/584/JHA of 13 June 2002 (OJ 2002 L 190, p. 1).

No 1347/2000 ⁽⁸⁾, to be dealt with under the urgent procedure pursuant to Article 104b of the Rules of Procedure of the Court of Justice is justified if it is based on a need to act urgently. Such is the case where any delay would be very unfavourable to the relationship between the child and the parent with whom the child does not live and the damage to that relationship could be irreparable. According to the Court, that need is apparent both from recital 17 in the preamble to the regulation, which refers to the return without delay of a child who has been removed or retained, and from Article 11(3) of the regulation, which sets a deadline of six weeks for the court to which an application for return is made to issue its judgment. The Court of Justice made clear that the need to protect the child against any possible harm and the need to ensure a fair balance between the interests of the child and those of the parents are also capable of justifying recourse to the urgent preliminary ruling procedure.

So far as concerns the principles in accordance with which cases are referred to the Court for the purposes of obtaining a preliminary ruling, the Court had occasion in Case C-210/06 *Cartesio* (judgment of 16 December 2008) to address the issue of the power of a national appellate court to vary the decision of a lower court making a reference for a preliminary ruling. The Court held in that regard that, where rules of national law apply which relate to the right of appeal against a decision making a reference for a preliminary ruling, and under those rules the main proceedings remain pending before the referring court in their entirety, the order for reference alone being the subject of a limited appeal, the second paragraph of Article 234 EC is to be interpreted as meaning that the jurisdiction conferred by that provision of the Treaty on any national court or tribunal to make a reference to the Court for a preliminary ruling cannot be called into question by the application of those rules, where they permit the appellate court to vary the order for reference, to set aside the reference and to order the referring court to resume the domestic law proceedings. It is true that Article 234 EC does not preclude decisions which are made by a court or tribunal of a Member State against whose decisions there is a judicial remedy under national law and by which questions are referred to the Court for a preliminary ruling from remaining subject to the remedies normally available under national law. Nevertheless, the outcome of such an appeal cannot limit the jurisdiction conferred by Article 234 EC on that court to make a reference to the Court if it considers that a case pending before it raises questions on the interpretation of provisions of Community law necessitating a ruling by the Court.

The effects of Community law on national legal systems have also been clarified.

In Joined Cases C-37/06 and C-58/06 *Viamex Agrar Handel* [2008] ECR I-69, the Court held that, while it is true that a directive cannot of itself impose obligations on an individual, it cannot be precluded, in principle, that the provisions of a directive may be applicable by means of an express reference in a regulation to its provisions, provided that general principles of law and, in particular, the principle of legal certainty are observed.

In Case C-2/06 *Kempter* [2008] ECR I-411, the Court was called upon to determine the question whether the review and amendment of a final administrative decision in order to take account

⁽⁸⁾ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, as amended by Council Regulation (EC) No 2116/2004 of 2 December 2004 (OJ 2004 L 367, p. 1).

of the interpretation of the relevant Community law carried out in the meantime by the Court of Justice is subject to the requirement that the party concerned relied on Community law when contesting the administrative decision before the national courts. The Court found that there was no such requirement.

Thus, it held that, while Community law does not require that administrative bodies be placed under an obligation, in principle, to reopen an administrative decision which has become final, specific circumstances may nevertheless be capable, by virtue of the principle of cooperation arising from Article 10 EC, of requiring such a body to review an administrative decision that has become final in order to take account of the interpretation of a relevant provision of Community law given subsequently by the Court. The condition — which is among those capable of providing the basis for such an obligation of review — that the judgment of the court of final instance by virtue of which the contested administrative decision became final was, in the light of a subsequent decision of the Court, based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling, cannot be interpreted as requiring the parties to have raised before the national court the point of Community law in question. It is sufficient in that regard if either the point of Community law the interpretation of which proved to be incorrect in light of a subsequent judgment of the Court was considered by the national court ruling at final instance or it could have been raised by the latter of its own motion. While Community law does not require national courts to raise of their own motion a plea alleging infringement of Community provisions where examination of that plea would oblige them to go beyond the ambit of the dispute as defined by the parties, they are obliged to raise of their own motion points of law based on binding Community rules where, under national law, they must or may do so in relation to a binding rule of national law.

While that possibility of applying for the review and withdrawal of a final administrative decision that is contrary to Community law is not subject to any limit in time, the Member States nevertheless remain free to set reasonable time limits for seeking remedies, in a manner consistent with the Community principles of effectiveness and equivalence.

Proceedings relating to public access to documents of the institutions show no signs of abating. In Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* (judgment of 1 July 2008), the Court clarified the examination to be carried out by the Council before it responds to a request for disclosure of a document.

The Community regulation regarding public access to documents ⁽⁹⁾ provides that any citizen of the Union, and any person residing in a Member State, has a right of access to documents of the institutions. It lays down exceptions to that general principle, including where disclosure of a document would undermine the protection of court proceedings and legal advice, unless there is an overriding public interest in its disclosure.

As regards, specifically, the exception relating to legal advice, the institution which is asked to disclose a document must satisfy itself that the document does indeed relate to legal advice and, if so, it must decide which parts of it are actually concerned and may, therefore, be

⁽⁹⁾ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

covered by the exception. The fact that a document is headed 'legal advice/opinion' does not mean that it is automatically entitled to the protection of legal advice ensured by the regulation referred to. Over and above the way a document is described, it is thus for the institution to satisfy itself that that document does indeed concern such advice. Where that is the case, the Council must then examine whether disclosure of the parts of the document in question would undermine the protection of the legal advice. In that regard, the Court construes the exception relating to legal advice as aiming to protect an institution's interest in seeking frank, objective and comprehensive advice. The risk of that interest being undermined must, in order to be capable of being relied on, be reasonably foreseeable and not purely hypothetical.

To submit, in a general and abstract way, that there is a risk that disclosure of legal advice relating to legislative processes may give rise to doubts regarding the lawfulness of legislative acts does not suffice to establish that the protection of legal advice will be undermined for the purposes of that provision and cannot, accordingly, provide a basis for a refusal to disclose such advice. It is precisely openness in this regard that contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated.

Lastly, the Court stated that it is incumbent on the Council to ascertain whether there is no overriding public interest justifying disclosure. In that respect, it is for the Council to balance the particular interest to be protected by non-disclosure of the document concerned against, *inter alia*, the public interest in the document being made accessible in the light of the advantages stemming from increased openness, in that this enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system.

The Court observed that such considerations are of particular relevance where the Council is acting in its legislative capacity. Openness in that respect contributes to strengthening democracy by allowing citizens to scrutinise all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights.

The Court concluded that Regulation No 1049/2001 imposes, in principle, an obligation to disclose the opinions of the Council's legal service relating to a legislative process, while nevertheless admitting that disclosure of a specific legal opinion, given in the context of a legislative process, but being of a particularly sensitive nature or having a particularly wide scope that goes beyond the context of the legislative process in question, may be refused, on account of the protection of legal advice. In such a case, it is incumbent on the institution concerned, therefore, to give a detailed statement of reasons for such a refusal.

On those grounds, the Court set aside the judgment of the Court of First Instance insofar as it related to the refusal of access to the legal opinion at issue in that case.

By contrast, the Court broke new ground in its consideration, in Joined Cases C-200/07 and C-201/07 *Marra* (judgment of 21 October 2008), of the issue of the immunity enjoyed by Members of the European Parliament in certain circumstances and subject to certain conditions, and more specifically of the rules for applying the immunity of a Member of the European

Parliament against whom proceedings had been brought for distributing a leaflet containing insulting remarks.

The Court began by observing that Article 9 of the Protocol on the Privileges and Immunities of the European Communities ⁽¹⁰⁾ sets out the principle of immunity of Members of the European Parliament in respect of opinions expressed or votes cast by them in the performance of their duties. Such immunity must, to the extent that it seeks to protect the freedom of expression and independence of Members of the European Parliament, be considered to be an absolute immunity barring any judicial proceedings. Therefore, in an action brought against a Member of the European Parliament in respect of opinions he has expressed, the national court is obliged to dismiss the action brought against the Member concerned where it considers that that Member enjoys parliamentary immunity. The national court is bound to respect that immunity, as is the European Parliament. Since the latter cannot waive the immunity, it is for the national court to dismiss the action in question.

Next, the Court acknowledged that the national court has exclusive jurisdiction to determine whether the conditions for applying that immunity are met, and is not required to refer the issue to the European Parliament, which has no power in that regard. By contrast, if, following a request from the Member concerned, the European Parliament has adopted a decision to defend immunity, that constitutes an opinion that has no binding effect with regard to national judicial authorities.

Where the Member makes a request to the European Parliament for defence of immunity and the national court is informed thereof, it must, in accordance with the duty of sincere cooperation between the European institutions and the national authorities ⁽¹¹⁾, stay the judicial proceedings and request the Parliament to issue its opinion as soon as possible. That cooperation is required in order to avoid any conflict in the interpretation and application of the provisions of the Protocol.

Finally, to bring this overview of case-law in the constitutional and institutional sphere to a close, reference is made to Case C-294/06 *Payir and Others* [2008] ECR I-203, in which the Court ruled on whether, under the EEC–Turkey Association Agreement, the status of ‘worker’ is to be accorded to Turkish nationals who enter the territory of a Member State as an au pair or as a student and belong to the labour force. Interpreting Article 6(1) of Decision No 1/80 of the EEC–Turkey Association Council of 19 September 1980 on the development of the Association, the Court held that the fact that a Turkish national was granted leave to enter the territory of a Member State as an au pair or as a student cannot deprive him of the status of ‘worker’ and prevent him from being regarded as ‘duly registered as belonging to the labour force’ of that Member State within the meaning of Article 6(1). Accordingly, that fact cannot prevent such a national from being able to rely on that provision for the purposes of obtaining renewed permission to work and a corollary right of residence.

⁽¹⁰⁾ Protocol on the Privileges and Immunities of the European Communities of 8 April 1965 (OJ 2006 C 231 E, p. 318).

⁽¹¹⁾ Enshrined in Article 10 EC.

European citizenship

In several cases the Court examined national provisions that can improperly limit the free movement of citizens of the Union.

Case C-353/06 *Grunkin and Paul* (judgment of 14 October 2008) concerned the recognition of the surname of a child of German nationality who was born and living in Denmark and registered at birth with a double-barrelled surname composed of the surnames of both the father and mother. The child's parents applied for the double-barrelled name to be entered in the family register held in Germany, and were refused on the ground that surnames of German citizens are governed by German law, which does not allow a child to bear a double-barrelled surname. The Court found that, although the rules governing a person's surname are matters coming within the competence of the Member States, the latter must nonetheless, when exercising that competence, comply with Community law. The Court explained that having to use a surname, in the Member State of which the person concerned is a national, that is different from that conferred and registered in the Member State of birth and residence is liable to hamper the free movement of citizens of the Union. A discrepancy in surnames in various German and Danish documents is liable to cause serious inconvenience for the person concerned at both professional and private levels. Since the restrictive German provisions had not been properly justified, the Court held that the right of European citizens to move and reside freely within the territory of the Member States precluded the legislation at issue.

Next, Case C-127/08 *Metock and Others* (judgment of 25 July 2008) and Case C-33/07 *Jipa* (judgment of 10 July 2008) concern the interpretation of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States ⁽¹²⁾.

In *Metock and Others*, the Court held that Directive 2004/38 precludes legislation of a Member State which makes a national of a non-member country who is the spouse of a Union citizen residing in that Member State but not possessing its nationality subject to a condition that he must have previously been lawfully resident in another Member State before arriving in the host Member State, in order to benefit from the provisions of that directive. As regards family members of a Union citizen, no provision of the directive makes its application subject to that condition; the Court took the view that it was necessary to reconsider the conclusion reached in its judgment in *Akrich* ⁽¹³⁾, which made the ability to benefit from the rights to enter and reside provided for by Regulation No 1612/68 ⁽¹⁴⁾ subject to such a condition. The inability of a Union citizen to be accompanied or joined by his family in the host Member State would be such as to discourage him from exercising his right of entry into and residence in that Member State. The Court also stated that a non-Community spouse of a Union citizen who accompanies or joins that citizen may benefit from Directive 2004/38, irrespective of when and where

⁽¹²⁾ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ 2004 L 158, p. 77, and corrigendum, OJ 2004 L 229, p. 35).

