

A — The Court of Justice in 2009: changes and proceedings

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This first part of the Annual Report gives an overview of the activity of the Court of Justice of the European Union in 2009. It describes, first, how the institution evolved during the past year, with the emphasis on the institutional changes affecting the Court of Justice 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 of Justice's workload and the average duration of proceedings (section 2). It presents, third, as each year, the main developments in the case-law, arranged by subject matter (section 3).

1.1. The major event bringing change to the Court of Justice as an institution in 2009 was incontestably the entry into force of the Treaty of Lisbon. This Treaty has made a number of amendments to the provisions of the EU Treaty and the EC Treaty concerning the Court of Justice. Some of these amendments flow from the abandonment of the three-pillar structure of the European Union, from the resulting disappearance of the European Community and from the legal personality which the European Union henceforth enjoys. Other amendments are more specific and concern the Court of Justice directly.

Mentioning only the most important amendments, first, the judicial institution of the European Union has, since 1 December 2009, been called the Court of Justice of the European Union. As before, it is composed of three courts, but henceforth called: the Court of Justice, the General Court and the Civil Service Tribunal.

The creation of further specialised tribunals remains possible but, following the entry into force of the Treaty of Lisbon, any such tribunals would be created in accordance with the ordinary legislative procedure, that is to say by co-decision with a qualified majority rather than, as hitherto, by unanimity. The same is true of amendments to the Statute of the Court of Justice, with the exception of the rules on the judges and advocates general and those governing the language arrangements of the Court.

A significant amendment concerns the procedure for appointment of members of the Court of Justice and the General Court. Judges and advocates general are henceforth appointed by a conference of representatives of the governments of the Member States after consultation of a panel responsible for giving an opinion on candidates' suitability to perform the duties of Judge and Advocate General of the Court of Justice and the General Court. This panel comprises seven persons chosen from among former members of the two Courts, members of national supreme courts and lawyers of recognised competence, one of whom is proposed by the European Parliament.

So far as concerns the jurisdiction of the Court of Justice, it is to be noted that its jurisdiction extends to the law of the European Union, unless the Treaties provide otherwise. Thus, the Court of Justice is conferred general jurisdiction to give preliminary rulings in the area of freedom, security and justice, as a result of the disappearance of the pillars and the repeal by the Treaty of Lisbon of Articles 35 EU and 68 EC which imposed restrictions on its jurisdiction.

First, as regards police and judicial cooperation in criminal matters, the jurisdiction of the Court of Justice to give preliminary rulings has become obligatory and is no longer subject to a declaration by each Member State recognising that jurisdiction and specifying the national courts that may request a preliminary ruling. Transitional provisions nevertheless provide that that full jurisdiction will not apply until five years after the entry into force of the Treaty of Lisbon.

Second, as regards visas, asylum, immigration and other policies related to free movement of persons (in particular, judicial cooperation in civil matters, recognition and enforcement of judgments), any national court or tribunal — no longer just the higher courts — can henceforth request preliminary rulings, and the Court henceforth has jurisdiction to rule on measures taken on grounds of public policy in connection with cross-border controls.

Also, it is significant that, now that the Treaty of Lisbon has entered into force, the Charter of Fundamental Rights of the European Union has become a binding legislative instrument with the same legal value as the Treaties⁽¹⁾. Finally, in the sensitive area of the common foreign and security policy (CFSP), the Court, by way of exception, has jurisdiction (i) to monitor the delimitation of the Union's competences and of the CFSP, the implementation of which must not affect the exercise of the Union's competences or the powers of the institutions in respect of the exercise of the exclusive and shared competences of the Union, and (ii) over actions for annulment brought against decisions providing for restrictive measures against natural or legal persons adopted by the Council in connection, for example, with combating terrorism (freezing of assets).

The Treaty of Lisbon also contains significant amendments concerning proceedings before the Courts of the European Union. The most important of these include, first, the easing of the conditions for the admissibility of actions brought by individuals against regulatory acts of the institutions, bodies, offices and agencies of the European Union. In particular, natural or legal persons may henceforth bring proceedings against a regulatory act if they are directly affected by it and it does not entail implementing measures. Consequently, they no longer have to show that they are individually concerned by an act of this type.

Second, the Treaty of Lisbon strengthens the system of pecuniary sanctions (lump sum and/or penalty payment) in the event of non-compliance with a judgment establishing a failure to fulfil obligations. In particular, where a Member State fails to notify national measures transposing a directive to the Commission, it is henceforth possible for the Court to impose pecuniary sanctions at the stage of delivery of the initial judgment establishing a failure to fulfil obligations.

1.2. Apart from the reforms introduced by the Treaty of Lisbon, it is also worth noting the amendment of 13 January 2009 to the Rules of Procedure of the Court of Justice (OJ 2009 L 24, p. 8). This amendment concerns Article 7(3) of the Rules of Procedure which lays down the procedure for electing the President and the Presidents of the Chambers. The previous version of Article 7(3) provided for two ballots. If, in the second round, judges obtained an equal number of votes, the oldest of them was deemed elected. The new version provides that, if no judge obtains the votes of more than half the judges composing the Court, further ballots are to be held until that majority is attained.

2. The statistics concerning the Court's activity in 2009 show, overall, increased productivity and the maintenance of a satisfactory level of efficiency as regards the duration of proceedings. The constant upward trend in the number of references for a preliminary ruling submitted to the Court should also be noted.

(1) Furthermore, Article 6(2) TEU provides that 'the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties'. Protocol No 8 states that the accession agreement is to specify, in particular, 'the specific arrangements for the Union's possible participation in the control bodies of the European Convention [and] the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate'. This accession 'shall not affect the competences of the Union or the powers of its institutions'.

The Court completed 543 cases in 2009 (net figures, that is to say, taking account of the joinder of cases), a very appreciable increase compared with the previous year (495 cases completed in 2008). Of those cases, 377 were dealt with by judgments and 165 gave rise to orders. The number of judgments delivered in 2009 is among the highest in the Court's history.

The Court had 561 new cases brought before it (without account being taken of the joinder of cases on the ground of similarity), representing a slight decrease compared with 2008 (592 new cases). It should, however, be pointed out that the number of references for a preliminary ruling submitted in 2009 is the highest ever reached (302 cases).

So far as concerns the duration of proceedings, the statistics are very positive. In the case of references for a preliminary ruling, the average duration amounted to 17.1 months, that is to say a duration practically identical to that in 2008 (16.8 months). The average time taken to deal with direct actions and appeals was 17.1 months and 15.4 months respectively (16.9 months and 18.4 months in 2008).

In addition to the reforms in its working methods that have been undertaken in recent years, the improvement in the Court's efficiency in dealing with cases is also due to the increased use of the various procedural instruments at its disposal to expedite the handling of certain cases (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 2009, use of the urgent preliminary ruling procedure was requested in three cases and the designated chamber considered that the conditions under Article 104b of the Rules of Procedure were met in two of them. Those cases were completed in an average period of 2.5 months.

Use of the expedited or accelerated procedure was requested five times, but the conditions under the Rules of Procedure were not met in any of those cases. 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 eight cases.

Also, the Court regularly used 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 22 cases were brought to a close by orders made on the basis of that provision.

Finally, the Court made more 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 52% of the judgments delivered in 2009 were delivered without an opinion (compared with 41% in 2008).

As regards the distribution of cases between the various formations of the Court, it may be noted that the Grand Chamber dealt with roughly 8%, chambers of five judges with 57%, and chambers of three judges with approximately 34%, of the cases brought to a close by a judgment in 2009. Compared with the previous year, a decrease may be noted in the proportion of cases dealt with by the Grand Chamber (14% in 2008), while the proportion of cases dealt with by three-judge chambers increased (26% in 2008). As regards cases completed by orders involving a judicial determination, 84% of such cases were entrusted to three-judge chambers and 10% to five-judge chambers, while orders made by the President account for 6% of such cases.

Part C of this chapter should be consulted for more detailed information regarding the statistics for the 2009 judicial year.

Constitutional or institutional issues

The recurring issue of the appropriate legal basis within the first pillar has given rise to a number of judgments worthy of mention. In Case C-166/07 *Parliament v Council* (judgment of 3 September 2009) the Court held that Community contributions to the International Fund for Ireland must have a dual legal basis, namely Articles 159 EC and 308 EC. The effect of using that dual basis is that the Community legislature is obliged to reconcile different legislative procedures in the adoption of a single measure.

The Court began by observing that, in the context of the organisation of the powers of the Community, the choice of the legal basis for a measure must rest on objective factors which are amenable to judicial review, including, in particular, the aim and the content of the measure. Article 308 EC may be used as the legal basis for a measure only where no other provision of the Treaty gives the Community institutions the necessary power to adopt it. In addition, recourse to that provision demands that the action envisaged should relate to the 'operation of the common market'.

The Court went on to find, first, that the objectives of Regulation (EC) No 1968/2006 concerning Community financial contributions to the International Fund for Ireland (2007–10)⁽²⁾ correspond to the objectives pursued by the Community policy on economic and social cohesion and, second, that the Community's financial contribution to the fund, leaving aside its legislative framework, forms part of the specific actions which, when they prove to be necessary outside the Structural Funds in order to realise the objectives referred to in Article 158 EC, may be adopted in accordance with the third paragraph of Article 159 EC. However, neither the arrangements governing cooperation between the Community and the fund nor the conditions and method of payment in respect of the Community's financial contribution allow the Community to prevent the use by the fund of that contribution to cover actions which, while complying with the objectives of the Agreement concerning the International Fund for Ireland, extend beyond the scope of the Community's policy on economic and social cohesion or, at least, are not managed in accordance with the criteria applied by the Community within the framework of that policy. The Community legislature was therefore entitled to take the view that the range of activities financed by that regulation would extend beyond the scope of the Community's policy on economic and social cohesion. Article 159 EC covers only independent action by the Community carried out in accordance with the Community regulatory framework, the content of which does not extend beyond the scope of the Community's policy on economic and social cohesion. Consequently, the third paragraph of Article 159 EC does not by itself confer on the Community the necessary power to pursue the objectives of the Community's policy on economic and social cohesion by means of a financial contribution under the conditions provided for by Regulation No 1968/2006.

Nevertheless, the purpose of Regulation No 1968/2006 is to support the actions of an international organisation established by two Member States, the objective of which is to strengthen economic and social cohesion. As follows from Articles 2 EC and 3(1)(k) EC, the strengthening of economic and social cohesion constitutes, outside of Title XVII of the Treaty, an objective of the Community. Furthermore, the objective of that regulation falls within the framework of the common market, since it seeks to bring about economic improvements in disadvantaged areas of two Member States and thus relates to the functioning of the common market.

⁽²⁾ Council Regulation (EC) No 1968/2006 of 21 December 2006 (OJ 2006 L 409, p. 81).

The Court concluded from this that, as Regulation No 1968/2006 pursues objectives set out in Articles 2 EC and 3(1)(k) EC and in Title XVII of the Treaty, without that title by itself conferring on the Community the power to realise those objectives, the Community legislature ought to have had recourse to both the third paragraph of Article 159 EC and Article 308 EC while complying with the legislative procedures laid down therein, that is to say, both the 'co-decision' procedure referred to in Article 251 EC and the requirement that the Council act unanimously.

In relation to the same issue of the determination of the appropriate legal basis within the first pillar, in Case C-411/06 *Commission v Parliament and Council* (judgment of 8 September 2009) the Court determined a dispute concerning the legal basis of Regulation (EC) No 1013/2006 on shipments of waste⁽³⁾. It held that that measure had to be based solely on Article 175(1) EC and not on Articles 133 EC and 175(1) EC since it had only a secondary effect on the common commercial policy.

Following the traditional case-law of the Court, it is only exceptionally — if an act simultaneously pursues a number of objectives or has several components that are indissociably linked, without one being secondary and indirect in relation to the other — that such an act has to be founded on the various corresponding legal bases. In the present case, the Commission was of the opinion that a dual legal basis was called for because the regulation comprised two indissociable components, one relating to the common commercial policy and the other to protection of the environment, neither of which could be regarded as secondary or indirect as compared with the other.