⁽¹³⁾ Case C-109/01 *Akrich* [2003] ECR I-9607.

⁽¹⁴⁾ Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475), amended by Directive 2004/38/EC.

their marriage took place and of how that spouse entered the host Member State, and that it is not necessary for the citizen to have already founded a family at the time when he moves in order for his family members who are nationals of non-member countries to be able to enjoy the rights conferred by that directive. Finally, the words ‘family members [of Union citizens] who accompany ... them’⁽¹⁵⁾ must be interpreted as referring both to the family members of a Union citizen who entered the host Member State with him and to those who reside with him in that Member State, without it being necessary, in the latter case, to distinguish according to whether they entered that Member State before or after the Union citizen or before or after becoming his family members.

In *Jipa*, the question before the Court was whether Community law, and in particular Directive 2004/38, precludes national legislation that allows the right of a national of a Member State to travel to another Member State to be restricted, in particular on the ground that he has previously been expelled from the latter Member State on account of his ‘illegal residence’ there. The Court noted that such a national enjoys the status of a citizen of the Union and may therefore rely, including against his Member State of origin, on the right of free movement and residence within the territory of the Member States, which includes both the right to enter a Member State other than the one of origin and the right to leave the State of origin. However, the right of free movement may be subject to limitations and conditions envisaged by the Treaty, inter alia on the basis of requirements of public policy or public security which the Member States have power to determine. In the Community context, those requirements must, however, be interpreted strictly. The Court explained that such restrictions imply in particular that, in order to be justified, measures taken on grounds of public policy or public security must be based exclusively on the personal conduct of the individual concerned and not on considerations of general prevention. A measure restricting free movement must be adopted in the light of considerations pertaining to the protection of public policy or public security in the Member State imposing it; while the authorities of that Member State are not precluded from being able to take into account reasons advanced by another Member State to justify a decision to remove a Community national from the territory of the latter State, the restrictive measure cannot be based exclusively on those reasons. The Court concluded that Community law does not preclude the national legislation in question, provided that certain requirements are met. First, the personal conduct of that national must constitute a genuine, present and sufficiently serious threat to one of the fundamental interests of society. Second, the restrictive measure envisaged must be necessary and proportionate to the achievement of the objective it pursues.

In Case C-499/06 *Nerkowska* (judgment of 22 May 2008), the Court held that the right of every citizen of the Union to move and reside freely within the territory of the Member States is to be interpreted as precluding legislation of a Member State under which it refuses, generally and in all circumstances, to pay to its nationals a benefit granted to civilian victims of war or repression solely because they are not resident in the territory of that State throughout the period of payment of the benefit, but in the territory of another Member State. The Court noted that such a benefit falls within the competence of the Member States, but that they must exercise that competence in accordance with Community law, in particular with the right to freedom of movement of citizens of the Union. The requirement of residence in national territory in order for the benefit to be granted is a restriction on the exercise of that freedom. The Court

⁽¹⁵⁾ Article 3(1) of Directive 2004/38/EC.

considered that both the wish to ensure that there is a connection between the society of the Member State concerned and the recipient of a benefit and the necessity to verify that the recipient continues to satisfy the conditions for the grant of that benefit constitute objective considerations of public interest which are capable of justifying that restriction. However, the fact that a person is a national of the Member State granting the benefit concerned and, moreover, has lived in that State for more than 20 years may be sufficient to establish such a connection. In those circumstances, the requirement of residence throughout the period of payment of the benefit must be held to be disproportionate. Furthermore, there are other means of verifying that the recipient continues to satisfy the conditions for the grant of the benefit, which, although less restrictive, are just as effective.

Free movement of goods

In the field of the free movement of goods, the Court delivered a number of judgments concerning the compatibility with Community legislation of national provisions amounting to measures having equivalent effect to quantitative restrictions.

First of all, in Case C-244/06 *Dynamic Medien* [2008] ECR I-505, the Court turned its attention to German rules prohibiting the sale and transfer by mail order of image storage media which have not been examined and classified by a competent national authority or by a national voluntary self-regulatory body for the purposes of protecting young persons and which do not bear a label from that authority or body indicating the age from which those image storage media may be viewed. The Court held that such rules do not constitute a selling arrangement which is capable of hindering, directly or indirectly, actually or potentially intra-Community trade, but a measure having equivalent effect to quantitative restrictions within the meaning of Article 28 EC and are, in principle, incompatible with the obligations arising from that provision. According to the Court, such rules may, however, be justified by the objective of protecting children, insofar as the rules are proportionate to that objective, as will be the case where they do not preclude all forms of marketing of unchecked image storage media and it is permissible to import and sell such image storage media to adults, while ensuring that children do not have access to them. It could be otherwise only if it appears that the examining, classifying and labelling procedure established by those rules is not easily accessible or cannot be completed within a reasonable period or that the decision of refusal cannot be open to challenge before the courts.

Next, in Case C-141/07 *Commission v Germany* (judgment of 11 September 2008), the Court was faced with German legislation concerning the requirements which external pharmacies had to meet if they were to be eligible to supply medicinal products to hospitals situated in Germany, requirements which, in practice, necessitated a degree of geographical proximity between the pharmacy supplying the medicinal products and the hospital. The Court held that, while such provisions must be regarded as concerning selling arrangements, since they do not concern the characteristics of the medicinal products, but concern solely the arrangements permitting their sale, they are nevertheless liable to hinder intra-Community trade and, therefore, constitute a measure having equivalent effect to a quantitative restriction on imports prohibited, in principle, by Article 28 EC. According to the Court, they are justified, however, on grounds of the protection of public health. Such legislation can achieve the objective of ensuring that the supply of products to hospitals of the Member State concerned is reliable

and of good quality and, in fact, transposes to the system of external provision of supplies to hospitals requirements analogous to those which characterise the system of internal provision of supplies, namely the requirement that there be one pharmacist who is responsible for the supply of medicinal products and who is, moreover, generally and quickly available *in situ*. The legislation in question thus ensures that all the elements of the system for the supply of medicinal products to hospitals in the Member State concerned are equivalent and mutually compatible, and guarantees the unity and balance of that system.

Finally, Case C-205/07 *Gysbrechts and Santurel Inter* (judgment of 16 December 2008) concerned the compatibility of Belgian rules relating to distance-selling contracts with the EC Treaty. Those rules prohibited a seller from requiring a deposit or form of payment from the consumer or even, according to the Belgian authorities, a consumer's payment card number, before expiry of the mandatory period of seven working days for withdrawal. Having taken the view that such prohibitions constitute a measure having equivalent effect to a quantitative restriction on exports, the Court held that, while the prohibition on requiring an advance or payment from the consumer is justified by the need to protect the latter, the imposition on a supplier of a prohibition on requiring that a consumer provide his payment card number goes beyond what is necessary to ensure the effective exercise of the consumer's right to withdraw. The value of such a prohibition resides only in the fact that it eliminates the risk that the supplier collects the price before expiry of the period for withdrawal. If, however, that risk materialises, the supplier's action is, in itself, a contravention of the prohibition on requesting an advance or payment from the consumer, which is an appropriate and proportionate measure to attain the objective pursued. Therefore, Article 29 EC does not preclude the prohibition on a supplier, in cross-border distance selling, requiring an advance or any payment from a consumer before expiry of the withdrawal period, but does preclude a prohibition on requesting, before expiry of that period, the number of the consumer's payment card.

Agriculture

In Case C-132/05 *Commission v Germany* [2008] ECR I-957, the Court was required to determine whether a Member State fails to fulfil its obligations by refusing to proceed against the use, on its territory, of the name 'Parmesan' on the labelling of products which do not comply with the requirements of the specification for the protected designation of origin (PDO) 'Parmigiano Reggiano', thereby favouring the appropriation of the reputation of a genuine, Community-wide protected product ⁽¹⁶⁾.

Noting, first of all, that it is not only the exact form of registration of a PDO that enjoys protection under Community law, the Court found that, in view of the phonetic and visual similarity between the names in question and the similar appearance of the products, the use of the name 'Parmesan' must be regarded as an evocation of the PDO 'Parmigiano Reggiano'. If it is unable to show that the name 'Parmesan' has become generic, a State cannot rely on the exception provided for under Regulation No 2081/92.

⁽¹⁶⁾ 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).

Finally, regarding the State's obligation to proceed against conduct infringing the PDO, the Court stated that the mere right to rely on the provisions of a regulation before the national courts does not release the Member States from their duty to take the national measures which may be needed to ensure its full application, and found that the legal system in question in this case provided the instruments capable of guaranteeing the protection of the interests both of the producers and of the consumers. However, a Member State is under no obligation to take on its own initiative the measures necessary to penalise, on its territory, infringements of PDOs from another Member State. The inspection structures whose task it is to ensure compliance with the PDO are those of the Member State from which the PDO comes and do not therefore fall within the inspection authorities of the State in question.

Free movement of persons, services and capital

In relation to the freedom of establishment, Case C-210/06 *Cartesio* (judgment of 16 December 2008) gave the Court an opportunity to clarify its case-law concerning the right of companies to move their company seat within the Union. The question referred to the Court for a preliminary ruling concerned the compatibility with Articles 43 EC and 48 EC of Hungarian legislation under which a company incorporated under national law may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation. The Court replied that, as Community law now stands, those articles do not preclude such legislation. In accordance with Article 48 EC, in the absence of a uniform Community law definition of the companies which may enjoy the right of establishment on the basis of a single connecting factor determining the national law applicable to a company, the question whether Article 43 EC applies to a company which seeks to rely on the fundamental freedom enshrined in that article is a preliminary matter which, as Community law now stands, can only be resolved by the applicable national law. In consequence, according to the Court, the question whether the company is faced with a restriction on the freedom of establishment, within the meaning of Article 43 EC, can arise only if it has been established, in the light of the conditions laid down in Article 48 EC, that the company actually has a right to that freedom. Thus a Member State has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under the law of that Member State and, as such, capable of enjoying the right of establishment, and that required if the company is to be able subsequently to maintain that status. That power includes the possibility for that Member State not to permit a company governed by its law to retain that status if the company intends to reorganise itself in another Member State by moving its seat to the territory of the latter, thereby breaking the connecting factor required under the national law of the Member State of incorporation.

Also in relation to the freedom of establishment, and equally noteworthy, Case C-414/06 *Lidl Belgium* (judgment of 15 May 2008) was initiated by a reference for a preliminary ruling concerning the compatibility with Article 43 EC of the German tax regime under which a resident company may not deduct losses relating to a non-resident permanent establishment belonging to it. The Court first made clear that the scope of application of Article 43 EC extends to the creation and the outright ownership by a natural or legal person established in a Member State of a permanent establishment not having a separate legal personality situated in another Member State, as well as to a company's activity in another Member State through a permanent establishment, as defined in a relevant double taxation convention, which constitutes, under

tax convention law, an autonomous entity. The Court went on to hold that Article 43 EC does not preclude a situation in which a company established in a Member State cannot deduct from its tax base losses relating to a permanent establishment belonging to it and situated in another Member State, to the extent that, by virtue of a double taxation convention, the income of that establishment is taxed in the latter Member State where those losses can be taken into account in the taxation of the income of that permanent establishment in future accounting periods. It is true that such a tax regime gives rise to a difference in tax treatment, by reason of which a resident company could be discouraged from carrying on its business through a permanent establishment situated in another Member State. Nevertheless, according to the Court, such a tax regime can be justified in the light of the need to safeguard the allocation of the power to tax between the Member States and the need to prevent the danger that the same losses will be taken into account twice which, taken together, pursue legitimate objectives compatible with the Treaty and thus constitute overriding reasons in the public interest, provided that the regime is proportionate to those objectives.

So far as concerns the freedom to provide services, attention must be drawn to three cases in particular.

The first is Case C-380/05 *Centro Europa 7* [2008] ECR I-349, concerning an Italian operator in the television broadcasting sector to which broadcasting authorisation had been granted, but which was unable to broadcast without broadcasting radio frequencies allocated to it. The Court interpreted the Community law provisions⁽¹⁷⁾ relating to the grant of the radio frequencies. It observed that the successive application of the transitional arrangements structured, under Italian legislation, in favour of the incumbent networks had the effect of preventing operators without broadcasting radio frequencies from accessing the market. The issuing of general authorisation to operate on the broadcasting services market only to the incumbent networks consolidated that restrictive effect. The consequence of this was to freeze the structures on the national market and to protect the position of those networks. The Court stated that a system which restricts the number of operators in the national territory is capable of being justified by general-interest objectives, but it must, in those circumstances, be structured on the basis of objective, transparent, non-discriminatory and proportionate criteria. That is not the case so far as concerns a system which allocates broadcasting radio frequencies exclusively, without restriction in time, to a limited number of incumbent operators, without taking account of the criteria referred to above. The Court concluded that national legislation the application of which makes it impossible for an operator holding rights to broadcast in the absence of broadcasting radio frequencies granted on the basis of those criteria is contrary to the principles of the Treaty concerning the freedom to provide services and to the principles laid down by the new common regulatory framework for electronic communications networks and services⁽¹⁸⁾.

⁽¹⁷⁾ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (framework directive) (OJ 2002 L 108, p. 33), Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (authorisation directive) (OJ 2002 L 108, p. 21) and Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services (OJ 2002 L 249, p. 21).

⁽¹⁸⁾ Known as 'the NCRF', this consists of the framework directive and four specific directives, including the authorisation directive, which are supplemented by Directive 2002/77/EEC.

The second is Case C-346/06 *Rüffert* (judgment of 3 April 2008), in which the Court turned its attention to the question whether the freedom to provide services precludes legislation of a Member State under which the contractor for a public works contract must agree in writing to pay its employees at least the wage provided for in the collective agreement in force and to impose that obligation on its transnational sub-contractors posting workers to that Member State, subject to payment of a contractual penalty in the event of non-compliance with that obligation. The Court held that, while a Member State may, pursuant to the provisions of Directive 96/71 concerning the posting of workers in the framework of the provision of services ⁽¹⁹⁾, impose minimum rates of pay on undertakings established in other Member States in the framework of the transnational provision of services, it is not entitled to impose on those undertakings a rate of pay — even if it exceeds the rate of pay applicable pursuant to law — provided for by a collective agreement which is in force at the place where the services concerned are performed and which has not been declared to be of general application, by requiring, by a measure of a legislative nature, the contracting authority to designate as contractors for public works contracts only contractors which, when submitting their tenders, agree in writing to pay their employees, in return for performance of the services concerned, at least the wage provided for in the collective agreement. Such legislation constitutes a restriction on the freedom to provide services laid down under Article 49 EC insofar as it may impose on service providers established in another Member State where minimum rates of pay are lower an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State.

Finally, in Case C-319/06 *Commission v Luxembourg* (judgment of 19 June 2008), the Court held that the first indent of Article 3(10) of Directive 96/71 concerning the posting of workers in the framework of the provision of services constitutes a derogation from the principle that the matters with respect to which the host Member State may apply its legislation to undertakings which post workers to its territory are set out in an exhaustive list in the first subparagraph of Article 3(1). The possibility, under the first indent of Article 3(10), for the host Member State to apply to those undertakings, in a non-discriminatory manner, terms and conditions of employment on matters other than those referred to in the first subparagraph of Article 3(1) of the directive, provided that public policy provisions are involved, constitutes an exception to the system put in place by that directive as well as a derogation from the fundamental principle of freedom to provide services, and must be interpreted strictly. Consequently, the Court held that, by declaring, first, measures resulting, in particular, from collective agreements which have been declared universally applicable and, second, measures transposing Directive 96/71 which require the undertakings concerned (i) to post only staff linked to the undertaking by a written contract of employment or another document deemed analogous thereto under Directive 91/533 ⁽²⁰⁾ and (ii) to comply with national rules on part-time and fixed-term work, to be mandatory provisions falling under national public policy, a Member State has failed to fulfil its obligations under the first indent of Article 3(10) of Directive 96/71. The Court also found that a Member State which, first, requires undertakings whose registered office is outside its national territory and which posts workers there to deposit, before the start of the posting, with an ad

⁽¹⁹⁾ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1).

⁽²⁰⁾ 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).

hoc agent residing in that State, the documents necessary for monitoring compliance with their obligations under national law and to leave them there for an indeterminate period after the provision of services has ceased and, second, sets out in rules of national law establishing a prior notification procedure when workers are posted conditions relating to access to the basic information necessary for monitoring purposes by the competent national authorities with insufficient clarity to ensure legal certainty for undertakings wishing to post workers to the territory of that Member State, has failed to fulfil its obligations under Article 49 EC.

With regard to the freedom of establishment and the freedom to provide services, Case C-347/06 *ASM Brescia* (judgment of 17 July 2008) relates to Italian legislation adopted in respect of the early cessation, at the end of a transitional period, of concessions for the distribution of natural gas granted without a competitive tendering procedure as envisaged by Directive 2003/55 concerning common rules for the internal market in natural gas and repealing Directive 98/30 ⁽²¹⁾. The questions referred to the Court for a preliminary ruling related, more specifically, to the compatibility of the extension, on certain conditions, of the length of the transitional period in question with Directive 98/30 and with Articles 43 EC, 49 EC and 86(1) EC. The Court held that neither Directive 2003/55 nor Articles 43 EC, 49 EC and 86(1) EC preclude such national legislation, provided that, as regards compatibility with the articles of the EC Treaty referred to, such an extension can be regarded as being necessary to enable the contracting parties to untie their contractual relations on acceptable terms both from the point of view of the requirements of the public service and from the economic point of view. Regarding that last point, the Court considered that, while the Italian legislation establishes a difference in treatment amounting to indirect discrimination on the basis of nationality, that difference in treatment may nevertheless be justified by the necessity of complying with the principle of legal certainty which requires, particularly, that rules of law be clear, precise and predictable in their effects. According to the Court, that principle not only permits but also requires that the termination of such a concession be coupled with a transitional period which enables the contracting parties to untie their contractual relations on acceptable terms both from the point of view of the requirements of the public service and from the economic point of view.

So far as concerns the free movement of capital, attention is drawn to Case C-43/07 *Arens-Sikken* (judgment of 11 September 2008) concerning national rules on the assessment of inheritance duties and transfer duties payable in respect of immovable property situated in a Member State, which, for the assessment of those duties, made no provision for the deductibility of overendowment debts resulting from a testamentary parental partition *inter vivos* where the person whose estate was being administered was residing, at the time of death, not in that State but in another Member State. The Court held that the Treaty provisions on the free movement of capital preclude such rules insofar as the rules apply a progressive rate of taxation and insofar as the combination of (i) the failure to take into account such debts and (ii) that progressive rate could result in a greater tax burden for heirs who are not in a position to rely on such deductibility. The Court thus rejected the argument that the difference in treatment established concerned situations which were not objectively comparable, since, except in relation to the deduction of debts, the legislation in question treated the inheritances of residents and non-residents in the same way for the purposes of taxing their inheritance. The Court also stated that, in the absence of a convention on the prevention of double taxation, the Member

⁽²¹⁾ Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC (OJ 2003 L 176, p. 57).

State in which the immovable property is situated cannot, in order to justify a restriction on the free movement of capital arising from its rules, rely on the existence of a possibility, beyond its control, of a tax credit being granted by the Member State in which the deceased was residing at the time of death, which could, wholly or partly, offset the loss incurred by that person's heirs as a result of the fact that, for the purposes of assessing transfer duties, no account is taken in the Member State in which that property is situated of overendowment debts resulting from a testamentary parental partition *inter vivos*.

In Case C-282/07 *Truck Center* (judgment of 22 December 2008), the Court responded to a request for interpretation of the Treaty provisions relating to the free movement of capital in the light of Belgian corporation tax legislation. Under that legislation, interest paid by a resident company to a recipient company resident in another Member State was subject to a retention at source (withholding tax), whereas interest paid to a resident recipient company was exempt from that retention. The Court held that the Treaty provisions relating to the freedom of establishment and the free movement of capital do not preclude such tax legislation. After recalling that, in relation to direct taxes, the situations of residents and non-residents are, as a rule, not comparable, the Court found that the difference in treatment at issue, consisting in the application of different taxation arrangements to those companies established in Belgium and to those established in another Member State, relates to situations which are not objectively comparable. According to the Court, the position of the Belgian State, the types of taxation of interest, which rest on separate legal bases, and the situations in which the companies receiving interest find themselves with regard to recovery of the tax differ according to whether the companies receiving the interest are resident or not. The Court also held that the difference in treatment resulting from the legislation at issue does not necessarily procure an advantage for resident recipient companies because, first, those companies are obliged to make advance payments of corporation tax and, second, the amount of withholding tax deducted from the interest paid to a non-resident company is significantly lower than the corporation tax charged on the income of resident companies which receive interest. In those circumstances, the difference in treatment thereby created does not constitute a restriction of the freedom of establishment or of the free movement of capital.

In relation to the free movement of workers, the Court ruled on the recognition of diplomas obtained following education and training provided within the framework of 'homologation agreements'.

In Case C-274/05 *Commission v Greece* (judgment of 23 October 2008), the Commission complained that the Hellenic Republic was failing to recognise diplomas awarded by the competent authorities of other Member States following education and training provided within the framework of agreements pursuant to which education and training provided by a private body in Greece is homologated by those authorities, and that it was entrusting to the Council Responsible for Recognising Professional Equivalence of Higher Education Qualifications power to verify whether the conditions necessary for the award of diplomas were fulfilled and the nature of the establishment in which the holder received his education and training. In the

light of the provisions of Directive 89/48⁽²²⁾, as amended by Directive 2001/19⁽²³⁾, the Court held, first, that it follows from the first subparagraph of Article 1(a) of that directive that the expression 'mainly in the Community' covers both education and training received entirely in the Member State which awarded the formal qualification in question and that received partly or wholly in another Member State. Second, although the method of recognition of higher education diplomas as laid down by that directive does not lead to automatic and unconditional recognition of the diplomas and professional qualifications concerned, particularly as regards the possibility provided for under Article 4 of the directive for the Member States to impose compensatory measures, the Court held that the choice of the type of compensatory measures is a matter for the applicant for recognition of the diploma, not only so far as concerns the professions which require knowledge of national law, but also in respect of all the other professions covered by various specific provisions. Third, the Court confirmed that, under Article 8(1) of the directive, it is for the authorities awarding diplomas alone to verify, in the light of the rules applicable in their professional education and training systems, whether the conditions necessary for their award are fulfilled and the nature of the establishment in which the holder received his education and training. By contrast, the host Member State cannot examine the basis on which the diplomas have been awarded. Finally, the Court held that, under Article 3 of the directive, the host Member State must allow, in the public sector, the reclassification in a higher grade of persons recruited at a level lower than that to which they would have been entitled if their diplomas had been recognised by the competent authority.