The Court disagreed, taking the view that it is evident from the analysis of the contested regulation that, both by its objective and content, it is aimed primarily at protecting human health and the environment against the potentially adverse effects of cross-border shipments of waste. More specifically, in so far as the prior written notification and consent procedure clearly pursues an environmental protection purpose in the field of shipments of waste between the Member States and, consequently, was correctly based on Article 175(1) EC, it would not be coherent to consider that that same procedure, when it applies to shipments of waste between Member States and third countries with the same environmental protection objective, is in the nature of an instrument of common commercial policy and must, on that ground, be based on Article 133 EC. That conclusion is corroborated by an analysis of the legislative context of the contested regulation. A broad interpretation of the concept of common commercial policy is not such as to call into question the finding that Regulation No 1013/2006 is an instrument falling principally under environmental protection policy. A Community act may fall within that area even when the measures provided for by it are liable to affect trade. A Community act falls within the exclusive competence in the field of the common commercial policy provided for in Article 133 EC only if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade in the products concerned. That was clearly not the situation in the present case. The aim of Regulation No 1013/2006 is not to define those characteristics of waste which will enable it to circulate freely within the internal market or as part of commercial trade with third countries, but to provide a harmonised set of procedures whereby movements of waste can be limited in order to secure protection of the environment.

An inter-pillar dispute about legal basis was, in turn, the subject of Case C-301/06 *Ireland v Parliament and Council* (judgment of 10 February 2009), in which the Court held that Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of

⁽³⁾ Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 (OJ 2006 L 190, p. 1).

publicly available electronic communications services or of public communications networks⁽⁴⁾ had to be adopted on the basis of the EC Treaty in so far as what is predominantly at issue is the functioning of the internal market.

The Community legislature may have recourse to Article 95 EC in particular where disparities exist between national rules which are such as to obstruct the fundamental freedoms or to create distortions of competition and thus have a direct effect on the functioning of the internal market. It was apparent that the differences between the various national rules adopted on the retention of data relating to electronic communications were liable to have a direct impact on the functioning of the internal market and that it was foreseeable that that impact would become more serious with the passage of time. Such a situation justified the Community legislature in pursuing the objective of safeguarding the proper functioning of the internal market through the adoption of harmonised rules.

Furthermore, the Court observed that Directive 2006/24 amended the provisions of the directive on the protection of privacy in the electronic communications sector, itself based on Article 95 EC. In those circumstances, in so far as it amended an existing directive which formed part of the *acquis communautaire*, Directive 2006/24 could not be based on a provision of the EU Treaty without infringing Article 47 EU.

Lastly, the Court found that Directive 2006/24 regulates operations which are independent of the implementation of any police and judicial cooperation in criminal matters. It harmonises neither the issue of access to data by the competent national law-enforcement authorities nor that of the use and exchange of the data between those authorities. Those matters, which fall, in principle, within the area covered by Title VI of the EU Treaty, have been excluded from the provisions of that directive. It follows that the substantive content of Directive 2006/24 is directed essentially at the activities of service providers in the relevant sector of the internal market, to the exclusion of State activities coming under Title VI of the EU Treaty. In light of that substantive content, it must be concluded that that directive relates predominantly to the functioning of the internal market.

Although long since proclaimed by the Court, the general principles of Community law continue to provide a source of further case-law. In Case C-345/06 *Heinrich* (judgment of 10 March 2009) the Court underlined the significance of the requisite publicity in respect of legal acts and thus confirmed the importance of the principle of legal certainty as a general principle of Community law.

A traveller was refused boarding at Vienna–Schwechat Airport on the ground that his cabin baggage contained articles regarded as prohibited articles under Community rules. Regulation (EC) No 2320/2002⁽⁵⁾ prohibits, inter alia, the presence on board aircraft of certain articles which are defined in general terms in a list attached as an annex to the regulation. That regulation was

⁽⁴⁾ Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 and amending Directive 2002/58/EC (OJ 2006 L 105, p. 54).

⁽⁵⁾ Regulation (EC) No 2320/2002 of the European Parliament and of the Council of 16 December 2002 establishing common rules in the field of civil aviation security (OJ 2002 L 355, p. 1).

implemented by Regulation (EC) No 622/2003⁽⁶⁾ and the annex thereto which was amended in 2004 by Regulation (EC) No 68/2004.⁽⁷⁾ The annex to Regulation No 622/2003 was never published.

Following that refusal to allow him to board, the person concerned issued proceedings for a declaration that the measures taken against him were illegal. The national court asked the Court of Justice whether regulations or parts thereof may nevertheless have binding force if they are not published in the *Official Journal of the European Union*.

In its judgment, the Court first of all observed that it is evident from the very wording of Article 254(2) EC that a Community regulation cannot take effect in law unless it has been published in the Official Journal. It went on to state that an act adopted by a Community institution cannot be enforced against natural and legal persons in a Member State before they have had the opportunity to make themselves acquainted with it by its proper publication in the Official Journal. The same principles must be observed in respect of national measures implementing Community legislation.

With regard to the case in point, the Court noted that Regulation (EC) No 2320/2002 seeks to impose obligations on individuals in so far as it prohibits on board aircraft certain articles defined in a list annexed to the regulation. Since the annex to Regulation (EC) No 622/2003 was not published, the Court was unable to consider whether the annex also relates to the list of prohibited articles and therefore seeks to impose obligations on individuals. The Court added that it cannot be ruled out, however, that that is the case. Furthermore, according to the Court, the list of prohibited articles does not fall within any of the categories of measures and information which are treated as confidential and which are therefore not published. It follows that, if Regulation (EC) No 622/2003 made adaptations to that list of prohibited articles, it would, by so doing, have to be held invalid. The Court concluded from this that the annex to Regulation (EC) No 622/2003 has no binding force in so far as it seeks to impose obligations on individuals.

In Case C-141/08 P *Foshan Shunde Yongjian Housewares & Hardware v Council* (judgment of 1 October 2009) the Court, ruling on an appeal, recalled the fundamental nature of respect for the rights of the defence and penalised their infringement in an antidumping proceeding.

At issue, inter alia, was the failure to comply with the 10-day period laid down under Article 20(5) of Regulation (EC) No 384/96⁽⁸⁾ for sending the Commission's definitive proposals to the Council. In its judgment, the Court began by explaining that the Commission is obliged to comply with that period in order to give undertakings which have been informed of its intention to increase the antidumping duty from that envisaged in its previous communication the opportunity to submit their observations. Next, the Court observed that the failure to comply with the period prescribed can result in annulment of the regulation adopted by the Council only where there is a possibility that, due to that irregularity, the administrative procedure could have resulted in a different outcome, and therefore that the rights of the defence of the undertaking concerned were in fact adversely affected.

⁽⁶⁾ Commission Regulation (EC) No 622/2003 of 4 April 2003 laying down measures for the implementation of the common basic standards on aviation security (OJ 2003 L 89, p. 9).

⁽⁷⁾ Commission Regulation (EC) No 68/2004 of 15 January 2004 amending Commission Regulation (EC) No 622/2003 laying down measures for the implementation of the common basic standards on aviation security (OJ 2004 L 10, p. 14).

⁽⁸⁾ Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1).

In order to secure the annulment of a Commission decision not to award market economy treatment that has been taken in breach of the 10-day period, the undertaking concerned is not, therefore, required to show that that decision would have been different in content but simply that such a possibility cannot be totally ruled out, since it would have been better able to defend itself had there been no procedural error. As regards the application of that principle in this case, the Court took the view, contrary to the Court of First Instance (hereafter in this section 'the General Court'), that, in light of the fact that the Commission had already altered its position twice as a result of the observations submitted by the interested parties, it could not be ruled out that the Commission might once again have altered its position because of the arguments put forward by the undertaking concerned. Therefore, the Court not only set aside the judgment of the General Court but also annulled the contested Council regulation.

With regard, again, to the general principles of Community law, attention is drawn to the Court's refusal to regard the principle of equality of shareholders as a general principle of Community law. The Court held in Case C-101/08 *Audiolux and Others* (judgment of 15 October 2009) that Community law does not include any general principle of law under which minority shareholders are protected by an obligation on the dominant shareholder, when acquiring or exercising control of a company, to offer to buy their shares under the same conditions as those agreed when the shareholding conferring or strengthening the control of that dominant shareholder was acquired. According to the Court, the mere fact that secondary Community legislation lays down certain provisions relating to the protection of minority shareholders is not sufficient in itself to establish the existence of a general principle of Community law, in particular if the scope of those provisions is limited to rights which are well defined and certain. Furthermore, the general principle of equal treatment cannot in itself either give rise to a particular obligation on the part of the dominant shareholder in favour of the other shareholders or determine the specific situation to which such an obligation relates. Nor can it determine the choice between various conceivable means of protection for minority shareholders. According to the Court, such treatment presupposes legislative choices, based on a weighing of the interests at issue and the fixing in advance of precise and detailed rules, and cannot be inferred from the general principle of equal treatment. The general principles of Community law have constitutional status while such treatment is characterised by a degree of detail requiring legislation to be drafted and enacted at Community level by a measure of secondary Community law.

The prohibition of any discrimination on the basis of nationality and its implications were considered in an unusual procedural context. In Case C-115/08 *ČEZ* (judgment of 27 October 2009) the Court was prompted to rule on that principle under the EAEC Treaty.

In an action for cessation of a nuisance that had been brought before it by property owners against the nuclear power plant at Temelín in the Czech Republic, an Austrian Regional Court asked the Court of Justice whether the authorisation given by the Czech authorities for the operation of the power plant was required to be recognised in Austria in the context of such judicial proceedings, there being no provision for such recognition under Austrian law.

The Court found, first of all, that the industrial activity carried out by the Temelín power plant falls within the scope of application of the Treaty establishing the European Atomic Energy Community (EAEC). It went on to state that undertakings which operate an installation situated in a Member State are usually established in accordance with the law of that State, and that their situation is comparable to that of nationals of that State. Therefore, the difference in treatment which works to the detriment of installations which have received official authorisation in a Member State other than the Republic of Austria must be regarded as a difference in treatment on grounds of nationality. The principle of prohibition of any discrimination on grounds of nationality is a general principle

of Community law which is also applicable under the EAEC Treaty. The difference in treatment applied by the Republic of Austria to the detriment of nuclear installations which have received official authorisation in another Member State must therefore be considered in relation to the EAEC Treaty. Next, the Court stated that discrimination on grounds of nationality cannot be justified by purely economic aims such as the protection of the interests of domestic economic operators. Nor can it be justified by the aim of protecting life, public health, the environment or property rights, since there is a Community legislative framework, of which that authorisation forms a part, which ensures such protection. It follows from this that the Republic of Austria cannot justify the discrimination applied in respect of the official authorisation issued in the Czech Republic for the operation of the nuclear power plant at Temelín.

Although the conditions governing the admissibility of actions for annulment have been the subject of a considerable body of case-law, in Joined Cases C-445/07 P and C-455/07 P *Commission v Ente per le Ville Vesuviane* (judgment of 10 September 2009) the Court, ruling on an appeal, was required once again to address the conditions governing the admissibility of actions brought by authorities within a State which are affected by the grant of financial assistance.

After recalling that, under the fourth paragraph of Article 230 EC, a local or regional entity may, to the extent that it has legal personality under national law, institute proceedings against a decision addressed to it or which is of direct and individual concern to it, the Court explained that the condition of being directly concerned requires two cumulative criteria to be met, namely, the contested Community measure must, first, directly affect the legal situation of the individual and, second, leave no discretion to the addressees entrusted with the task of implementing it.