In addition, the Court developed its case-law in relation to social security for migrant workers in two cases concerning the interpretation of Regulation No 1408/71⁽²⁴⁾. Case C-212/06 *Gouvernement de la Communauté française and Gouvernement wallon* (judgment of 1 April 2008) concerned a care insurance scheme implemented by the Flemish Government of the Kingdom of Belgium in the Dutch-speaking region and in the bilingual region of Brussels-Capital. That scheme provided, subject to certain conditions and up to a maximum amount, for an insurance fund to take responsibility for the paying of certain costs occasioned by a state of dependence for health reasons. Affiliation to the scheme was open only to persons resident in the two regions referred to and to persons working in the territory of those regions and residing in a Member State other than Belgium. Persons who, although working in the Dutch-speaking region or in the bilingual region of Brussels-Capital, were living in another part of Belgium were thus excluded from the scheme. After confirming that the benefits provided under a scheme such as the care insurance scheme in question fall within the scope *ratione materiae* of Regulation No 1408/71, the Court observed that Articles 39 EC and 43 EC militate against any national measure which, even though applicable without discrimination on grounds of nationality, is

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

(23) Directive 2001/19/EC of the European Parliament and of the Council of 14 May 2001 amending Council Directives 89/48/EEC and 92/51/EEC on the general system for the recognition of professional qualifications and Council Directives 77/452/EEC, 77/453/EEC, 78/686/EEC, 78/687/EEC, 78/1026/EEC, 78/1027/EEC, 80/154/EEC, 80/155/EEC, 85/384/EEC, 85/432/EEC, 85/433/EEC and 93/16/EEC concerning the professions of nurse responsible for general care, dental practitioner, veterinary surgeon, midwife, architect, pharmacist and doctor (OJ 2001 L 206, p. 1).

(24) Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416).

capable of hindering or rendering less attractive the exercise by Community nationals of the fundamental freedoms guaranteed by the Treaty. Therefore, on a proper construction of Articles 39 EC and 43 EC, legislation of a federated entity of a Member State, such as that governing a care insurance scheme, limiting affiliation to a social security scheme and entitlement to the benefits provided by that scheme to persons either residing in the territory coming within that entity's competence or pursuing an activity in that territory but residing in another Member State is contrary to those provisions, insofar as such limitation affects nationals of other Member States or nationals of the Member State concerned who have made use of their right to freedom of movement within the European Community.

Article 13(2)(a) of Regulation No 1408/71, as amended by Regulation No 647/2005 ⁽²⁵⁾, provides that a person employed in the territory of one Member State is to be subject to the legislation of that State even if he resides in the territory of another Member State. In Case C-352/06 *Bosmann* (judgment of 20 May 2008), the Court considered the situation of a worker who found herself ineligible for child benefits in her Member State of residence because she took up employment in another Member State. The Court stated that Article 13(2)(a) must be interpreted in the light of Article 42 EC which aims to facilitate freedom of movement for workers and entails, in particular, that migrant workers must not lose their right to social security benefits or have the amount of those benefits reduced because they have exercised the right to freedom of movement conferred on them by the Treaty. The Court concluded from this that the Member State of residence cannot be deprived of the right to grant child benefit to those resident within its territory and that Article 13(2)(a) of the regulation does not preclude a migrant worker, who is subject to the social security scheme of the Member State of employment, from receiving, pursuant to the national legislation of the Member State of residence, child benefit in the latter State. It is for the national court to determine whether the circumstances of the case are relevant for the purposes of deciding whether the worker satisfies the requirements for the grant of such child benefit pursuant to the legislation of the Member State in question.

Transport

There are four particularly noteworthy cases relating to transport.

With regard to road transport, the Court stated in Joined Cases C-329/06 and C-343/06 *Wiedemann and Funk* (judgment of 28 May 2008), concerning a refusal to recognise driving licences obtained in the Czech Republic after the administrative withdrawal of the drivers' German driving licences for consumption of drugs or alcohol, that Directive 91/439 on driving licences ⁽²⁶⁾ is to be interpreted as preventing one Member State from refusing to recognise in its territory the validity of a driving licence subsequently issued by another Member State, so long as the

⁽²⁵⁾ Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005 amending Council Regulations (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 (OJ 2005 L 117, p. 1).

⁽²⁶⁾ Council Directive 91/439/EEC of 29 July 1991 on driving licences (OJ 1991 L 237, p. 1), as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 (OJ 2003 L 284, p. 1).

licence-holder has not satisfied the necessary conditions in that first Member State for the issue of a new licence following the withdrawal of a previous licence, including the examination of fitness to drive certifying that the grounds justifying the withdrawal are no longer in existence. However, it is not contrary to that directive for a Member State to refuse to recognise in its territory the right to drive stemming from a driving licence subsequently issued by another Member State if it is established, on the basis of entries appearing in the driving licence itself or of other incontestable information supplied by the Member State of issue, that when that licence was issued its holder, who had been the object, in the territory of the first Member State, of a measure withdrawing an earlier licence, was not normally resident in the territory of the Member State of issue. Moreover, it is contrary to that directive for a Member State temporarily to suspend the right to drive stemming from a driving licence issued by another Member State while the latter Member State investigates the procedure followed in the issuing of that licence.

With regard to air transport, the Court stated in Case C-173/07 *Emirates Airlines* (judgment of 10 July 2008), in the context of a dispute between a passenger and an airline company which refused to pay compensation to the passenger following the cancellation of a flight departing from Manila (Philippines), that a journey out and back cannot be regarded as a single 'flight' for the purposes of Regulation No 261/2004 establishing common rules on compensation and assistance to passengers ⁽²⁷⁾. Consequently, Article 3(1)(a) of that regulation, which provides that the regulation applies to passengers departing from an airport located in the territory of a Member State to which the Treaty applies, is to be interpreted as not applying to the case of an outward and return journey in which passengers who have originally departed from an airport located in the territory of a Member State to which the Treaty applies travel back to that airport on a flight departing from an airport located in a non-member country. The fact that the outward and return flights are the subject of a single booking does not affect the interpretation of that provision.

Also in relation to air transport, in Case C-549/07 *Wallentin-Hermann* (judgment of 22 December 2008) the Court was required to interpret Article 5(3) of Regulation No 261/2004, which is concerned with the right of passengers to compensation if their flight is cancelled and the concept of 'extraordinary circumstances'. The Court decided that a technical problem in an aircraft which leads to the cancellation of a flight is not covered by the concept of 'extraordinary circumstances' within the meaning of that provision unless such a problem stems from events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control. Even though a technical problem in an aircraft may fall within unexpected flight safety shortcomings, such circumstances cannot be characterised as extraordinary, while a technical problem caused by failure to maintain an aircraft must be regarded as inherent in the normal exercise of an air carrier's activity. The Court stated that the Montreal Convention is not decisive for the interpretation of that concept. Moreover, it added that the frequency of the technical problems experienced by an air carrier is not in itself a factor from which the presence or absence of 'extraordinary circumstances' within the meaning of Article 5(3) of Regulation No 261/2004 can be concluded. Finally, the Court held that the fact that an air carrier has complied with the minimum rules

⁽²⁷⁾ Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 46, p. 1).

on maintenance of an aircraft cannot in itself suffice to establish that that carrier has taken 'all reasonable measures' within the meaning of that provision and, therefore, to relieve the carrier of its obligation to pay compensation provided for by Articles 5(1)(c) and 7(1) of the regulation. Since not all extraordinary circumstances therefore confer exemption but simply those which could not have been avoided even if all reasonable measures had been taken, the onus is on the party seeking to rely on them to establish that they could not have been avoided by measures appropriate to the situation unless it had made intolerable sacrifices in the light of the capacities of its undertaking.

With regard to maritime transport, the Court stated in Case C-308/06 *The International Association of Independent Tanker Owners and Others* (judgment of 3 June 2008) that Article 4 of Directive 2005/35 on ship-source pollution⁽²⁸⁾, read in conjunction with Article 8 of that directive, which obliges Member States to punish ship-source discharges of polluting substances if committed 'with intent, recklessly or by serious negligence', without, however, defining those concepts, does not infringe the general principle of legal certainty insofar as it requires the Member States to punish ship-source discharges of polluting substances committed by 'serious negligence'. Those various concepts, in particular that of 'serious negligence', correspond to tests for the incurring of liability which are to apply to an indeterminate number of situations that it is impossible to envisage in advance and not to specific conduct capable of being set out in detail in a legislative measure of Community or of national law. Moreover, those concepts are fully integrated into, and used in, the Member States' respective legal systems. 'Serious negligence' within the meaning of Article 4 of Directive 2005/35 must be understood as entailing an unintentional act or omission by which the person responsible commits a patent breach of the duty of care which he should have and could have complied with in view of his attributes, knowledge, abilities and individual situation. Lastly, in accordance with Article 249 EC, Directive 2005/35 must be transposed by each of the Member States into national law. Thus, the actual definition of the infringements referred to in Article 4 of that directive and the applicable penalties are those which result from the rules laid down by the Member States.

Competition rules

With regard to competition rules applicable to undertakings, there are four judgments to which particular attention should be given.

As regards the concepts of undertaking and economic activity, the Court held in Case C-49/07 *MOTOE* (judgment of 1 July 2008) that a legal person whose activities consist in organising sports competitions and in entering, in that connection, into sponsorship, advertising and insurance contracts which are designed to exploit those competitions commercially and constitute a source of income for that entity must be classified as an undertaking for the purposes of Community competition law. That classification is not affected by the fact that such an undertaking does not seek to make a profit. Nor is it affected by the fact that it has the power to give its consent to applications for authorisation to organise events submitted to the authorities, since the participation of that entity in the decision-making process of the authorities must be distinguished from the economic activities it engages in, such as the organisation and com-

⁽²⁸⁾ Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements (OJ 2005 L 255, p. 11).

mercial exploitation of events. The Court also pointed out that the fact that an economic activity has a connection with sport does not hinder the application of the rules of the Treaty. Finally, in this judgment, the Court held that Articles 82 EC and 86 EC preclude a national rule which confers on a legal person which organises sporting events and enters, in that connection, into sponsorship, advertising and insurance contracts, the power to give consent to applications for authorisation to organise such competitions, without that power being made subject to restrictions, obligations and review.

In Case C-279/06 *CEPSA* (judgment of 11 September 2008), the Court considered the conditions for exempting exclusive supply contracts for petroleum products (see Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* [2006] ECR I-11987). Such a contract is capable of falling within the scope of Article 81(1) EC where a service-station operator assumes, in a non-negligible proportion, financial and commercial risks linked to the sale of petroleum products to third parties and where that contract contains clauses capable of infringing competition. If the operator does not assume such risks, only the obligations imposed on the operator in the context of services as an intermediary offered by the operator to the principal, such as the exclusivity and non-competition clauses, are capable of falling within the scope of Article 81(1) EC. As regards the conditions for exemption, the Court held that such a contract is capable of benefiting from a block exemption under Regulation No 1984/83 ⁽²⁹⁾ if it complies with the maximum duration of 10 years and if the supplier grants the service-station operator, in return for exclusivity, substantial commercial advantages which contribute to an improvement in distribution, facilitate the establishment or modernisation of the service station and lower the distribution costs. The Court also specified the rules applicable to agreements concluded under Regulation No 1984/83 where the performance of the contract extends beyond the date on which that regulation expired. Moreover, with regard to contracts covered by Regulation No 2790/1999 ⁽³⁰⁾, since the exemption provided for in Article 2 thereof was not to apply to vertical agreements which have as their object the restriction of the buyer's ability to determine his sale price, the Court held that it was for the referring court to examine whether it was genuinely possible for the reseller to lower that sale price. Finally, the Court stated that the automatic nullity provided for in Article 81(2) EC affects a contract in its entirety only if the clauses which are incompatible with Article 81(1) EC are not severable from the contract. Otherwise, the consequences of the nullity, in respect of all the other parts of the contract, are not a matter for Community law.