In that regard, unlike the General Court, the Court of Justice took the view that the designation of a regional or local entity in a decision to grant Community financial assistance as the authority responsible for the implementation of a European Regional Development Fund project does not imply that that entity is itself entitled to the assistance. Also, the very fact that the national authorities stated their intention to recover the sums wrongly received by that regional or local entity was, in the absence of obligations in that regard pursuant to Community law, an expression of an autonomous will on their part, which clearly demonstrated a discretion on the part of the Member State concerned. Therefore, the Court decided that the entity in question was not directly concerned by the Commission's decision and, as a result, could only turn to its national courts in order to challenge the legality of national measures relating to the application of a Community act.

The Court also had occasion to recall the requirements of the rule that the parties should be heard, which governs proceedings before the Community Courts.

In Case C-89/08 P *Commission v Ireland and Others* (judgment of 2 December 2009) it held that that principle does not, as a rule, merely confer on each party to proceedings the right to be apprised of the documents produced and observations made to the Community Courts by the other party and to discuss them, and does not merely prevent the Community Courts from basing their decision on facts and documents which the parties, or one of them, have not had an opportunity to examine and on which they have therefore been unable to comment, but also implies a right for the parties to be apprised of pleas in law raised by those Courts of their own motion, on which they intend basing their decisions, and to discuss them. In order to satisfy the requirements associated with the right to a fair hearing, it is important for the parties to be apprised of, and to be able to debate and be heard on, the matters of fact and of law which will determine the outcome of the proceedings. Accordingly, except in particular cases such as, inter alia, those provided for by the rules of procedure of the Community Courts, those Courts cannot base their decisions on a plea raised of their own motion, even one involving a matter of public policy and — as in the present case — based

on the absence of a statement of reasons for the decision at issue, without first having invited the parties to submit their observations on that plea. The Court stated that, in the analogous context of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), it had already held that it is precisely in deference to that article and to the very purpose of every individual's right to adversarial proceedings and to a fair hearing within the meaning of that provision that the Court may of its own motion, on a proposal from the Advocate General or at the request of the parties order that the oral procedure be reopened, in accordance with Article 61 of its Rules of Procedure, if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see order in Case C-17/98 *Emesa Sugar* [2000] ECR I-665, paragraphs 8, 9 and 18, and Joined Cases C-270/97 and C-271/97 *Deutsche Post* [2000] ECR I-929, paragraph 30). In the present case, it was apparent from the file and from the hearing before the Court of Justice that, by the judgment under appeal, the General Court annulled the Commission's decision on the basis of a plea that it had raised of its own motion concerning an infringement of Article 253 EC without first having invited the parties, in the course of the written or oral procedures, to submit their observations on that plea. In so doing, the General Court failed to have regard to the rule that the parties should be heard, thereby adversely affecting the interests of the Commission. The Court of Justice explained that, as the Advocate General had noted, while an inadequate statement of reasons is a defect which, in principle, cannot be remedied, the finding of such a defect nevertheless follows from an assessment which, as has consistently been held, must take certain matters into consideration. Such an assessment may be open to debate, particularly where it relates to the reasons for a specific point of fact and of law rather than to the total absence of reasons. In the present case, if the Commission had been in a position to submit its observations, it could, inter alia, have put forward the same arguments as those advanced in relation to the fourth and fifth grounds of the appeal.

With regard to the obligations which Community law places on Member States, the Court had the opportunity, in Case C-445/06 *Danske Slagterier* (judgment of 24 March 2009), to recall the principles of the Member States' non-contractual liability for breach of Community law, while at the same time providing clarification and explanations in relation to their specific application.

As regards the enforcement of that liability, the Court observed that, in the absence of Community legislation, it is on the basis of the rules of national law on liability that the State must make reparation for the consequences of the loss or damage caused to individuals by the breach of Community law, provided that the conditions, including time limits, for reparation of loss or damage laid down by national law accord with the principles of equivalence and effectiveness. The laying down in advance of reasonable time limits for bringing proceedings has already been held to be compatible with Community law. The Court added that such a time limit must also be sufficiently foreseeable for individuals. It is for the national court, taking account of all the features of the legal and factual situation at the material time, to determine whether that is the case. It is likewise for the national court to determine whether, as a result of the application by analogy of the time limit laid down in national legislation, the conditions for reparation of loss or damage caused to individuals by the breach of Community law by the Member State concerned are less favourable than those applicable to the reparation of similar domestic loss or damage.

Next, ruling on the specific application of the limitation period, the Court held that Community law does not require the period to be interrupted or suspended where the European Commission has brought infringement proceedings under Article 226 EC. Likewise, in the case of an action for damages against the State for incorrect transposition of a directive, as in the case in point, Community law does not preclude the limitation period from beginning to run on the date on which the first injurious effects of the incorrect transposition have been produced and on which the further

injurious effects thereof are foreseeable, even if that date is prior to the correct transposition of the directive.

Finally, as regards the requisite attitude on the part of the injured party, the Court decided that national legislation which lays down that an individual cannot obtain reparation for loss or damage which he has wilfully or negligently failed to avert by utilising a legal remedy is compatible with Community law, provided that utilisation of that remedy can reasonably be required of the injured party, a matter which was for the referring court to determine. The likelihood that a national court will make a reference for a preliminary ruling under Article 234 EC or the existence of infringement proceedings pending before the Court of Justice cannot, in itself, constitute a sufficient reason for concluding that it is not reasonable to have recourse to a legal remedy.

With regard to the law governing the Community's external relations, an opinion and three cases are particularly noteworthy.

In Opinion 1/08 of 30 November 2009, the Court ruled pursuant to Article 300(6) EC, at the request of the Commission, on whether the European Community's competence to conclude with certain members of the World Trade Organisation (WTO) agreements modifying the Schedules of Specific Commitments of the Community and its Member States under the General Agreement on Trade in Services (GATS) is exclusive or merely shared with the Member States, and on what the appropriate legal basis is to which recourse must be had when concluding those agreements.

In this instance, the enlargements which took place in 1995 and 2004 made it necessary to draw up a new schedule, including the 13 new Member States which until then had had their own schedules of commitments in relation to GATS. In order to merge the schedules of commitments of the 13 new Member States with the existing schedule of the Community and of its Member States, the Commission notified the list of modifications and withdrawals of commitments on 28 May 2004. Under Article XXI of GATS, those modifications to the schedule of commitments resulted in requests for compensation for the WTO members affected by the various adjustments to the lists on account of the merger. The Court recalled, first of all, that the choice of the appropriate legal basis has constitutional significance. Since the Community has conferred powers only, it must tie the agreement that it seeks to conclude to a Treaty provision which empowers it to approve such a measure. It therefore considered the Community's competence to conclude the agreements at issue and the possible legal bases for such a conclusion, the two questions being inextricably linked. Having analysed Article 133(1), (5) and (6) EC, the Court came to the conclusion that the agreements with the affected WTO members fall within the sphere of shared competence of the European Community and the Member States. With regard to the appropriate legal basis, it stated that the 'transport' aspect of the agreements at issue falls, in accordance with the third subparagraph of Article 133(6) EC, within the sphere of transport policy and not that of the common commercial policy. Finally, the Court's analysis led it to conclude that the Community act concluding the abovementioned agreements must be based both on Article 133(1), (5) and (6), second subparagraph, EC and on Articles 71 EC and 80(2) EC, in conjunction with Article 300(2) and (3), first subparagraph, EC.

In Case C-205/06 *Commission v Austria* and Case C-249/06 *Commission v Sweden* (judgments of 3 March 2009) the Court held, in infringement proceedings brought by the Commission, that, by not having taken appropriate steps to eliminate incompatibilities between their obligations under Community law and provisions on transfer of capital contained in investment agreements entered into with certain third countries, the Kingdom of Sweden and the Republic of Austria had failed to fulfil their obligations under the second paragraph of Article 307 EC. In the cases in point, the various investment agreements at issue contained provisions guaranteeing the free transfer,

in freely convertible currency, of payments connected with an investment. To that extent, those agreements were consistent with the wording of Article 56(1) EC which prohibits any restriction on the movement of capital and of payments between Member States and between Member States and third countries. However, the provisions of Articles 57(2) EC, 59 EC and 60(1) EC confer on the Council power to restrict, in certain specific circumstances, movements of capital and payments between Member States and third countries. The Court first of all observed that, in order to ensure the effectiveness of those provisions, measures restricting the free movement of capital must be capable, where adopted by the Council, of being applied immediately with regard to the States to which they relate, which may include some of the States party to one of the agreements at issue with the Kingdom of Sweden and the Republic of Austria. Those powers of the Council, which consist in the unilateral adoption of restrictive measures with regard to third countries on a matter which is identical to or connected with that covered by an earlier agreement concluded between a Member State and a third country, reveal an incompatibility with that agreement where, first, the agreement does not contain a provision allowing the Member State concerned to exercise its rights and to fulfil its obligations as a member of the Community and, second, there is also no international law mechanism which makes that possible. The Court stated, moreover, that the periods of time necessarily involved in any international negotiations which would be required in order to reopen discussion of the agreements at issue were inherently incompatible with the practical effectiveness of those measures. The possibility of relying on other mechanisms offered by international law, such as suspension of the agreement, or even denunciation of the agreements at issue or of some of their provisions, was too uncertain in its effects to guarantee that the measures adopted by the Council could be applied effectively.

In Case C-228/06 *Soysal and Savatli* (judgment of 19 February 2009) the Court ruled on the ‘standstill’ clause provided for in Article 41(1) of the Additional Protocol to the EEC–Turkey Association Agreement⁽⁹⁾, according to which the contracting parties are to refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services as from the date of entry into force of the protocol.

The case concerned two Turkish nationals wishing to make use in the territory of a Member State of the right to freedom to provide services under the Association Agreement. The Court observed, first of all, that that provision, which is laid down clearly, precisely and unconditionally, has direct effect. It went on to interpret the provision in question as prohibiting the introduction, as from the entry into force of the Additional Protocol to the EEC–Turkey Association Agreement in the Member State concerned, of a requirement that Turkish nationals must have a visa to enter the territory of a Member State in order to provide services there on behalf of an undertaking established in Turkey, since, on that date, such a visa was not required.

According to the Court, that conclusion cannot be called into question by the fact that the restriction arises from national legislation implementing a provision of secondary Community legislation, in view of the primacy of international agreements concluded by the Community over secondary Community legislation.

European citizenship

Case C-544/07 *Rüffler* (judgment of 23 April 2009) is a good example of the application of European Union citizens’ right of movement and right to reside.

⁽⁹⁾ Additional Protocol signed on 23 November 1970 at Brussels and concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972 (OJ 1977 L 361, p. 60).

Mr Rüssler, a German worker who took up residence in Poland on his retirement, received two pensions which were paid in Germany, one of which was taxed in Germany and the other in Poland. Mr Rüssler applied to the Polish tax authorities for the income tax which he was liable to pay in Poland to be reduced by the amount of health insurance contributions paid in Germany. That application was rejected, however, on the ground that Polish law provides that only contributions paid to a Polish health insurance institution may be deducted from income tax. The case was brought before a national court, then before this Court.

Unlike the applicant and the national court, whose arguments were founded on Articles 12 EC and 39 EC, the Court began by ruling out the application of Article 39 EC since it relates only to workers in active employment or in search of employment. Nevertheless, Mr Rüssler could rely on his status as a citizen of the Union, and thus on the right conferred on him by Article 18 EC to move and reside freely within the territory of the Member States. Therefore, the Court analysed whether the Polish tax system is consistent with that article and decided that, to the extent to which it makes the granting of a tax advantage in connection with contributions conditional on those contributions having been paid to a Polish health insurance body and leads to that advantage being refused to taxpayers who have paid contributions to the body of another Member State, the Polish legislation disadvantages taxpayers who have exercised their freedom of movement by leaving the Member State in which they have carried out all their occupational activity in order to take up residence in Poland. Such a restriction of entitlement to a reduction of income tax amounts to a restriction on the freedom to move and reside within the territory of the Member States which is not objectively justified.

Free movement of goods

In this area, three cases illustrate the difficulty of defining the parameters of a measure having equivalent effect.

In Case C-110/05 *Commission v Italy* (judgment of 10 February 2009), after reopening the oral procedure, the Court ruled on the Commission's application for a finding that, by maintaining rules which prohibit mopeds, motorcycles, tricycles and quadricycles from towing a trailer, the Italian Republic had failed to fulfil its obligations under Article 28 EC. According to the Court, a Member State which, for reasons of road safety, prohibits vehicles from towing a trailer specially designed for them and lawfully produced and marketed in other Member States has not failed to fulfil its obligations under that article. The Court stated that such a prohibition certainly constitutes a measure having equivalent effect to quantitative restrictions on imports prohibited by that article to the extent that its effect is to hinder access to the market at issue for trailers specifically designed for motorcycles inasmuch as it has a considerable influence on the behaviour of consumers and prevents a demand from existing in the market at issue for such trailers. However, that prohibition must, in this instance, be regarded as justified by reasons relating to the protection of road safety. Whilst it is for a Member State which invokes an imperative requirement as justification for the hindrance to free movement of goods to demonstrate that its rules are appropriate and necessary to attain the legitimate objective being pursued, that burden of proof cannot be so extensive as to require the Member State to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions. Although it is possible to envisage that measures other than the prohibition at issue could guarantee a certain level of road safety for the circulation of a combination composed of a motorcycle and a trailer, the fact remains that Member States cannot be denied the possibility of attaining an objective such as road safety by the introduction of general and simple rules which will be easily understood and applied by drivers and easily managed and supervised by the competent authorities.

Case C-531/07 *Fachverband der Buch- und Medienwirtschaft* (judgment of 30 April 2009) related to Austrian provisions on the obligation to sell German-language books at a fixed price, according to which the publisher or importer was required to fix and publish a retail price and an importer was required not to fix a price below the retail price fixed or recommended by the publisher for the State of publication, less any value added tax included in it. According to the Court, although the Austrian legislation concerned selling arrangements for books, by prohibiting importers from fixing a price below that charged in the State of publication, the legislation did not affect the marketing of domestic books and of books from other Member States in the same manner. The Court explained that the legislation in question provided for less favourable treatment for German-language books from other Member States than for domestic books, since it prevented Austrian importers and foreign publishers from fixing minimum retail prices according to the conditions of the import market, whereas the Austrian publishers were free to fix themselves, for their goods, such minimum retail prices for the national market. Such legislation therefore, according to the Court, constituted a restriction of the free movement of goods. The Court confirmed, moreover, that that restriction was not justified. It pointed out, in particular, that the protection of books as cultural objects can be considered as an overriding requirement in the public interest capable of justifying measures restricting the free movement of goods, on condition that those measures are appropriate for achieving the objective fixed and do not go beyond what is necessary to achieve them. In the present case, the objective of the protection of books as cultural objects could be achieved by measures less restrictive for the importer, for example by allowing the latter or the foreign publisher to fix a retail price for the Austrian market which took the conditions of that market into account. Consequently, the Court held that the Austrian provisions prohibiting importers of German-language books from fixing a price lower than the retail price fixed or recommended by the publisher in the State of publication constituted an obstacle to the free movement of goods which could not be justified under Community law.

In Case C-142/05 *Mickelsson and Roos* (judgment of 4 June 2009) the Court was asked about the compatibility with, inter alia, Articles 28 EC and 30 EC of Swedish legislation prohibiting the use, except in certain waters, of certain types of jet-ski (personal watercraft), namely those 'of less than four metres in length ... which ... [have] an internal combustion engine with a water jet unit as [their] primary source of propulsion and ... [are] designed to be operated by a person or persons sitting, standing or kneeling on, rather than within the confines of, the hull'. According to the Court, Articles 28 EC and 30 EC do not preclude national regulations which, for reasons relating to the protection of the environment, prohibit the use of such personal watercraft on waters other than designated waterways, provided that: (i) the competent national authorities are required to adopt the implementing measures provided for in order to designate waters other than general navigable waterways on which those watercraft may be used; (ii) those authorities have actually made use of the power conferred on them in that regard and designated the waters which satisfy the conditions laid down in the national regulations; and (iii) such measures have been adopted within a reasonable period after the entry into force of those regulations. It is true that where the national regulations for the designation of navigable waters and waterways have the effect of preventing users of such watercraft from using them for the specific and inherent purposes for which they were intended or of greatly restricting their use, a matter which was for the referring court to ascertain, such regulations may have a considerable influence on the behaviour of consumers who, knowing that the use permitted by such regulations is very limited, have only a limited interest in buying that product. Such regulations therefore have the effect of hindering the access to the domestic market in question for those goods and therefore constitute measures having equivalent effect to quantitative restrictions on imports prohibited by Article 28 EC. Such regulations may, however, according to the Court, be justified by the aim of the protection of the environment provided that the above conditions are complied with. While a restriction or a prohibition on the use of personal watercraft is an appropriate means for the purpose of ensuring that the environment is

protected, it is also incumbent on the national authorities to show — for the national regulations to be capable of being regarded as justified — that their restrictive effects on the free movement of goods do not go beyond what is necessary to achieve that aim. In that regard, although it is possible to envisage that measures other than the prohibition in question could guarantee a certain level of protection of the environment, the fact remains that Member States cannot be denied the possibility of attaining an objective such as the protection of the environment by the introduction of general rules which are necessary on account of the particular geographical circumstances of the Member State concerned and easily managed and supervised by the national authorities. However, since the wording of the national regulations themselves suggests that, on waters which must be designated by implementing measures, personal watercraft may be used without giving rise to risks or pollution deemed unacceptable for the environment, it follows that a general prohibition on using such goods on waters other than general navigable waterways constitutes a measure going beyond what is necessary to achieve the aim of protection of the environment. Furthermore, if the national court were to find that implementing measures were adopted within a reasonable time but after the material time of the events in the main proceedings and that those measures designate as navigable waters the waters in which the accused in the main proceedings used personal watercraft and in respect of which they consequently had proceedings brought against them, then, for the national regulations to remain proportionate and therefore justified in the light of the aim of protection of the environment, the accused would have to be allowed to rely on that designation; that is also dictated by the general principle of Community law of the retroactive application of the most favourable criminal law and the most lenient penalty.

Agriculture

Disputes concerning agricultural matters have shown a marked decline for a number of years and that trend continued in 2009.

Reference is therefore made only to Case C-478/07 *Budějovický Budvar* (judgment of 8 September 2009), which relates to the question of the protection of the name 'BUD' as a designation of origin. The Council's regulation of 20 March 2006 on the protection of geographical indications and designations of origin⁽¹⁰⁾ is intended to assure consumers that agricultural products bearing a geographical indication registered under that regulation have, because of their provenance from a particular geographical area, certain specific characteristics and, accordingly, offer a guarantee of quality due to their geographical provenance. Provided that they fulfil the conditions laid down by the regulation, 'qualified' designations of origin and geographical indications are protected. By contrast, the regulation does not apply to 'simple' geographical indications, that is to say, those which do not require that the goods have a special attribute or a certain reputation associated with their place of origin. However, the protection by a Member State of such simple geographical indications of provenance, which is likely to constitute a restriction on the free movement of goods, can, under certain conditions, be justified under Community law. In this case, proceedings had been brought before the Commercial Court, Vienna, by a Czech brewery with a view to prohibiting a Viennese beverage distributor from marketing under the mark 'American Bud' beer produced by a brewery established in the United States, on the ground that the use of that designation for a beer from a State other than the Czech Republic would be contrary to the provisions of a bilateral convention concluded in 1976 between Austria and the former Czechoslovak Socialist Republic. Pursuant to that convention, the designation 'Bud' was a protected designation and therefore reserved exclusively for Czech products. Having been asked by the Commercial Court under what

⁽¹⁰⁾ Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 2006 L 93, p. 12).

conditions the designation 'Bud' may be protected under that bilateral convention in respect of beer produced in the Czech Republic, the Court observed that the name 'Bud' could constitute a simple and indirect indication of geographical provenance, that is to say, a name in respect of which there is no direct link between a specific quality, reputation or other characteristic of the product and its specific geographical origin, and which, moreover, is not in itself a geographical name, but which is at least capable of informing the consumer that the product bearing that indication comes from a particular place, region or country. If the Commercial Court were to classify the designation 'Bud' as a simple indication of geographical provenance, it would have to ascertain that, according to factual circumstances and perceptions prevailing in the Czech Republic, the designation 'Bud' is at least capable of informing the consumer that the product bearing that indication comes from a particular place or region of that Member State and has not become generic in that Member State. In those circumstances, Community law does not preclude national protection of such a simple indication of geographical source, nor, moreover, the extension of that protection by way of a bilateral agreement to the territory of another Member State. Nevertheless, according to the Commercial Court, the designation 'Bud' is to be classified instead as a designation of origin describing products whose special features are attributable to natural or human factors inherent in their place of origin. On that basis, the Commercial Court queried whether the Community regulation on the protection of geographical indications precludes the protection of the designation of origin 'Bud', registration of which has not been sought in accordance with that regulation. On its accession to the European Union, the Czech Republic sought Community protection only in respect of three indications of provenance concerning beer produced in the town of České Budějovice, namely 'Budějovické pivo', 'Českobudějovické pivo' and 'Budějovický měšťanský', designating a strong beer called 'Bud Super Strong'. According to the Court, the regulation on the protection of geographical indications and designations of origin is exhaustive in nature, with the result that it precludes the application of a system of protection laid down by agreements between two Member States, such as the bilateral instruments at issue, which confers on a designation, recognised under the law of a Member State as constituting a designation of origin, protection in another Member State where that protection is actually claimed despite the fact that no application for registration of that designation of origin has been made in accordance with the regulation.

Free movement of persons, services and capital

This year, the Court has again delivered numerous judgments relating, first, to the application of the principles of free movement in Community legislation and, second, to the restrictions imposed on the freedoms of movement by certain national rules. A number of cases relate simultaneously to the exercise of a number of freedoms, as a result of which it is more appropriate for the relevant decisions to be presented on the basis of the particular freedom concerned rather than on a judgment-by-judgment basis.

In relation to the freedom of establishment and the free movement of workers, reference must be made to Case C-311/06 *Consiglio Nazionale degli Ingegneri* (judgment of 29 January 2009), which concerns the interpretation of Directive 89/48/EEC 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⁽¹⁾. The questions referred to the Court for a preliminary ruling related, specifically, to whether the holder of a certificate, obtained by homologation of a diploma, which is issued by an authority of a Member State, does not attest any education and training covered by the education system of that State and is not based on either an examination or professional experience acquired in the latter, may rely on the provisions of that directive for the purpose of

⁽¹⁾ Council Directive 89/48/EEC of 21 December 1988 (OJ 1989 L 19, p. 16).

gaining entry to a regulated profession in a host Member State. The Court replied in the negative, ruling that a certificate attesting professional qualifications cannot be treated in the same way as a 'diploma' for the purposes of that directive unless those qualifications were acquired, wholly or in part, under the education system of the Member State which issued the certificate in question. Furthermore, a diploma facilitates the taking-up of a profession in so far as it proves the possession of an additional qualification. According to the Court, allowing a person who has merely obtained a qualification awarded by the Member State of origin which does not in itself provide access to a regulated profession nevertheless to gain access to that profession, without the homologation certificate obtained in the other Member State providing evidence that the holder has acquired an additional qualification or professional experience, would be contrary to the principle according to which Member States reserve the option of fixing the minimum level of qualification necessary to guarantee the quality of services provided in their territory.

In relation to the freedom of establishment and, ancillary thereto, the freedom to provide services or the free movement of capital, the Court delivered several judgments regarding national legislation that has the objective of protecting public health.