With regard to abuse of a dominant position, of particular note are Joined Cases C-468/06 to C-478/06 *Sot. Lelos kai Sia* (judgment of 16 September 2008), which followed on from Case C-53/03 *Syfait and Others* [2005] ECR-4609. The Court held that the refusal by a pharmaceuticals company occupying a dominant position on the market for certain medicinal products to satisfy 'ordinary' orders placed by wholesalers in order to prevent the latter from exporting those medical products from one Member State to other Member States constitutes an abuse of a dominant position. In order to arrive at that conclusion, the Court examined whether particular circumstances are present in the pharmaceuticals sector as a result of which the refusal

⁽²⁹⁾ Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreements (OJ 1983 L 173, p. 5), as amended by Commission Regulation (EC) No 1582/97 of 30 July 1997 (OJ 1997 L 214, p. 27).

⁽³⁰⁾ Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (OJ 1999 L 336, p. 21).

does not constitute an abuse. It considered, first of all, that a pharmaceuticals company occupying a dominant position cannot rely on the fact that parallel exports of medicinal products from a Member State where the prices are low to other Member States in which the prices are higher will be of only minimal benefit to the final consumer. In fact, such exports constitute an alternative source of supply, which necessarily brings some benefits to the final consumer. The Court then stated that the fact that prices of medicinal products are subject to State regulation does not prevent the refusal being abusive either. It pointed out, however, that a company in a dominant position can take steps that are reasonable and in proportion to the need to protect its own commercial interests. Consequently, in order to appraise whether the refusal by a pharmaceuticals company occupying a dominant position to supply wholesalers involved in parallel exports constitutes a reasonable and proportionate measure in relation to the threat that those exports represent to its legitimate commercial interests, it must be ascertained whether the orders of the wholesalers are out of the ordinary in the light of both the previous business relations between the company and the wholesalers concerned and the size of the orders in relation to the requirements of the market in the Member State concerned. The Court stated that it is for the national court to ascertain whether the orders are 'ordinary' in the light of both those criteria.

Finally, worthy of particular note is Case C-413/06 P *Bertelsmann and Sony Corporation of America v Impala* (judgment of 10 July 2008), in which the Court set aside the judgment of the Court of First Instance in Case T-464/04 *Impala v Commission* [2006] ECR II-2289 and examined in considerable detail standards of proof and the scope of judicial review in relation to concentrations. First of all, the Court held that there is no general presumption that a notified concentration is compatible with the common market and that decisions approving concentrations are not subject to different standards of proof from those applicable to decisions prohibiting concentrations. Secondly, the Court pointed out that the Commission may, in its decision, depart from the provisional findings in the statement of objections. While the Court of First Instance may therefore verify the correctness, completeness and reliability of the factual material which underpinned the decision in the light of the statement of objections, it must not treat the conclusions set out in that statement as established. Thirdly, the Court stated that the notifying parties cannot be criticised for not putting forward certain information until their reply to the statement of objections and that such information is not subject to more demanding standards of proof than those imposed in relation to the arguments of third parties or other information provided by the notifying undertakings. Moreover, the Court held that when the Commission examines in its decision the arguments submitted in response to the statement of objections, it may depart from the provisional findings in that statement without making a request for information or undertaking any additional market investigations. Fourthly, the Court set out the legal criteria applying to a collective dominant position arising from tacit coordination and held that the assessment of those criteria, including the transparency of the market concerned, should not be undertaken in an isolated and abstract manner, but should be carried out using the mechanism of a hypothetical tacit coordination as a basis. Finally, the Court held that a Commission decision approving a concentration can be annulled on the basis that it is inadequately reasoned.

With regard to State aid, two judgments merit particular attention. One of these concerns the concept of State aid, in particular the condition that the measure be selective, and the other regards the problem of aid that is unlawful but compatible with the common market.

In Joined Cases C-428/06 to C-434/06 *Unión Trabajadores de La Rioja* (judgment of 11 September 2008), the Court was asked whether tax measures adopted by infra-State bodies providing for a rate of tax lower than the basic rate set in Spanish State legislation and for deductions from the amount of tax payable which do not exist in State tax legislation are to be considered State aid that is incompatible with the common market on the sole ground that they apply only in the territory of those bodies. The Court stated that it is for the national court, which alone has jurisdiction to identify the national law applicable and to interpret it, as well as to apply Community law to the cases before it, to determine, in accordance with the judgment in Case C-88/03 *Portugal v Commission* [2006] ECR I-7115, whether the infra-State bodies concerned, which in this case were the Historical Territories and the Autonomous Community of the Basque Country, enjoy institutional, procedural and economic autonomy, which, if so, would have the result that the laws adopted within the limits of the areas of competence granted to those infra-State bodies by the Spanish Constitution of 1978 and the other provisions of Spanish law are not of a selective nature within the meaning of the concept of State aid as referred to in Article 87(1) EC. The Court thus had the opportunity to state, in relation to the judgment in Case C-88/03, that such autonomy requires that infra-State bodies assume responsibility for the political and financial consequences of a tax reduction measure. That cannot be the case where such bodies are not responsible for the management of a budget, in other words, where they do not have control of both revenue and expenditure. Moreover, the financial consequences of a reduction of the national tax rate must not be offset by aid or subsidies from other regions or central government which have been declared or result only from the actual examination of the financial flows.

In Case C-199/06 *Centre d'exploitation du livre français* [2008] ECR I-469, the Court held that, while Community law requires the national court to order the measures appropriate to remedy effectively the consequences of unlawfulness, it does not impose an obligation, even in the absence of exceptional circumstances, of full recovery of unlawful aid. According to the Court, the last sentence of Article 88(3) EC is based on the preservative purpose of ensuring that only compatible aid will be implemented. In order to achieve that purpose, the implementation of planned aid is to be deferred until any doubt as to its compatibility is resolved by the Commission's final decision. When the Commission adopts a positive decision, it is then apparent that that purpose has not been frustrated by the premature payment of the aid. However, in that case, from the point of view of operators other than the recipient of such aid, the fact that the aid was unlawful when it was paid will have had the effect of, first, exposing them to the risk, in the event unrealised, of the implementation of incompatible aid, and, second, making them suffer, depending on the circumstances, earlier than they would have had to, in competition terms, the effects of compatible aid. From the aid recipient's point of view, the undue advantage will have consisted, first, in the non-payment of the interest which it would have paid on the amount of the compatible aid in question, had it had to borrow that amount on the market pending the Commission's decision, and, second, in the improvement of its competitive position as against the other operators in the market while the unlawfulness lasted. It is for that reason that the national court must, applying Community law, order the aid recipient to pay interest in respect of the period of unlawfulness. The Court stated in addition that, within the framework of its domestic law, the national court may, if appropriate, also order the recovery of the unlawful aid, without prejudice to the Member State's right to re-implement it subsequently. The national court may also be required to uphold claims for compensation for damage caused by reason of the unlawful nature of the aid.

Moreover, in this judgment, the Court stated that where the Community judicature annuls a Commission decision declaring compatible with the common market aid which, contrary to the prohibition laid down by the last sentence of Article 88(3) EC, had been implemented without awaiting the Commission's final decision, the presumption of the lawfulness of the acts of the Community institutions and the rule that annulment is retroactive apply in turn. Aid implemented after the Commission's positive decision is presumed lawful until the Community judicature decides to annul that decision and subsequently, on the latter decision, the aid is deemed, in accordance with the first paragraph of Article 231 EC, not to have been declared compatible by the annulled decision, with the result that its implementation must be regarded as unlawful. In that case, the rule arising from the first paragraph of Article 231 EC puts a stop, retroactively, to the application of the presumption of lawfulness. Accordingly, the obligation arising from the last sentence of Article 88(3) EC to remedy the consequences of the aid's unlawfulness extends also, for the purposes of calculating the sums to be paid by the recipient, and save for exceptional circumstances, to the period between the adoption of the Commission's positive decision and its annulment by the Community judicature.

Taxation

With regard to value added tax, Case C-288/07 *Isle of Wight Council and Others* (judgment of 16 September 2008) is worthy of mention. In that judgment, the Court clarified the scope of a number of expressions which appear in the second subparagraph of Article 4(5) of Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes ⁽³¹⁾. The Court found that the significant distortions of competition, to which the treatment as non-taxable persons of bodies governed by public law acting as public authorities would lead, must be evaluated by reference to the activity in question, as such, without such evaluation relating to any local market in particular. The Court also stated that the expression 'would lead to', for the purposes of that provision, is to be interpreted as encompassing not only actual competition, but also potential competition, provided that the possibility of a private operator entering the relevant market is real, and not purely hypothetical. The word 'significant' is, for the purposes of that provision, to be understood as meaning that the actual or potential distortions of competition must be more than negligible.

Approximation and harmonisation of laws

Once again, the case-law has proved to be particularly fertile in this area, in which the European Union is extremely active. Reference will be made first of all to a series of judgments which have supplemented the already abundant case-law on public procurement.

In Case C-213/07 *Michaniki* (judgment of 16 December 2008), the Court settled the question whether Member States have discretion to include in their national legislation further grounds for the exclusion of tenderers in addition to those provided for in the relevant Community

⁽³¹⁾ 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).

directives. The Court decided that the first paragraph of Article 24 of Directive 93/37⁽³²⁾ must be interpreted as listing exhaustively the grounds based on objective considerations of professional quality which are capable of justifying the exclusion of a contractor from participation in a public works contract but as not precluding a Member State from providing for further exclusionary measures designed to ensure observance of the principles of equal treatment of tenderers and of transparency, provided that such measures do not go beyond what is necessary to achieve that objective. Since Member States enjoy a certain discretion, it follows that Community law does not preclude the adoption of national measures designed to avoid the risk of occurrence of practices capable of jeopardising transparency and distorting competition, a risk which could arise from the presence, amongst the tenderers, of a contractor active in the media sector or connected with a person involved in that sector, and thus to prevent or punish fraud and corruption. However, a national provision which establishes a system of general incompatibility between the sector of public works and that of the media has the consequence of excluding from the award of public contracts public works contractors who are also involved in the media sector on account of a connection as owner, main shareholder, partner or management executive, without affording them the possibility of showing that there is no real risk of that type. Accordingly, by excluding an entire category of public works contractors on the basis of such an irrebuttable presumption, such a provision goes beyond what is necessary to achieve the claimed objectives.

In Case C-324/07 *Coditel Brabant* (judgment of 13 November 2008), the Court decided that Articles 43 EC and 49 EC, the principles of equal treatment and of non-discrimination on grounds of nationality and the concomitant obligation of transparency do not preclude a public authority from awarding, without calling for competition, a public service concession to an inter-municipal cooperative society of which all the members are public authorities, where those public authorities exercise over that cooperative society control similar to that exercised over their own departments and where that society carries out the essential part of its activities with those public authorities. There must be a power of decisive influence over both the strategic objectives and significant decisions of the concessionaire. It follows that, in circumstances in which decisions regarding the activities of such an inter-municipal cooperative society owned exclusively by public authorities are taken by bodies, created under the statutes of that society, which are composed of representatives of the affiliated public authorities, the control exercised may be regarded as enabling those authorities to exercise over the cooperative society control similar to that exercised over their own departments.

Where a public authority joins an inter-municipal cooperative of which all the members are public authorities in order to transfer to that cooperative society the management of a public service, it is possible, in order for the control to be regarded as similar to that exercised by a public body over its own departments, for it to be exercised jointly, decisions being taken by a majority, as the case may be. The control exercised by a concession-granting public authority must be similar to that which the authority exercises over its own departments, but it need not be identical to it in every respect. The control exercised over the concessionaire must be effective, but it is not essential that it be exercised individually. It must therefore be recognised that, where a number of public authorities own a concessionaire to which they entrust the performance of one of their public service tasks, the control which those public authorities exercise over that entity may be exercised jointly. As regards collective decision-making bodies, the procedure which is used for adopting decisions — such as, *inter alia*, adoption by majority — is of no importance.

⁽³²⁾ 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).