They include two judgments concerning provisions under Italian and German legislation which stipulate that only pharmacists may own and operate pharmacies. In Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes and Others* (judgment of 19 May 2009) the Court held that Articles 43 EC and 48 EC do not preclude such legislation. It is true that such a rule excluding non-pharmacists constitutes a restriction within the meaning of Article 43 EC. However, according to the Court, it may be justified by the protection of public health, more specifically by the objective of ensuring that the provision of medicinal products to the public is reliable and of good quality. In view of the very particular nature of medicinal products, the therapeutic effects of which distinguish them substantially from other goods, and the risks to public health and to the financial balance of social security systems resulting from overconsumption or incorrect consumption of medicinal products, the Member States may make persons entrusted with the retail supply of medicinal products subject to strict requirements, including as regards the way in which the products are marketed and the pursuit of profit. In particular, the Member States may restrict the retail sale of medicinal products, in principle, to pharmacists alone, because of the safeguards which pharmacists must provide and the information which they must be in a position to furnish to consumers. In Case C-531/06 *Commission v Italy* (judgment of 19 May 2009) the Court adopted similar reasoning in ruling that, by keeping in force legislation which restricts the right to operate a private retail pharmacy to natural persons who have graduated in pharmacy and to operating companies and firms composed exclusively of members who are pharmacists, the Italian Republic had not failed to fulfil its obligations under Articles 43 EC and 56 EC. The Court reached the same conclusion as regards the impossibility for undertakings engaged in the distribution of pharmaceutical products to acquire stakes in companies which operate municipal pharmacies.

By contrast, in Case C-169/07 *Hartlauer* (judgment of 10 March 2009) the Court held that Articles 43 EC and 48 EC preclude national legislation under which authorisation is necessary for the setting up of a private health institution in the form of an independent outpatient dental clinic and authorisation must be refused if there is no need for that outpatient clinic, having regard to the care already offered by contractual practitioners. According to the Court, such legislation is not appropriate for ensuring attainment of the objectives of maintaining a balanced high-quality medical service open to all and preventing the risk of serious harm to the financial balance of social security where it does not also subject group practices to such a system and is not based on a condition capable of adequately circumscribing the exercise by the national authorities of their discretion. If such a prior administrative authorisation scheme is to be justified, it must be based on objective, non-discriminatory criteria known in advance, in such a way as adequately to

circumscribe the exercise of the national authorities' discretion. However, according to the Court, that is not the case if the issue of authorisation to set up a new outpatient dental clinic is subject to the criterion of the number of patients per doctor, which is not fixed or brought in advance to the notice of the persons concerned in any way, or if the prior administrative authorisation scheme is based on a method which is liable to affect the objectivity and impartiality of the treatment of the application for authorisation.

As regards the freedom of establishment and the freedom to provide services, Case C-518/06 *Commission v Italy* (judgment of 28 April 2009) concerns Italian legislation requiring all insurance undertakings, including those which have their head office in another Member State but which pursue their business in Italy, to provide third-party liability motor insurance at the request of any potential customer. The Court held that, by maintaining such legislation in force, the Italian Republic had not failed to fulfil its obligations under Articles 43 EC and 49 EC. It is true that such an obligation to contract restricts the freedom of establishment and the freedom to provide services. However, according to the Court, that restriction is justified by a social protection objective, which amounts, essentially, to ensuring that victims of road traffic accidents will be adequately compensated. As regards, in particular, the proportionality of the legislation concerned, the Court noted that it is not essential that a restrictive measure laid down by the authorities of a Member State should correspond to a view shared by all the Member States concerning the means of protecting the legitimate interest at issue. Therefore, the fact that some Member States have chosen to establish a different system to ensure that every vehicle owner is able to take out third-party liability motor insurance for a premium that is not excessive does not indicate that the obligation to contract goes beyond what is necessary to attain the objective pursued.

It will be noted that, in the same judgment, the Court also examined Article 9 of Directive 92/49/EEC⁽¹²⁾, finding that it defines the scope of home Member State supervision in a non-exhaustive way by providing that financial supervision is to 'include' the state of solvency and the establishment of technical provisions. Nevertheless, that provision cannot be interpreted as meaning that the home Member State should have exclusive supervisory competence extending to the commercial conduct of insurance undertakings. It follows that that provision does not preclude the possibility of controls being exercised by the host Member State over the detailed rules according to which insurance undertakings, operating in that Member State under the freedom of establishment or the freedom to provide services, calculate their insurance premiums, together with the imposition of penalties.

As regards the freedom to provide services, Case C-42/07 *Liga Portuguesa de Futebol Profissional and Baw International* (judgment of 8 September 2009) gave the Court an opportunity to clarify its case-law concerning gaming and betting legislation in the Member States. In that judgment, the Court held that Article 49 EC does not preclude legislation of a Member State which prohibits private operators which are established in other Member States, in which they lawfully provide similar services, from offering games of chance via the Internet within the territory of that Member State. According to the Court, while such legislation gives rise to a restriction of the freedom to provide services, in the light of the specific features associated with the provision of games of chance via the Internet that restriction may, however, be regarded as justified by the objective of combating tax evasion and crime. As to whether the system concerned is necessary, the Court observed that the sector involving games of chance offered via the Internet has not been the subject

⁽¹²⁾ Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (OJ 1992 L 228, p. 1).

of Community harmonisation. A Member State is therefore entitled to take the view that the mere fact that a private operator lawfully offers services in that sector via the Internet in another Member State, in which it is established and where it is in principle already subject to statutory conditions and controls on the part of the competent authorities in that State, cannot be regarded as amounting to a sufficient assurance that national consumers will be protected against the risks of fraud and crime, in the light of the difficulties liable to be encountered in such a context by the authorities of the Member State of establishment in assessing the professional qualities and integrity of operators. In addition, because of the lack of direct contact between consumer and operator, games of chance accessible via the Internet involve different and more substantial risks of fraud by operators to the detriment of consumers compared with the traditional markets for such games. Moreover, the possibility cannot be ruled out that an operator which sponsors some of the sporting competitions on which it accepts bets and some of the teams taking part in those competitions may be in a position to influence their outcome directly or indirectly, and thus increase its profits.

With regard to the freedom to provide services and the free movement of capital, attention should be drawn to Joined Cases C-155/08 and C-157/08 *X and Passenheim-van Schoot* (judgment of 11 June 2009) concerning the recovery period provided for under Netherlands legislation where savings balances and income from those balances are concealed from the national tax authorities. The Court held that Articles 49 EC and 56 EC do not preclude the application by a Member State, where the tax authorities of that Member State have no evidence of the existence of such assets which would enable an investigation to be initiated, of a longer recovery period when the balances are held in another Member State than when they are held in the first Member State. The fact that that other Member State applies banking secrecy is not relevant in that regard. Nor, according to the Court, do Articles 49 EC and 56 EC preclude in such cases the fine imposed for concealment of the foreign assets and income from being calculated as a proportion of the amount to be recovered and over that longer period. The Court found that, while such legislation constitutes a restriction both of the freedom to provide services and of the free movement of capital, it may nevertheless be justified by the need to ensure effective fiscal supervision and to prevent tax evasion, subject to compliance with the principle of proportionality. In relation to that last point, the Court noted that, in the absence of evidence of the existence of items which would enable the tax authorities of a Member State to initiate an investigation, that Member State is unable to request the competent authorities of the other Member State to communicate to it the information necessary to establish correctly the amount of tax due. By contrast, where the tax authorities of a Member State had evidence enabling them to turn to the competent authorities of other Member States, the mere fact that the taxable items concerned are located in another Member State does not justify the general application of an additional recovery period which is in no way based on the time needed to have effective recourse to those mechanisms of mutual assistance.

With regard, finally, to the principle of the free movement of capital, the Court delivered two judgments which are particularly noteworthy.

The cases concerned are, first of all, Case C-318/07 *Persche* (judgment of 27 January 2009), which relates to the delicate issue of gifts to charitable bodies. Having stated that such gifts come within the compass of the provisions of the Treaty relating to the free movement of capital, even if they are made in kind in the form of everyday consumer goods, the Court held that Article 56 EC precludes legislation of a Member State by virtue of which, as regards gifts made to bodies recognised as having charitable status, the benefit of a deduction for tax purposes is allowed only for gifts made to bodies established in that Member State, without any possibility for the taxpayer to show that a gift made to a body established in another Member State satisfies the requirements imposed by that legislation for the grant of such a benefit. According to the Court, it is indeed permissible for a Member State, as part of its legislation relating to the deduction for tax purposes

of gifts, to apply a difference in treatment between national bodies recognised as charitable and those established in other Member States if the latter bodies pursue objectives other than those advocated by its own legislation. However, a body which is established in one Member State but satisfies the requirements imposed for that purpose by another Member State for the grant of tax advantages is, in respect of the grant by the latter Member State of tax advantages intended to encourage the charitable activities concerned, in a situation comparable to that of bodies recognised as having charitable purposes which are established in the latter Member State. According to the Court, the difference in treatment introduced by the aforementioned legislation constitutes, therefore, a restriction on the free movement of capital. That restriction cannot be justified by the need to safeguard the effectiveness of fiscal supervision or by the fight against tax evasion. In respect of that last point, the Court nevertheless stated that, as regards charitable bodies in a non-member country, it is, as a rule, legitimate for the Member State of taxation to refuse to grant such deductibility if, in particular because that non-member country is not under any international obligation to provide information, it proves impossible to obtain the necessary information from that country.

The second case is Case C-567/07 *Woningstichting Sint Servatius* (judgment of 1 October 2009), which arose from a request for interpretation of the Treaty provisions relating to the free movement of capital with a view to assessing whether Netherlands legislation to promote adequate housing is compatible with them. Under that legislation, Netherlands approved housing institutions are required to submit their cross-border property investment projects to a prior administrative authorisation procedure and to demonstrate that the investments concerned are in the interests of housing in the Netherlands. According to the Court, such an obligation constitutes a restriction on the free movement of capital. The Court accepted that requirements related to public housing policy in a Member State and to the financing of that policy can constitute overriding reasons in the public interest and therefore justify such a restriction. The Court stated, however, that a scheme of prior administrative authorisation cannot render legitimate discretionary conduct on the part of the national authorities which is liable to negate the effectiveness of provisions of Community law. Therefore, if such a scheme is to be justified, it must be based on objective, non-discriminatory criteria known in advance, in such a way as adequately to circumscribe the exercise of the national authorities' discretion, a matter which falls to be determined by the national court.

Transport

In Joined Cases C-402/07 and C-432/07 *Sturgeon and Others* (judgment of 19 November 2009) the Court was called upon to rule on the concept of a delayed flight in connection with Regulation (EC) No 261/2004⁽¹³⁾. This regulation provides for flat-rate compensation in the event of cancellation of a flight, but not in the case of a flight delay. Actions were brought before the national courts by passengers claiming such flat-rate compensation on the ground that they had arrived at their airports of destination 22 and 25 hours after the scheduled arrival times.

The Court observed, first of all, that the duration of a delay, even if it is long, is not sufficient for a flight to be regarded as cancelled. A flight which is delayed, irrespective of the duration of the delay, cannot be regarded as cancelled where, apart from the departure time, all the other elements of the flight as originally planned, including in particular the itinerary, remain unchanged.

⁽¹³⁾ 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).

With regard to the right to compensation, the Court went on to find that passengers whose flights have been cancelled and passengers affected by a flight delay suffer similar damage, namely a loss of time, and thus find themselves in a comparable situation which does not justify different treatment. The Court concluded from this that passengers whose flights are delayed may be treated, for the purposes of the application of the right to compensation, as passengers whose flights are cancelled, which means that they too can claim flat-rate compensation from the airline where they reach their final destination three hours or more after the scheduled arrival time, unless the delay was caused by extraordinary circumstances. The Court noted that a technical problem in an aircraft cannot be regarded as an extraordinary circumstance unless the problem stems from events which, by their nature or origin, are not inherent in the normal exercise of the activity of the airline concerned and are beyond its actual control.