In Case C-412/04 *Commission v Italy* [2008] ECR I-619, the Court held that a Member State which makes mixed works, supply and service contracts and supply or service contracts which include ancillary works, if the works represent more than 50 % of the total value of the relevant contract, subject to the national rules on public works contracts, fails to fulfil its obligations under Directives 92/50 ⁽³³⁾, 93/36 ⁽³⁴⁾ and 93/37 ⁽³⁵⁾. Where a contract contains both elements relating to a public works contract and elements relating to another type of contract, it is the main purpose of the contract that determines which Community directive on public procurement is to be applied. The assessment must be made in the light of the essential obligations which predominate and which, as such, characterise the transaction, as opposed to those which are only ancillary or supplementary in nature and are required by the very purpose of the contract; the value of the various matters covered by the contract is, in that regard, just one criterion among others to be taken into account for the purposes of the assessment. The Court also held that if an agreement concluded between a private person who is the owner of development land and the municipal authority satisfies the criteria for the definition of a 'public works contract' within the meaning of Article 1(a) of Directive 93/37, the estimated value which must in principle be taken into account in order to ascertain whether the threshold set by the directive is attained and whether, therefore, the award of the contract must comply with the rules on advertising laid down therein may be calculated solely by reference to the total value of the various works, by adding together the value of the various lots. The only permitted exceptions to the application of Directives 92/50 and 93/38 ⁽³⁶⁾ are those which are exhaustively and expressly mentioned therein.

In another case involving the same parties (judgment of 8 April 2008 in Case C-337/05 *Commission v Italy*), the question to be determined was whether a Member State can award directly to an undertaking, without complying with the procedures provided for by Directive 93/36 ⁽³⁷⁾, contracts for the purchase of helicopters to meet the requirements of several military and civilian corps. The Court found, first of all, that such a procedure cannot be justified by the existence of an 'in-house' relationship if a private undertaking has a shareholding, even a minority holding, in the capital of the company which produces the helicopters, in which the contracting authority in question is also a shareholder, as the undertaking's shareholding precludes the authority from exercising over that company a control similar to that which it exercises over its own departments.

Moreover, as regards reliance on the legitimate requirements of national interest foreseen in Article 296 EC and Article 2(1)(b) of Directive 93/36 on the ground that such helicopters are dual-use items, the Court pointed out that any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected

⁽³³⁾ Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

⁽³⁴⁾ Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1).

⁽³⁵⁾ 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).

⁽³⁶⁾ Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84).

⁽³⁷⁾ See footnote 34.

with the production of or trade in arms, munitions and war materials, provided, however, that such measures do not alter the conditions of competition in the common market regarding products which are not intended for specifically military purposes. Therefore, the purchase of equipment the use of which for military purposes is hardly certain must necessarily comply with the rules governing the award of public contracts. That applies to the supply of helicopters to military corps for the purpose of civilian use (and those rules must be complied with even where there is an obligation of confidentiality). Consequently, the negotiated procedure is exceptional in nature and may be applied only in cases which are set out in an exhaustive list. Since Directive 93/36 must be interpreted strictly in order to prevent it being deprived of its effectiveness, the Member States cannot provide for the use of the negotiated procedure in cases not provided for by that directive or add new conditions to the cases expressly provided for which make that procedure easier to use. Furthermore, the burden of proving the existence of exceptional circumstances justifying a derogation from those rules lies on the person seeking to rely on those circumstances.

Reference will next be made, in no particular order, to other cases which are of particular interest.

In Case C-452/06 *Synthon* (judgment of 16 October 2008), the Court was required to interpret Article 28 of Directive 2001/83 ⁽³⁸⁾ and held that that provision precludes a Member State to which an application is made for mutual recognition of a marketing authorisation of a medicinal product for human use granted by another Member State under the abridged procedure provided for in Article 10(1)(a)(iii) of that directive from refusing that application on the ground that the medicinal product in question is not essentially similar to the reference product. The existence of a risk to public health constitutes the only ground that a Member State is entitled to rely on to object to the recognition of a marketing authorisation granted by another Member State. In addition, a Member State wishing to rely on such a ground is required to comply with a specifically prescribed procedure for provision of information, concerted action and arbitration. The Court added that, if a Member State was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach of Community law. Accordingly, since Article 28 of Directive 2001/83 confers on a Member State in receipt of an application for mutual recognition only a very limited discretion in relation to the reasons for which it is entitled to refuse to recognise the marketing authorisation in question, the failure on the part of the Member State to recognise such an authorisation, on the ground that the relevant medicinal product either is not essentially similar to the reference product or belongs to a category of medicinal products for which the Member State concerned has a general policy which does not allow it to be considered as essentially similar, constitutes a sufficiently serious breach of Community law capable of rendering that Member State liable in damages.

⁽³⁸⁾ Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJ 2001 L 311, p. 67).

In Joined Cases C-152/07 to C-154/07 *Arcor* (judgment of 17 July 2008), concerning the telecommunications sector, the Court held that Article 12(7) of Directive 97/33 ⁽³⁹⁾ and Article 4c of Directive 90/388 ⁽⁴⁰⁾ must be interpreted as precluding a national regulatory authority from requiring an operator of a network interconnected with a public network to pay to the market-dominant subscriber network operator a connection charge which is additional to an interconnection charge and is intended to compensate the latter operator for the deficit incurred as a result of providing the local loop. Article 12(7) of Directive 97/33 does not allow a national regulatory authority to approve a connection charge the rate of which is not cost-oriented, when it has the same characteristics as an interconnection charge and is levied as a supplement to such a charge. Furthermore, the effect of such a charge is only to protect the market-dominant subscriber network operator, enabling it to fund its own deficit from the subscribers of the other operators of interconnected networks. Such funding, which is separate from any funding of universal service obligations, is contrary to the principle of free competition. The provisions in question produce direct effect and can be relied on directly before a national court by individuals to challenge a decision of the national regulatory authority.

In Case C-426/05 *Tele2 Telecommunications* [2008] ECR I-685, concerning the electronic communications networks and services referred to in Directive 2002/21 ⁽⁴¹⁾, the Court gave a ruling on the terms user 'affected' or undertaking 'affected' for the purposes of Article 4(1) of that directive ⁽⁴²⁾, and the term party 'affected' within the meaning of Article 16(3) of that directive ⁽⁴³⁾. Those terms must be interpreted as covering not only an 'undertaking (formerly) having significant power on the relevant market' which is the subject of a decision of a national regulatory authority taken in the context of a market analysis procedure and is the addressee of that decision, but also users and undertakings in competition with such an undertaking which are not themselves addressees of that decision but the rights of which are adversely affected by it. In the context of such proceedings, a provision of national law which grants party status only to 'undertakings (formerly) having significant power on the relevant market' in respect of which specific regulatory obligations are imposed, amended or withdrawn is not, in principle, contrary to Article 4 of the directive. However, it is for the national court to ensure that national procedural law guarantees the safeguarding of the rights which those users and undertakings in competition derive from the Community legal order in a manner which is not less favourable than that in which comparable domestic rights are safeguarded and which does not prejudice the effectiveness of the legal protection of the parties concerned, which is guaranteed in Article 4 of the directive.

⁽³⁹⁾ Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of open network provision (ONP) (OJ 1997 L 199, p. 32), as amended by Directive 98/61/EC of the European Parliament and of the Council of 24 September 1998 (OJ 1998 L 268, p. 37).

⁽⁴⁰⁾ Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ 1990 L 192, p. 10), as amended by Commission Directive 96/19/EC of 13 March 1996 (OJ 1996 L 74, p. 13).

⁽⁴¹⁾ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (framework directive) (OJ 2002 L 108, p. 33).

⁽⁴²⁾ Which grants any user or undertaking providing electronic communications networks and/or services a right to appeal against a decision taken by a national regulatory authority by which it is affected.

⁽⁴³⁾ Which grants to such a person the right to be given an appropriate period of notice of a decision to withdraw sector-specific regulatory obligations.

In Case C-239/07 *Sabatauskas and Others* (judgment of 9 October 2008), concerning the internal market in electricity, the Court held that Article 20 of Directive 2003/54 ⁽⁴⁴⁾ is to be interpreted as defining the Member States' obligations only in respect of the access and not the connection of third parties to the electricity transmission and distribution systems and as not laying down that the system of network access that the Member States are required to establish must allow an eligible customer to choose, at his discretion, the type of system to which he wishes to connect. That provision does not preclude national legislation which lays down that an eligible customer's equipment may be connected to a transmission system only where the distribution system operator refuses, on account of established technical or operating requirements, to connect to its system the equipment of the eligible customer which is on the territory included in its licence. It is, however, for the national courts to verify that the implementation and application of that access system is carried out in accordance with criteria which are objective and do not discriminate between the users of the transmission and distribution systems.

With regard to the protection of personal data, of particular note is Case C-524/06 *Huber* (judgment of 16 December 2008), concerning the German system for processing personal data relating to Union citizens who are not German nationals, under which the data relating to such foreign nationals is to be processed and stored in a special register containing a wider range of information than that relating to German nationals, which is kept in district registers. When asked whether such a system is compatible with Article 7(e) of Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ⁽⁴⁵⁾, the Court held that such a system, having as its object the provision of support to the national authorities responsible for the application of the legislation relating to the right of residence, does not satisfy the requirement of necessity laid down by that provision, interpreted in the light of the prohibition of any discrimination on grounds of nationality, unless it contains only the data which are necessary for the application by those authorities of that legislation and its centralised nature enables that legislation to be more effectively applied as regards the right of residence of Union citizens who are not nationals of that Member State. It is for the national courts to ascertain whether that is the case. The storage and processing of personal data containing individualised personal information in such a register for statistical purposes cannot, on any basis, be considered to be necessary within the meaning of Article 7(e) of Directive 95/46. Moreover, the Court considered that Article 12(1) EC precludes the putting in place by a Member State, for the purpose of fighting crime, of such a system for processing personal data that is specific to Union citizens who are not nationals of that Member State, since the situation of the nationals of a Member State, as regards the objective of fighting crime, is not different from that of Union citizens who are not nationals of that Member State and are resident in its territory.

In Case C-275/06 *Promusicae* [2008] ECR I-271, the Court held that Community law does not require the Member States to lay down an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings. In a situation in

⁽⁴⁴⁾ Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (OJ 2003 L 176, p. 37).

⁽⁴⁵⁾ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31).

which a non-profit-making organisation of producers and publishers of musical and audiovisual recordings brings proceedings seeking an order that a provider of Internet access services disclose to the organisation the identities and addresses of certain subscribers, so as to enable civil proceedings to be brought for infringement of copyright, neither the directives relating to the information society and the protection of intellectual property, especially copyright ⁽⁴⁶⁾, nor those relating to the protection of personal data ⁽⁴⁷⁾ require the Member States to lay down an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings. The agreement on trade-related aspects of intellectual property rights (TRIPs Agreement) does not contain provisions which require those directives to be interpreted as compelling the Member States to lay down such an obligation. However, the Court pointed out that Community law requires that, when transposing those directives, the Member States take care to rely on an interpretation of them which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. When implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with fundamental rights or with the other general principles of Community law, such as the principle of proportionality.

In two cases, the Court was called upon to consider Directive 2000/35 on combating late payment in commercial transactions ⁽⁴⁸⁾.

In Case C-306/06 *01051 Telecom* (judgment of 3 April 2008), involving a dispute concerning payment of default interest claimed following alleged late payment of invoices, the Court held that Article 3(1)(c)(ii) of that directive is to be interpreted as meaning that it requires, in order that a payment by bank transfer may avoid or put an end to the application of interest for late payment, that the sum due be credited to the account of the creditor within the period for payment.

In Case C-265/07 *Caffaro* (judgment of 11 September 2008), the Court held that that directive is to be interpreted as not precluding a national provision pursuant to which a creditor in possession of an enforceable title in respect of an unchallenged claim against a public authority as remuneration for a commercial transaction cannot proceed to forced execution against the public authority before a period of 120 days has elapsed since service of the enforceable title on the authority. As regards the recovery procedures for unchallenged claims, the directive

⁽⁴⁶⁾ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market (OJ 2000 L 178, p. 1), Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10) and Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45).

⁽⁴⁷⁾ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31) and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (OJ 2002 L 201, p. 37).

⁽⁴⁸⁾ Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions (OJ 2000 L 200, p. 35).

harmonises only the period within which an enforceable title can be obtained, but does not govern forced execution procedures, which remain subject to the national law of the Member States.

With regard to consumer protection, there are again two judgments which merit consideration.

In Case C-412/06 *Hamilton* (judgment of 10 April 2008), the Court stated that Directive 85/577 to protect the consumer in respect of contracts negotiated away from business premises ⁽⁴⁹⁾ must be interpreted as meaning that the national legislature is entitled to provide that the right of cancellation laid down in Article 5(1) of the directive, which provides that the consumer can renounce the effects of his undertaking by sending notice within a period of not less than seven days from the date on which the trader notified him of that right, may be exercised no later than one month from the date on which the contracting parties performed in full their obligations under a contract for long-term credit, where the consumer has been given defective notice concerning the exercise of that right.

In Case C-404/06 *Quelle* (judgment of 17 April 2008), a reference was made to the Court by the Bundesgerichtshof (Federal Court of Justice) concerning a dispute between a consumers' association and Quelle, which had, in accordance with German legislation, requested and obtained payment from a consumer for use of a defective appliance which was replaced with a new appliance. The Court considered that Directive 1999/44 on consumer goods ⁽⁵⁰⁾ precludes national legislation under which a seller who has sold consumer goods which are not in conformity may require the consumer to pay compensation for the use of the defective goods until their replacement with new goods. The 'free of charge' aspect of the seller's obligation to bring goods into conformity is intended to protect consumers from the risk of financial burdens which might dissuade them from asserting their rights in the absence of such protection. Moreover, the 'free of charge' aspect of the seller's obligation is consistent with the purpose of that directive, which is to ensure a high level of consumer protection. The seller, who, in contrast with the consumer who has already paid the selling price, does not perform his contractual obligation correctly if he delivers goods which are not in conformity, must bear the consequences of that faulty performance. The seller's financial interests are nevertheless protected, on the one hand, by the two-year time limit and, on the other, by the fact that it may refuse to replace the goods where that remedy would be disproportionate in that it would impose unreasonable costs on the seller.

⁽⁴⁹⁾ Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ 1985 L 372, p. 31).

⁽⁵⁰⁾ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ 1999 L 171, p. 12).

Trade marks

With regard to the case-law on trade marks, two cases dealing with the possibility under Articles 5(1)(b) and 6(1)(b) of Directive 89/104 ⁽⁵¹⁾ for the proprietor of a trade mark to prevent the use of a sign that is similar to his mark merit particular attention.

In Case C-533/06 *O₂ Holdings and O₂ (UK)* (judgment of 12 June 2008), O₂, the proprietor of two United Kingdom trade marks consisting of a static picture of bubbles, used that image to promote its services both as a static and a moving image. In an advertisement comparing its services with those of O₂, Hutchison 3G used moving black-and-white bubble imagery. In infringement proceedings brought by O₂, which were dismissed by the High Court at first instance, the Court of Appeal asked, in essence, whether the proprietor of a trade mark is entitled to prevent the use of a sign which is identical with, or similar to, his mark in a comparative advertisement. Pointing out, first of all, the conditions laid down in Article 3a of Directive 84/450 ⁽⁵²⁾, as amended by Directive 97/55 ⁽⁵³⁾, under which the proprietor of a trade mark is permitted to prevent such use, the Court ruled that Article 5(1)(b) of Directive 89/104 is to be interpreted as meaning that the proprietor of a registered trade mark is not entitled to prevent the use by a third party, in a comparative advertisement, of a sign similar to that mark in relation to goods or services identical with, or similar to, those for which that mark was registered where such use does not give rise to a likelihood of confusion on the part of the public, and that is so irrespective of whether the comparative advertisement satisfies all the conditions under which such advertising is permitted.

In Case C-102/07 *adidas and adidas Benelux* (judgment of 10 April 2008), adidas AG, the proprietor of figurative trade marks composed of three vertical, parallel stripes of equal width which are featured on the sides of sports and leisure garments in a colour which contrasts with the basic colour of those garments, objected to the companies Marca Mode, C & A, H & M and Vindex using a similar sign composed of two stripes. Those companies relied on the requirement of availability to use those stripes without adidas' permission. Following a reference from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), the Court found that the requirement of availability cannot in any circumstances constitute an independent restriction of the effects of the trade mark in addition to those expressly provided for in Article 6(1)(b) of Directive 89/104. However, the proprietor of a mark cannot prevent the fair use by third parties of descriptive indications. In order for a third party to be able to plead the limitations of the effects of a trade mark in that trade marks directive and rely on the requirement of availability, the indication used by it must relate to one of the characteristics of the goods.

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

⁽⁵²⁾ Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (OJ 1984 L 250, p. 17).

⁽⁵³⁾ Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising (OJ 1997 L 290, p. 18).

Social policy

Among the Court's judgments given in the field of social policy, attention should be focused on a number of cases that deal with the implementation of the principle of equal treatment and with provisions designed to protect workers, as well as a case dealing with institutional issues which are of particular interest.

First of all, the Court developed its case-law on the interpretation of Directive 2007/78 on equal treatment in employment and occupation ⁽⁵⁴⁾ in the context of two references for preliminary rulings. In Case C-303/06 *Coleman* (judgment of 17 July 2008), the Court stated that the principle of equal treatment enshrined in that directive applies not to a particular category of person but by reference to the grounds of discrimination mentioned in Article 1 thereof and the prohibition of direct discrimination is not therefore limited only to people who are themselves disabled. Accordingly, where an employer treats an employee who is not himself disabled less favourably than another employee in a comparable situation and it is established that the less favourable treatment of that employee is based on the disability of his child, whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct discrimination laid down by Article 2 of that directive. Any other interpretation is liable to deprive the directive of an important element of its effectiveness and to reduce the protection which it is intended to guarantee. The same reasoning applies with regard to harassment, since it is deemed to be a form of discrimination within the meaning of the directive. The prohibition of harassment cannot therefore be limited only to persons who are themselves disabled but extends to persons who are subject to conduct amounting to harassment related to the disability of their child.

In Case C-267/06 *Maruko* (judgment of 1 April 2008), the Court held that a survivor's benefit granted under an occupational pension scheme managed by a pension fund for a particular category of workers falls within the scope of Directive 2000/78. Such a benefit must be classified as 'pay' within the meaning of Article 141 EC on account of the fact, in particular, that it is derived from the employment relationship of the deceased person. Moreover, Articles 1 and 2 of that directive preclude legislation under which, after the death of his life partner, the surviving partner does not receive a survivor's benefit equivalent to that granted to a surviving spouse, even though, under national law, life partnership places persons of the same sex in a situation comparable to that of spouses so far as concerns that survivor's benefit. According to the Court, the refusal to grant life partners a survivor's benefit constitutes direct discrimination on grounds of sexual orientation. It is for the national court to determine whether a surviving life partner is in a situation comparable to that of a spouse who is entitled to the survivor's benefit provided for under the occupational pension scheme managed by the pension fund concerned.

The Court also developed its case-law in the field of protection of pregnant women and equal treatment of men and women in Case C-506/06 *Mayr* [2008] ECR I-1017, concerning a woman who had undergone *in vitro* fertilisation treatment. The judgment stated that Directive

⁽⁵⁴⁾ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

92/85⁽⁵⁵⁾, which provides, *inter alia*, for the protection of female workers against dismissal, must be interpreted as not extending to a female worker who is undergoing *in vitro* fertilisation treatment where, on the date she is given notice of her dismissal, her ova have already been fertilised by her partner's sperm cells, so that *in vitro* fertilised ova exist, but they have not yet been transferred into her uterus. The protection established by Article 10 of Directive 92/85 cannot, for reasons connected with the principle of legal certainty, given the period of time for which fertilised ova may potentially be conserved, be extended to such a worker. On the other hand, the Court stated that Directive 76/207 on the implementation of the principle of equal treatment for men and women⁽⁵⁶⁾ precludes the dismissal of a female worker who is at an advanced stage of *in vitro* fertilisation treatment, that is, between the follicular puncture and the immediate transfer of the *in vitro* fertilised ova into her uterus, where it is established that the dismissal is essentially based on the fact that the woman has undergone such treatment. Since such medical treatment directly affects only women, the dismissal of a female worker essentially because she is undergoing that important stage of *in vitro* fertilisation treatment constitutes direct discrimination on grounds of sex.

Case C-396/07 *Juuri* (judgment of 27 November 2008) enabled the Court to clarify the effect of Articles 3 and 4 of Directive 2001/23 concerning employees' rights in the event of transfers of undertakings⁽⁵⁷⁾. Article 4(2) of that directive provides that, where a contract of employment is terminated as a result of a substantial change in working conditions due to a transfer of the undertaking, the employer is to be regarded as responsible for the termination. The Court held that, in the absence of any failure on the part of the transferee employer to fulfil its obligations under that directive, the Member States are not required by that provision to guarantee the employee a right to financial compensation, for which the transferee employer is liable, in accordance with the same conditions as the right upon which an employee can rely where the contract of employment or the employment relationship is unlawfully terminated by his employer. However, in such a case, the national court is required, in a case within its jurisdiction, to ensure that, at the very least, the transferee employer bears the consequences that the applicable national law attaches to termination by an employer of the contract of employment or the employment relationship, such as the payment of the salary and other benefits relating to the notice period. Moreover, the Court stated that Article 3(3) of Directive 2001/23, which provides that, following the transfer, the transferee is to continue to observe the terms and conditions agreed in a collective agreement until the date of termination or expiry of the collective agreement, does not require the transferee to ensure that the working conditions are observed after that date, even though that date coincides with the date on which the undertaking was transferred.

⁽⁵⁵⁾ Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (OJ 1992 L 348, p. 1).

⁽⁵⁶⁾ Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40).

⁽⁵⁷⁾ Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ 2001 L 82, p. 16).

In Case C-268/06 *Impact* (judgment of 15 April 2008), the Court was required to consider the issue of the Member States' procedural autonomy and the direct effect of Community legislation on fixed-term employment in the public sector.

The Court held that Community law, in particular the principle of effectiveness, requires that a specialised court which is called upon, under the, albeit optional, jurisdiction conferred on it by the legislation transposing Directive 1999/70 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, to hear and determine a claim based on an infringement of that legislation must also have jurisdiction to hear and determine an applicant's claims arising directly from the directive itself in respect of the period between the deadline for transposing the directive and the date on which the transposing legislation entered into force, if it is established that the obligation on that applicant to bring, at the same time, a separate claim based directly on the directive before an ordinary court would involve procedural disadvantages liable to render excessively difficult the exercise of the rights conferred on him by Community law. Clause 4(1) of that framework agreement, which prohibits any difference in treatment of fixed-term workers in respect of employment conditions which is not objectively justified, is unconditional and sufficiently precise for individuals to be able to rely upon it before a national court; that is not the case as regards Clause 5(1), which assigns to the Member States the general objective of preventing the abusive use of successive fixed-term employment contracts or relationships, while leaving to them the choice as to how to achieve it.

An authority of a Member State acting in its capacity as a public employer may not adopt measures which consist in the renewal of fixed-term contracts for an unusually long term in the period between the deadline for transposing Directive 1999/70 and the date on which the transposing legislation entered into force. In such circumstances, insofar as the applicable national law contains a rule that precludes the retrospective application of legislation unless there is a clear and unambiguous indication to the contrary, a national court hearing a claim based on an infringement of a provision of national legislation transposing Directive 1999/70 is required, under Community law, to give that provision retrospective effect to the date by which that directive should have been transposed only if that national legislation includes an indication of that nature capable of giving that provision retrospective effect.