Competition rules

On a very general level, in Case C-429/07 *X BV* (judgment of 11 June 2009) the Court held that the Commission may submit on its own initiative written observations to a national court of a Member State in proceedings relating to the tax deductibility of a fine imposed by the Commission for infringement of Article 81 EC or 82 EC. Article 15 of Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty⁽¹⁴⁾, entitled 'Cooperation with national courts', provides, in specific circumstances, for the possibility of intervention by the Commission in proceedings pending before national courts. The Court stated that the option for the Commission, acting on its own initiative, to submit written observations to national courts is subject to the sole condition that the coherent application of Article 81 EC or 82 EC so requires. That condition may be fulfilled even if the proceedings concerned do not pertain to issues relating to the application of Article 81 EC or 82 EC. In addition, given that there is an intrinsic link between fines and the application of Article 81 EC and 82 EC, the effectiveness of the penalties imposed by the national or Community competition authorities on the basis of Article 83(2)(a) EC is a condition for the coherent application of Articles 81 EC and 82 EC. Consequently, the decision that the court of a Member State must give in proceedings relating to the deductibility from taxable profits of the amount of a fine or a part thereof is capable of impairing the effectiveness of penalties in respect of anti-competitive practices and, therefore, might compromise the coherent application of Article 81 EC or 82 EC. The Court thus found that, in such a situation, Article 15 of Regulation No 1/2003 permits the Commission to submit observations to a national court.

With regard to agreements and concerted practices, the Court was given the opportunity in Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline v Commission* (judgment of 6 October 2009) to rule on the compatibility with Article 81 EC of agreements aimed at restricting parallel trade in medicinal products⁽¹⁵⁾. The Court held that, in principle, agreements aimed at prohibiting or limiting parallel trade have as their object the prevention of competition. That principle applies to the pharmaceuticals sector. It cannot be a requirement for finding that an agreement has an anti-competitive object that there be proof that the agreement entails disadvantages for final consumers. In addition, the Court noted that, in order to be capable of being exempted under Article 81(3) EC, an agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress. That contribution is not identified with all the advantages which the undertakings participating in the agreement derive from it for their activities, but with appreciable objective advantages of such a kind as to compensate for the

⁽¹⁴⁾ Council Regulation (EC) No 1/2003 of 16 December 2002 (OJ 2003 L 1, p. 1).

⁽¹⁵⁾ On the assessment, in relation to Article 82 EC, of unilateral measures restricting parallel trade in pharmaceutical products, see Joined Cases C-468/06 to C-478/06 *Sot. Lelos kai Sia* [2008] ECR I-7139.

resulting disadvantages for competition. The Commission may therefore carry out a prospective analysis. It is sufficient for the Commission to arrive at the conviction that the occurrence of the appreciable objective advantage is sufficiently likely in order to presume that the agreement entails such an advantage. The Court also stated that the examination of an agreement for the purposes of determining whether it contributes to the improvement of the production or distribution of goods or to the promotion of technical or economic progress, and whether that agreement generates appreciable objective advantages, which must be undertaken in the light of the factual arguments and evidence provided in connection with the request for exemption, may require the nature and specific features of the sector concerned by the agreement to be taken into account if its nature and specific features are decisive for the outcome of the analysis. Taking those matters into account does not mean that the burden of proof is reversed, but merely ensures that the examination of the request for exemption is conducted in the light of the appropriate factual arguments and evidence provided by the party requesting the exemption.

In Case C-511/06 P *Archer Daniels Midland v Commission* (judgment of 9 July 2009), concerning an unlawful cartel in the citric acid sector, the Court dealt with the consequences of the classification as leader of a cartel for the rights of defence. Such a classification has significant repercussions on the amount of the fine to be imposed on an undertaking. It constitutes, first, an aggravating circumstance and, second, a circumstance which, where the undertaking cooperates, excludes from the outset the granting of a very substantial reduction of the fine. The Court held that, although the Commission is not required to state in the statement of objections the manner in which it intends to take account of the facts when setting the level of the fine or, in particular, whether it intends, on the basis of those facts, to classify an undertaking as a leader of the cartel, it is required, at the very least, to state those facts. Where the documents and items of evidence which are the source of the facts used as a basis for the classification as a leader of the cartel consist of testimonies of persons involved in the infringement procedure and therefore have a subjective aspect, the fact that those documents are annexed to the statement of objections, without those facts being expressly referred to in the wording itself of the statement, does not enable the undertaking either to assess the credence which the Commission gives to each of the items of evidence or to contest them, or consequently usefully to exercise its rights. In proceeding in that manner, the Commission infringes the rights of defence of the undertaking concerned. The Commission cannot therefore rely on those items of evidence in order to classify the undertaking as a leader of the cartel. In addition, in the absence of other evidence in the statement of objections which makes it possible to arrive at such a classification, the Commission cannot rule out, from the outset, a significant reduction in the fine where the undertaking cooperates. Furthermore, in that same case, the Court confirmed that actual termination of the infringement as soon as the Commission intervenes does not automatically entail a reduction of the fine. It also noted that the actual impact of an infringement on the market is a factor, among others, which must be taken into account in assessing the gravity of the infringement.

By its judgment of 24 September 2009 in Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erste Bank der österreichischen Sparkassen v Commission*, which was delivered on the appeal in the 'Lombard Club' case, the Court held that the fact that an arrangement relates only to the marketing of products in a single Member State is not sufficient to preclude the possibility that trade between Member States might be affected. Since such an arrangement has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thus impeding the economic interpenetration which the EC Treaty is designed to bring about, there is a strong presumption that trade between Member States is affected, which can only be rebutted if an analysis of the characteristics of the agreement and its economic context demonstrates the contrary.

In addition, the Court stated that the Commission is in no way obliged, where the subsidiary has committed an infringement, to verify as a matter of priority whether the conditions for attribution of the infringement to the parent company have been fulfilled. The Commission has the option of penalising either the subsidiary which participated in the infringement or the parent company which controlled it during that period.

As regards the determination of the amount of the fines, the Court held, first of all, that a horizontal price cartel in an economic sector as important as the banking industry cannot, in principle, escape the classification of a very serious infringement, whatever its context. It then stated that, contrary to what the applicants claimed, the General Court did not base its findings in relation to the assessment of the gravity of the infringement merely on the implementation of the cartel, but determined its actual impact on the market. Furthermore, the Court considered that, in the context of the determination of the amount of the fines, the taking into account by the Commission, in order to divide into different categories the companies which assumed the role of lead institutions within a banking group, of the market shares of the members of the group did not constitute imputation of the unlawful conduct of the latter to the lead institutions. It was a step designed to ensure that the level of the fines imposed on the lead institutions adequately reflected the gravity of their unlawful conduct. Finally, the Court noted that, as far as concerns the extent of the reduction of the fine, it is not for the Court to substitute its own assessment for that of the General Court when it exercises its unlimited jurisdiction.

With regard to abuse of a dominant position, the Court delivered two important judgments.

Following the appeal brought by France Télécom against the judgment in Case T-340/03 *France Télécom v Commission* [2007] ECR II-107, the Court upheld that judgment, which had dismissed the action brought against the Commission's decision imposing on France Télécom a fine of EUR 10.35 million for abuse of a dominant position on the French market for high-speed Internet access for residential customers. In response to that company's argument that the General Court infringed Article 82 EC in finding that demonstration of the possibility of recouping losses was not a precondition to making a finding of predatory pricing, the Court stated that that possibility does not constitute a necessary precondition to establishing that such a pricing policy is abusive. Such a possibility constitutes merely a relevant factor in assessing whether or not the practice concerned is abusive, in that it may, for example where prices lower than average variable costs are applied, assist in excluding economic justifications other than the elimination of a competitor, or, where prices below average total costs but above average variable costs are applied, assist in establishing that a plan to eliminate a competitor exists. Moreover, in the Court's view, the lack of any possibility of recoupment of losses is not sufficient to prevent the undertaking concerned reinforcing its dominant position, in particular following the withdrawal from the market of one or a number of its competitors, so that the degree of competition existing on the market, already weakened precisely because of the presence of the undertaking concerned, is further reduced and customers suffer loss as a result of the limitation of the choices available to them.

In Case C-385/07 P *Der Grüne Punkt — Duales System Deutschland v Commission* (judgment of 16 July 2009), after noting that the reasonableness of the period for delivering judgment is to be appraised in the light of the circumstances specific to each case, such as the complexity of the case and the conduct of the parties, the Court stated that, in the case of proceedings concerning infringement of competition rules, the fundamental requirement of legal certainty on which economic operators must be able to rely and the aim of ensuring that competition is not distorted in the internal market are of considerable importance not only for an applicant himself and his competitors but also for third parties, in view of the large number of persons concerned and the financial interests involved. In the case in point relating to the abuse of a dominant position by an

undertaking demanding a fee for the extremely widespread use of its logo, and having regard to the possible effects of the outcome of that dispute, proceedings before the General Court which lasted approximately five years and 10 months, where that could not be justified by any of the particular circumstances of the case, whether it be the complexity of the dispute, the conduct of the parties or by supervening procedural matters raised by the parties, or the adoption by the General Court of measures of organisation of procedure, failed to have regard to the requirement that the case be dealt with within a reasonable time. However, the Court stated that, although it is true that failure on the part of the General Court to adjudicate within a reasonable time constitutes a procedural irregularity, the first paragraph of Article 61 of the Statute of the Court must be interpreted and applied purposively. Since there was nothing to suggest that the failure to adjudicate within a reasonable time may have had an effect on the outcome of the dispute, the setting aside of the judgment under appeal would not have remedied the infringement of the principle of effective legal protection committed by the General Court. In addition, having regard to the need to ensure that Community competition law is complied with, an appellant cannot be permitted to reopen the question of the existence of an infringement, on the sole ground that there was a failure to adjudicate within a reasonable time, where all of its pleas directed against the findings made by the General Court concerning that infringement and the administrative procedure relating to it have been rejected as unfounded. Conversely, failure on the part of the General Court to adjudicate within a reasonable time can give rise to a claim for damages brought against the Community under Article 235 EC and the second paragraph of Article 288 EC.

The case-law on State aid was also supplemented by various judgments. In Case C-319/07 P *3F v Commission* (judgment of 9 July 2009), the Court, on appeal, had the opportunity to develop its case-law on actions for annulment in State aid cases where the action is brought by a third party who is not the recipient of the aid. The proceedings at first instance concerned an action brought by the main Danish trade union for annulment of a Commission decision declaring compatible with the common market aid granted in the form of an exemption from income tax for seafarers employed on board vessels registered in the Danish International Register for vessels, the register having the aim of keeping under the national flag vessels which were likely to be transferred to flags of convenience. The Commission did so without initiating the formal review procedure under Article 88(2) EC. The General Court dismissed the action as inadmissible, considering that neither the trade union nor its members were individually concerned by the contested decision.

In its judgment, the Court of Justice noted, first of all, that an action brought against a decision not to initiate the formal review procedure is admissible where the applicant has to be regarded as a party concerned, within the meaning of Article 88(2) EC, whose action seeks to safeguard procedural interests. Consequently, it is not excluded that a trade union may be regarded as 'concerned' within the meaning of Article 88(2) EC if it shows that its interests or those of its members might be affected by the granting of aid.

In that regard, the Court pointed out that the question was whether the appellant's competitive position in relation to other trade unions had been affected by the granting of that aid. It cannot be inferred from the fact that an agreement between trade unions and employers could be excluded, by reason of its nature and purpose and the social policy objectives pursued by it, from the scope of the provisions of Article 81(1) EC that collective negotiations or the parties involved in them are likewise, entirely and automatically, excluded from the Treaty rules on State aid, or that an action for annulment which might be brought by those parties would, almost automatically, be regarded as inadmissible because of their involvement in those negotiations. To exclude a priori the possibility that a trade union could show that it is a party concerned within the meaning of Article 88(2) EC, by relying on its role in collective negotiations and the effects on that role of national tax measures regarded by the Commission as aid compatible with the common market, would be

liable to undermine the same social policy objectives, laid down in particular in the first paragraph of Article 136 EC and Article 138(1) EC.

In addition, the Court found that, since it cannot be ruled out that organisations representing the workers of the undertakings benefiting from aid may, as parties concerned within the meaning of Article 88(2) EC, submit observations to the Commission on considerations of a social nature which it can take into account if appropriate, in the present case the Community judicature must, in order to assess whether the appellant's arguments based on the Community guidelines on State aid to maritime transport suffice to establish its status of a party concerned within the meaning of Article 88(2) EC, examine the social aspects of the measure at issue with regard to those guidelines, which contain the legal conditions for assessing the compatibility of the State aid in question.