Environment

In Case C-188/07 *Commune de Mesquer* (judgment of 24 June 2008), following the sinking off the French Atlantic coast of the *Erika*, a vessel chartered by Total International Ltd, the commune de Mesquer (Municipality of Mesquer) brought proceedings in reliance upon the waste framework directive⁽⁵⁸⁾ against companies in the Total group for recovery of the costs incurred on cleaning and anti-pollution measures along its coast. Requested by the French Court of Cassation to interpret that directive, the Court of Justice ruled that heavy fuel oil transported by a ship does not constitute 'waste' where it is exploited or marketed on economically advantageous terms and is capable of actually being used as a fuel without requiring prior processing.

⁽⁵⁸⁾ Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Commission Decision 96/350/EC of 24 May 1996 adapting Annexes IIA and IIB to Council Directive 75/442/EEC on waste (OJ 1996 L 135, p. 32).

However, such hydrocarbons spilled following a shipwreck, mixed with water and sediment and drifting along the coast of a Member State until being washed up on that coast, are to be regarded as substances which the holder did not intend to produce and which he discards, albeit involuntarily, while they are being transported, so that they must be classified as waste within the meaning of the waste framework directive. Also, for the purpose of determining who had to bear the cost of the Municipality of Mesquer's disposal of the waste, the Court held, first, that the owner of a ship carrying hydrocarbons, being in possession of them immediately before they become waste, may be regarded as having produced the waste and on that basis be categorised as a 'holder' within the meaning of that directive and, second, that the seller of the hydrocarbons and charterer of the ship carrying them has 'produced' waste if the national court finds that that seller–charterer contributed to the risk that the pollution caused by the shipwreck would occur, in particular if he failed to take measures to prevent such an incident, such as measures concerning the choice of ship. Finally, the Court held that if the cost of disposing of the waste is not borne or cannot be borne by the International Oil Pollution Compensation Fund and, in accordance with the limitations and/or exemptions of liability laid down, the national law of a Member State, including the law derived from international agreements, prevents that cost from being borne by the shipowner and the charterer, even though they are regarded as holders, such a national law then has to make provision for the cost of disposing of the waste to be borne by the producer of the product from which the waste thus spread came. By virtue of the 'polluter pays' principle, however, such a producer cannot be liable to bear that cost unless he has contributed by his conduct to the risk that the pollution caused by the shipwreck will occur.

The scope of Directive 85/337 ⁽⁵⁹⁾, as amended by Directive 97/11 ⁽⁶⁰⁾, was clarified in two cases relating to its interpretation.

While in Case C-142/07 *Ecologistas en Acción-CODA* (judgment of 25 July 2008) the association *Ecologistas en Acción-CODA* challenged the assessment carried out by the city council of Madrid of the environmental effects of projects for refurbishment and improvement of the Madrid urban ring road on the basis that Directive 85/337 as amended had been infringed, in Case C-2/07 *Abraham and Others* [2008] ECR I-1197 individuals who lived near Liège–Bierset Airport complained of noise pollution resulting from the restructuring of that former military airport in an action before the Belgian Court of Cassation concerning liability. In both cases the question arose as to whether the concept of projects as referred to in that directive could encompass projects for the modification, refurbishment, improvement and extension of the infrastructure in question. In *Ecologistas en Acción-CODA*, the Court ruled that the directive as amended must be interpreted providing for environmental impact assessment of refurbishment and improvement projects for urban roads, either where they are projects covered by point 7(b) or (c) of Annex I to the directive — that is to say, inter alia, the 'construction of motorways and express roads' — or where they are projects covered by point 10(e) of Annex II or the first indent of point 13 of Annex II, which are likely, by virtue of their nature, size or location and, if appropriate, having regard to their interaction with other projects, to have significant effects on the environment. The Court stated that a project for refurbishment of a road which would be

⁽⁵⁹⁾ Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40).

⁽⁶⁰⁾ Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (OJ 1977 L 73, p. 5).

equivalent, because of its size and the manner in which it is carried out, to construction may be regarded as a construction project for the purposes of Annex I and that it would be contrary to the very purpose of the directive as amended to allow any urban road project to fall outside its scope solely on the ground that the directive does not expressly mention among the projects listed in Annexes I and II those concerning that kind of road. In *Abraham and Others*, the Court ruled that point 12 of Annex II, read in conjunction with point 7 of Annex I, to Directive 85/337, in their original version, also encompasses works to modify the infrastructure of an existing airport, without extension of the runway, where they may be regarded, in particular because of their nature, extent and characteristics, as a modification of the airport itself. It explained that it would be contrary to the very objective of that directive to exclude works to improve or extend the infrastructure of an existing airport from the scope of Annex II on the ground that Annex I covers the 'construction of airports' and not 'airports' as such.

In Case C-237/07 *Janecek* (judgment of 25 July 2008), the Court ruled that Article 7(3) of Directive 96/62 on ambient air quality assessment and management ⁽⁶¹⁾, as amended by Regulation No 1882/2003 ⁽⁶²⁾, must be interpreted as meaning that, where there is a risk that the limit values or alert thresholds may be exceeded, persons directly concerned must be in a position to require the competent national authorities to draw up an action plan, even though, under national law, those persons may have other courses of action available to them for requiring those authorities to take measures to combat atmospheric pollution. The Member States are obliged, subject to judicial review by the national courts, to take such measures — in the context of an action plan and in the short term — as are capable of reducing to a minimum the risk that the limit values or alert thresholds may be exceeded and of ensuring a gradual return to a level below those values or thresholds, taking into account the factual circumstances and all opposing interests.

Judicial cooperation in civil matters

In the field of judicial cooperation in civil matters, Case C-195/08 PPU *Rinau* (judgment of 11 July 2008) is to be noted in particular. This was the first case decided by the Court under the urgent preliminary ruling procedure, which entered into force on 1 March 2008. Application had been made to the Supreme Court of Lithuania for non-recognition in Lithuania of a decision made by a German court awarding custody of a child to her father, who was resident in Germany, and ordering the mother, who was resident in Lithuania, to return the child to the father. The Supreme Court was uncertain to what extent the enforceability of the German court's decision requiring the child's return, conferred on that decision by the certificate issued pursuant to Regulation No 2201/2003 concerning jurisdiction and the recognition and enforcement

⁽⁶¹⁾ Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management (OJ 1996 L 296, p. 55).

⁽⁶²⁾ Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 adapting to Council Decision 1999/468/EC the provisions relating to committees which assist the Commission in the exercise of its implementing powers laid down in instruments subject to the procedure referred to in Article 251 of the EC Treaty (OJ 2003 L 284, p. 1).

of judgments in matrimonial matters and the matters of parental responsibility ⁽⁶³⁾, could be called into question on the ground that the Lithuanian courts had finally ordered that the child be returned to Germany. The Court of Justice held that, once a decision that a child not be returned has been taken and brought to the attention of the court of origin, it is irrelevant, for the purposes of issuing the certificate provided for in Article 42 of Regulation No 2201/2003, that that decision has been suspended, overturned, set aside or, in any event, has not become *res judicata* or has been replaced by a decision ordering return, insofar as the return of the child has not actually taken place. Since no doubt had been expressed as regards the authenticity of that certificate and since it was drawn up in accordance with the standard form set out in Annex IV to the regulation, opposition to the recognition of the decision ordering return was not permitted and it was for the requested court only to declare the enforceability of the certified decision and to allow the immediate return of the child. According to the Court, if the position were otherwise, there would be a risk that Regulation No 2201/2003 would be deprived of its useful effect, since the objective of the return of the child would remain subject to the condition that the redress procedures allowed under the domestic law of the Member State in which the child is wrongfully retained have been exhausted.

Police and judicial cooperation in criminal matters, and combating terrorism

In Case C-66/08 *Kozłowski* (judgment of 17 July 2008), relating to the execution of a European arrest warrant, the Court interpreted Article 4(6) of Framework Decision 2002/584 ⁽⁶⁴⁾, which permits the executing judicial authority to refuse to execute such a warrant where the requested person 'is staying in, or is a national or a resident of, the executing Member State' and that State undertakes to execute the sentence in accordance with its domestic law. The Court held that a requested person is 'resident' in the executing Member State when he has established his actual place of residence there. He is 'staying' there when, following a stable period of presence in the executing Member State, he has acquired connections with that State which are of a similar degree to those resulting from residence; it is for the executing judicial authority to determine whether there are such connections by making an overall assessment of various objective factors characterising the situation of that person, including, in particular, the length, nature and conditions of his presence and his family and economic connections. Since the objective of the framework decision is to put in place a system of surrender, as between judicial authorities, of convicted persons or suspects for the purpose of enforcing judgments or of criminal proceedings, based on the principle of mutual recognition — a surrender which the executing judicial authority can oppose only on one of the grounds for refusal provided for by the framework decision — the terms 'staying' and 'resident', which determine the scope of the framework decision, must be defined uniformly as they concern autonomous concepts of Union law. Therefore, in their national law transposing the framework decision, the Member States are not entitled to give those terms a broader meaning than that which derives from such a uniform interpretation.

⁽⁶³⁾ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, as amended by Council Regulation (EC) No 2116/2004 of 2 December 2004 (OJ 2004 L 367, p. 1).

⁽⁶⁴⁾ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1).

Common foreign and security policy

In Case C-91/05 *Commission v Council* (judgment of 20 May 2008), the Court annulled Decision 2004/833 ⁽⁶⁵⁾ implementing Joint Action 2002/589 ⁽⁶⁶⁾ with a view to a European Union contribution to the Economic Community of West African States in the framework of a moratorium on small arms and light weapons. That Council decision had been adopted on the basis of the Treaty on European Union, under the common foreign and security policy (CFSP), rather than on the basis of the EC Treaty, under development cooperation policy. The Court stated that, while the objectives of development cooperation policy should not be limited to measures directly related to the campaign against poverty, it is nonetheless necessary, if a measure is to fall within that policy, that it contributes to the pursuit of the policy's economic and social development objectives. Certain measures aiming to prevent fragility in developing countries, including those adopted in the framework of the moratorium, can contribute to the pursuit of these objectives. A concrete measure aiming to combat the proliferation of small arms and light weapons may be adopted by the Community under its development cooperation policy only if the measure, by virtue both of its aim and of its content, falls within the scope of the competences conferred by the EC Treaty on the Community in that field. The Court recalled the case-law stating that where a measure simultaneously pursues a number of objectives or has several components, without one being incidental to the other, and various legal bases of the EC Treaty are applicable, the measure will have to be founded, exceptionally, on the various corresponding legal bases. The Court held, however, that under Article 47 of the Treaty on European Union such a solution is impossible with regard to a measure which, like Decision 2004/833, pursues a number of objectives or which has several components falling, respectively, within development cooperation policy and within the CFSP, and where one of those components is not incidental to the other. Since Article 47 of the Treaty on European Union precludes the Union from adopting, on the basis of that Treaty, a measure which could properly be adopted on the basis of the EC Treaty, the Union cannot have recourse to a legal basis falling within the CFSP in order to adopt provisions which also fall within a competence conferred by the EC Treaty on the Community. The Court concluded that the Council infringed Article 47 of the Treaty on European Union by adopting Decision 2004/833 on the basis of the CFSP, since that decision also fell within development cooperation policy.

⁽⁶⁵⁾ Council Decision 2004/833/CFSP of 2 December 2004 implementing Joint Action 2002/589/CFSP with a view to a European Union contribution to Ecowas in the framework of the Moratorium on Small Arms and Light Weapons (OJ 2004 L 359, p. 65).

⁽⁶⁶⁾ Council Joint Action 2002/589/CFSP of 12 July 2002 on the European Union's contribution to combating the destabilising accumulation and spread of small arms and light weapons (OJ 2002 L 191, p. 1).