On appeal against a judgment of the General Court which annulled a Commission decision for failure to state reasons, the Court held, in Case C-494/06 P *Commission v Italy and Wam* (judgment of 30 April 2009), that the General Court had rightly found that general reasoning based on the reaffirmation of the principles flowing from the *Tubemeuse* judgment (C-142/87 [1990] ECR I-959) could not, by itself, be considered to satisfy the requirements arising under Article 253 EC, in the light of the case at hand. In the Court of Justice's view, as the aid was intended to finance, by means of loans at reduced rates, expenses for market penetration programmes in non-member States and the grant equivalent was relatively small in amount, the effect of the aid on trade and on intra-Community competition was difficult to discern, and this required a greater effort to state reasons on the part of the Commission. Thus, the mere fact that the recipient undertaking took part in intra-Community trade by exporting a large part of its production within the Union was not sufficient, in respect of such aid, to demonstrate those effects.

In Case C-222/07 *UTECA* (judgment of 5 March 2009), the Court held that Article 87 EC must be interpreted as meaning that a measure adopted by a Member State requiring television operators to earmark 5% of their operating revenue for the pre-funding of European cinematographic films and films made for television and, more specifically, to reserve 60% of that 5% for the production of works of which the original language is one of the official languages of that Member State does not constitute State aid in favour of the cinematographic industry of that Member State. The Court explained that it is not apparent that the advantage given by way of such a measure to the cinematographic industry of the Member State concerned constitutes an advantage granted directly by the State or by a public or private body designated or established by the State. The advantage is the result of general legislation requiring television operators, whether public or private, to earmark a percentage of their operating revenue for the pre-funding of European cinematographic films and films made for television. In addition, in the Court's view, it does not appear, in the present instance, that the advantage in question is dependent on the control exercised by the public authorities over such operators or on instructions given by those authorities to such operators.

Taxation

Worthy of mention in this field is Case C-357/07 *TNT Post UK* (judgment of 23 April 2009) which, in the context of value added tax, provided the Court with the opportunity to specify the scope of the exemption of 'public postal services', laid down in Article 13A(1)(a) of Sixth Directive 77/388/EEC⁽¹⁶⁾. In the main proceedings, the company TNT Post, which offers 'upstream services' for business mail

⁽¹⁶⁾ Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1997 L 145, p. 1).

subject to value added tax, challenged the legality of the exemption from tax of postal services supplied by Royal Mail, which is the sole universal postal service provider in the United Kingdom and whose status and obligations were not amended following the liberalisation of the postal market in the United Kingdom in 2006. Giving judgment on a reference for a preliminary ruling, the Court held that the term 'public postal services' in Article 13A(1)(a) of the Sixth Directive covers operators, whether they are public or private, who undertake to provide, in a Member State, all or part of the universal postal service, as defined in Article 3 of Directive 97/67/EC⁽¹⁷⁾. In that regard, the exemption provided for in Article 13A(1)(a) has been maintained in the form in which it was originally enacted, notwithstanding the liberalisation of the postal sector. The Court also stated that that exemption applies to the supply by the public postal services acting as such — that is, in their capacity as an — operator who undertakes to provide all or part of the universal postal service in a Member State of services other than passenger transport and telecommunications services, and the supply of goods incidental thereto. It does not apply to supplies of services or of goods incidental thereto for which the terms have been individually negotiated.

Approximation and harmonisation of laws

Once again, the case-law in this field has been plentiful. Reference will first be made to two judgments relating to the award of public contracts.

In Case C-573/07 *Sea* (judgment of 10 September 2009) relating to the award of a service of collecting, transporting and disposing of urban waste, the Court noted that it is not contrary to Articles 43 EC and 49 EC, the principles of equal treatment and of non-discrimination on grounds of nationality or the obligation of transparency arising therefrom for a public service contract to be awarded directly to a company limited by shares with wholly public capital so long as the public authority which is the contracting authority exercises over that company control similar to that which it exercises over its own departments and so long as the company carries out the essential part of its activities with the authority or authorities controlling it.

Consequently, without prejudice to the determination by the national court of the effectiveness of the relevant provisions of the statutes, the control exercised over that company by the shareholder authorities may be regarded as similar to that which they exercise over their own departments, when, first, that company's activity is limited to the territory of those authorities and is carried on essentially for their benefit and, second, through the bodies established under the company's statutes made up of representatives of those authorities, the latter exercise conclusive influence on both the strategic objectives of the company and on its significant decisions.

The Court also noted that, although it is not inconceivable that shares in a company may be sold to private investors, to allow that mere possibility to keep in indefinite suspense the determination whether or not the capital of a company awarded a public procurement contract is public would not be consistent with the principle of legal certainty. Opening of the capital to private investors may not be taken into consideration unless there exists, at the time of the award of the public contract, a real prospect in the short term of such an opening.

⁽¹⁷⁾ Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (OJ 1998 L 15, p. 14), as amended by Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 (OJ 2002 L 176, p. 21).

In Case C-480/06 *Commission v Germany* (judgment of 9 June 2009) concerning a contract relating to the disposal of waste in a new incineration facility concluded between four Landkreise (administrative districts) and the City of Hamburg Cleansing Department without a tendering procedure, the Court held that a contract which forms both the basis and the legal framework for the future construction and operation of a facility intended to perform a public service, namely thermal incineration of waste, in so far as it has been concluded solely by public authorities, without the participation of any private party, and does not provide for or prejudice the award of any contracts that may be necessary in respect of the construction and operation of the waste treatment facility, does not fall within the scope of Directive 92/50/EEC⁽¹⁸⁾.

A public authority has the possibility of performing the public interest tasks conferred on it either by using its own resources or in cooperation with other public authorities, without being obliged to call on outside entities not forming part of its own departments. In that connection, first, Community law does not require public authorities to use any particular legal form in order to carry out jointly their public service tasks. Secondly, such cooperation between public authorities does not undermine the principal objective of the Community rules on public procurement, that is, the free movement of services and the opening-up of undistorted competition in all the Member States, where implementation of that cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest and the principle of equal treatment of the persons concerned, referred to in Directive 92/50, is respected, so that no private undertaking is placed in a position of advantage vis-à-vis competitors.

Reference will now be made to a series of judgments in which the Court was required to interpret Community legislation which seeks to supervise commercial practices with a view to consumer protection.

In Case C-489/07 *Messner* (judgment of 3 September 2009) concerning the protection of consumers in respect of distance contracts, the Court dealt with the possibility of claiming compensation from a consumer who, after signing, withdraws from such a contract. The Court held that the provisions of the second sentence of Article 6(1) and Article 6(2) of Directive 97/7/EC⁽¹⁹⁾ must be interpreted as precluding a provision of national law which provides in general that, in the case of withdrawal by a consumer within the withdrawal period, a seller may claim compensation from him for the value of the use of the consumer goods acquired under a distance contract. If the consumer were required to pay such compensation merely because he had the possibility of using the goods whilst they were in his possession, he would be able to exercise his right of withdrawal only against payment of that compensation. That would be clearly at variance with the wording and purpose of Directive 97/7 and would, in particular, deprive the consumer of the possibility of making completely free and independent use of the period for reflection granted to him by that directive. Likewise, the functionality and efficacy of the right of withdrawal would be impaired if the consumer were obliged to pay compensation simply as a result of having examined and tested the goods. Since the right of withdrawal is intended precisely to give the consumer that possibility, the fact of having made use thereof cannot have the consequence that the consumer is able to exercise that right only if he pays compensation.

⁽¹⁸⁾ 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).

⁽¹⁹⁾ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ 1997 L 144, p. 19).

However, those provisions do not prevent the consumer from being required to pay compensation for the use of the goods in the case where he has made use of them in a manner incompatible with the principles of civil law, such as those of good faith or unjust enrichment, on condition that the purpose of that directive and, in particular, the functionality and efficacy of the right of withdrawal are not adversely affected, this being a matter for the national court to determine.

In Case C-243/08 *Pannon GSM* (judgment of 4 June 2009), the Court noted that the consumer protection provided by Directive 93/13/EEC⁽²⁰⁾ extends to cases in which a consumer who has concluded with a seller or supplier a contract containing an unfair term fails to raise the unfairness of the term, whether because he is unaware of his rights or because he is deterred from enforcing them on account of the costs which judicial proceedings would involve. The role of the national court in the area of consumer protection is thus not limited to a mere power to rule on the possible unfairness of a contractual term, but also consists of the obligation to examine that issue of its own motion where it has available to it the legal and factual elements necessary for that task, including when it is assessing whether it has territorial jurisdiction. Where the national court considers such a term to be unfair, it must not apply it, except if the consumer, after having been informed of it by that court, does not intend to assert its unfair or non-binding status.

Likewise, a national rule if it is not compatible with the directive provides that it is only where the consumer has successfully challenged an unfair contract term before a national court that he is not bound by it. Such a rule excludes the possibility for the national court to assess of its own motion whether a contractual term is unfair.

The Court also stated that a term, contained in a contract concluded between a consumer and a seller or supplier, which has been included without being individually negotiated and which confers exclusive jurisdiction on the court in the territorial jurisdiction of which the seller or supplier has his principal place of business may be considered to be unfair.

Similarly, in Case C-40/08 *Asturcom Telecomunicaciones* (judgment of 6 October 2009), the Court held that a national court hearing an action for enforcement of an arbitration award which has become final and was made in the absence of the consumer is required, where it has available to it the legal and factual elements necessary for that task, to assess of its own motion whether an arbitration clause in a contract concluded between a seller or supplier and a consumer is unfair, in so far as, under national rules of procedure, it can carry out such an assessment in similar actions of a domestic nature. If that is the case, it is for that court or tribunal to establish all the consequences thereby arising under national law, in order to ensure that the consumer is not bound by that clause.

In reaching this conclusion, the Court stated, first, that Article 6(1) of Directive 93/13 is a mandatory provision and, second, that, in view of the nature and importance of the public interest underlying the protection which that directive confers on consumers, Article 6 must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy.

⁽²⁰⁾ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

In Case C-358/08 *Aventis Pasteur* (judgment of 2 December 2009), the Court, after recalling the judgment in *O'Byrne*⁽²¹⁾, stated that Article 11 of Directive 85/374/EEC⁽²²⁾ must be interpreted as precluding national legislation which allows the substitution of one defendant for another during proceedings from being applied in a way which permits a 'producer', within the meaning of Article 3 of that directive, to be sued, after the expiry of the period prescribed by that article, as a defendant in proceedings brought within that period against another person.

However, first, Article 11 must be interpreted as not precluding a national court from holding that, in proceedings instituted within the period prescribed by that article against the wholly-owned subsidiary of the 'producer', within the meaning of Article 3(1) of Directive 85/374, that producer can be substituted for that subsidiary if that court finds that the putting into circulation of the product in question was, in fact, determined by that producer.

Second, Article 3(3) of Directive 85/374 must be interpreted as meaning that, where the person injured by an allegedly defective product was not reasonably able to identify the producer of that product before exercising his rights against the supplier of that product, that supplier must be treated as a 'producer' for the purposes, in particular, of the application of Article 11 of that directive, if it did not inform the injured person, on its own initiative and promptly, of the identity of the producer or its own supplier, which it is for the national court to determine in the light of the circumstances of the case.

In relation to unfair commercial practices, the Court was required to interpret Directive 2005/29/EC⁽²³⁾ in Joined Cases C-261/07 and C-299/07 *VTB–VAB* (judgment of 23 April 2009). It held that that directive precludes national legislation which with certain exceptions and without taking account of the specific circumstances — therefore generally and as a preventative measure — imposes a general prohibition of combined offers made by a vendor to a consumer.

The legislation in question laid down the principle that combined offers are prohibited, notwithstanding the fact that such practices are not referred to in Annex I to the directive which exhaustively lists the only commercial practices which are prohibited in all circumstances and accordingly do not have to be assessed on a case-by-case basis.

The Court noted that that directive fully harmonises, at the Community level, the rules on unfair commercial practices. Therefore, Member States may not adopt stricter rules than those provided for in the directive, even in order to achieve a higher level of consumer protection.

By establishing a presumption of unlawfulness of combined offers, even though a certain number of exceptions to that prohibition are laid down, national legislation does not meet the requirements of the directive.

In the field of intellectual property rights, two judgments are worthy of note.

⁽²¹⁾ Case C-127/04 *O'Byrne* [2006] ECR I-1313.

⁽²²⁾ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ 1985 L 210, p. 29).

⁽²³⁾ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (OJ 2005 L 149, p. 22).

First, in Case C-32/08 *FEIA* (judgment of 2 July 2009) the Court held that Article 14(3) of Regulation (EC) No 6/2002⁽²⁴⁾, which provides that the right to the Community design vests in the employer where a design is developed by an employee in the execution of his duties or following the instructions given by his employer, unless otherwise agreed or specified under national law, does not apply to a Community design that has been produced as a result of a commission. The Community legislature intended to define the special system set out in Article 14(3) of the regulation by reference to a specific type of contractual relationship, namely that of an employment relationship, which precludes the application of Article 14(3) to other contractual relationships, such as that relating to a Community design that has been produced as a result of a commission.

Where, first, there are unregistered Community designs produced as a result of a commission, second, the national legislation does not deem such designs to be the same as designs developed in the context of an employment relationship, Article 14(1) of Regulation No 6/2002 must be interpreted as meaning that the right to the Community design vests in the designer, unless it has been assigned by way of contract to his successor in title. The possibility of assignment by way of contract of the right to the Community design from the designer to his successor in title within the meaning of Article 14(1) of the regulation both stems from the wording of that article and is consistent with the aims of the regulation. Adapting the protection of Community designs to the needs of all sectors of industry in the Community by means of a contractual assignment of the right to the Community design is likely to help to achieve the essential objective of the enforcement of the rights conferred by a Community design in an efficient manner throughout the territory of the Community. Moreover, enhanced protection for industrial design not only promotes the contribution of individual designers to the sum of Community excellence in the field, but also encourages innovation and development of new products and investment in their production. It is, however, for the national court to ascertain the contents of such a contract and in that regard to determine whether the right to the unregistered Community design has in fact been transferred from the designer to his successor in title, applying, in the context of that assessment, the law on contracts in order to determine who owns the right to the unregistered Community design, in accordance with Article 14(1) of the regulation.

Second, in Case C-240/07 *Sony Music Entertainment* (judgment of 20 January 2009), the Court held that the term of protection of copyright and certain related rights, in this case rights concerning the reproduction of phonograms, laid down by Directive 2006/116/EC⁽²⁵⁾, is also applicable, pursuant to Article 10(2) thereof, where the subject matter at issue has at no time been protected in the Member State in which the protection is sought. According to the wording of that provision, the first alternative requirement concerns the prior existence of protection for the subject matter at issue in at least one Member State. That provision does not require that Member State to be the State in which the protection for which the directive provides is sought. Moreover, that directive is intended to harmonise the laws of the Member States so as to make terms of protection identical throughout the Community, and to interpret Article 10(2) of Directive 2006/116 as meaning that the application of that requirement is conditional on the prior existence of protection under the national legislation of the Member State in which the protection for which the directive provides is sought, even though such prior protection has been granted in another Member State, would comply neither with the terms of the provision at issue nor with the purpose of the directive.

⁽²⁴⁾ Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1).

⁽²⁵⁾ Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (OJ 2006 L 372, p. 12)

The Court added that Article 10(2) of Directive 2006/116 is also to be interpreted as meaning that the terms of protection provided for by that directive apply in a situation where the work or subject matter at issue was, on 1 July 1995, protected as such in at least one Member State under that Member State's national legislation on copyright and related rights and where the holder of such rights in respect of that work or subject matter, who is a national of a non-Member State, benefited, at that date, from the protection provided for by those national provisions. The question whether, in the context of the provision, a holder of copyright-related rights in a work or subject matter who is a national of a non-Member State was protected on 1 July 1995 in at least one Member State must be assessed in the light of the national provisions of that Member State and not in the light of the national provisions of the Member State in which the protection for which that directive provides is sought. Such a conclusion is, moreover, supported by the objectives of harmonisation pursued by that directive and, in particular, that of providing for the same starting point for the calculation of the term of protection for copyright-related rights as well as the same term of protection for those rights throughout the Community. It follows that, in respect of a work or subject matter protected on 1 July 1995 in at least one Member State according to the national provisions of that Member State, the fact that the rightholder thus protected is a national of a non-Member State and is not entitled, in the Member State in which the term of protection provided for by Directive 2006/116 is sought, to protection under the national law of that Member State is not decisive for the application of Article 10(2) of that directive. What matters is whether the work or the subject matter at issue was covered by protection on 1 July 1995, under the national provisions of at least one Member State.

Other sectors which have been harmonised at Community level have also given rise to litigation.

In Case C-421/07 *Damgaard* (judgment of 2 April 2009), the Court was required to define more precisely the notion of advertising in the field of medicinal products for human use. A journalist had been charged with having publicly disseminated information about the properties and availability of a medicinal product the marketing of which is not authorised in all of the Member States. Directive 2001/83/EC⁽²⁶⁾ provides for a high degree of consumer protection in the area of information and advertising relating to medicinal products. The Court was therefore asked how Article 86 of Directive 2001/83, as amended by Directive 2004/27/EC⁽²⁷⁾, should be interpreted. It held that dissemination by a third party of information about a medicinal product, including its therapeutic or prophylactic properties, may be regarded as advertising within the meaning of that article, even though the third party in question is acting on his own initiative and completely independently, *de jure* and *de facto*, of the manufacturer and the seller of such a medicinal product. The Court added that it is for the national court to determine whether that dissemination constitutes a form of door-to-door information, canvassing activity or inducement designed to promote the prescription, supply, sale or consumption of medicinal products.

In *UTECA*, the Court held that Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, as amended by Directive 97/36/EC⁽²⁸⁾, more particularly Article 3

⁽²⁶⁾ 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).

⁽²⁷⁾ Directive 2004/27/EC of the European Parliament and of the Council of 31 March 2004 amending Directive 2001/83/EC on the Community code relating to medicinal products for human use (OJ 2004 L 136, p. 34).

⁽²⁸⁾ 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).

thereof, and Article 12 EC must be interpreted as meaning that they do not preclude Spanish legislation which requires television operators to earmark 5% of their operating revenue for the pre-funding of European cinematographic films and films made for television and, more specifically, to reserve 60% of that 5% for the production of works of which the original language is one of the official languages of that Member State. In the Court's view, irrespective of whether such a measure is in an area covered by that directive, the Member States retain, in principle, jurisdiction to adopt it, provided that they respect the fundamental freedoms guaranteed by the Treaty. Although such a measure — in so far as it relates to the obligation to reserve, for the production of films of which the original language is one of the official languages of the Member State in question, 60% of the 5% of operating revenue reserved for the pre-funding of European cinematographic films and films made for television — constitutes a restriction on several fundamental freedoms, that is to say on the freedom to provide services, freedom of establishment, the free movement of capital and freedom of movement for workers, it may be justified by the objective of defending and promoting one or several of the official languages of the Member State concerned. In that regard, such a measure, in so far as it introduces an obligation to invest in cinematographic films and films made for television the original language of which is one of the official languages of that Member State, appears appropriate to ensure that such an objective is achieved. In addition, it does not appear, in the Court's view, that such a measure goes beyond what is necessary to achieve that objective. Since that measure affects, first of all, only 3% of the operating revenue of the operators, the percentage cannot be considered disproportionate in relation to the objective pursued. Furthermore, such a measure does not go beyond what is necessary to achieve the objective pursued by reason of the mere fact that it does not lay down criteria which would allow the works concerned to be classified as 'cultural productions'. Since language and culture are intrinsically linked, the view cannot be taken that the objective pursued by a Member State of defending and promoting one or several of its official languages must of necessity be accompanied by other cultural criteria in order for it to justify a restriction on one of the fundamental freedoms guaranteed by the Treaty. Nor does such a measure go beyond what is necessary to achieve the objective pursued by reason of the mere fact that the beneficiaries of the financing concerned are mostly cinema production undertakings in that Member State. The fact that the criterion on which that measure is based, namely the linguistic criterion, may constitute an advantage for cinema production undertakings which work in the language covered by that criterion and which, accordingly, may in practice mostly comprise undertakings established in the Member State of which the language constitutes an official language appears inherent to the objective pursued. Such a situation cannot, of itself, constitute proof of the disproportionate nature of that measure without rendering nugatory the recognition, as an overriding reason in the public interest, of the objective pursued by a Member State of defending and promoting one or several of its official languages. The Court noted, with regard to Article 12 EC, that that provision applies independently only to situations governed by Community law for which the Treaty lays down no specific rules of non-discrimination. However, in relation to the freedom of movement for workers, the right of establishment, the freedom to provide services and the free movement of capital, the principle of non-discrimination was implemented by Articles 39(2) EC, 43 EC, 49 EC and 56 EC respectively. Since it follows from the foregoing that the measure at issue does not appear contrary to those provisions of the Treaty, it cannot be considered contrary to Article 12 EC either.

Trade marks

In this field, Case C-301/07 *PAGO International* (judgment of 6 October 2009) merits consideration. Here, the Court clarified the conditions which a trade mark needs to satisfy to benefit from

a 'reputation' for the purposes of Article 9(1)(c) of Regulation (EC) No 40/94⁽²⁹⁾. Drawing an analogy with Case C-292/00 *Davidoff* [2003] ECR I-389, the Court held, first, that, notwithstanding the wording of Article 9(1)(c) and in the light of the overall scheme and objectives of the system of which Article 9(1)(c) of the regulation is part, the protection accorded to Community trade marks with a reputation cannot be less where a sign is used for identical goods and services than where a sign is used for non-similar goods or services. Therefore, in the Court's view, that article also benefits a Community trade mark with a reputation in the case of goods or services similar to those for which that mark is registered. The Court then held that, in order to benefit from the protection afforded in that provision, a Community trade mark must be known by a significant part of the public concerned by the products or services covered by that trade mark, in a substantial part of the territory of the Community, and that, in view of the reputation of the mark PAGO International throughout the territory of a Member State, namely Austria, that territory could be considered to constitute a substantial part of the territory of the Community.

Social policy

In this field the Court has been faced with novel issues. Case C-44/08 *Akavan Erityisalojen Keskuslitto AEK and Others* (judgment of 10 September 2009) provided the Court with the opportunity to give judgment, for the first time, on the obligation to provide information and hold consultations laid down in Article 2 of Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies⁽³⁰⁾.

As regards the time at which the obligation to hold consultations arises, the Court considered that it is the adoption, within a group of undertakings, of strategic decisions or of changes in activities which compel the employer to contemplate or to plan for collective redundancies that gives rise to an obligation on that employer to consult with workers' representatives. In addition, it noted that the time at which that obligation arises does not depend on whether the employer is already able to supply to the workers' representatives all the information required in Article 2(3)(b) of Directive 98/59.

So far as concerns designation of the person responsible for the obligation to hold consultations, the Court stated that the only party on whom the obligations to inform, consult and notify are imposed is the employer. An undertaking which controls the employer, even if it can take decisions which are binding on the latter, does not have the status of employer. In the case of a group of undertakings consisting of a parent company and one or more subsidiaries, the obligation to hold consultations with the workers' representatives falls on the subsidiary which has the status of employer only once that subsidiary, within which collective redundancies may be made, has been identified.

As regards the conclusion of the consultation procedure, the Court stated that, in the case of a group of undertakings, the consultation procedure must be concluded by the subsidiary affected by the collective redundancies before that subsidiary, on the direct instructions of its parent company or otherwise, terminates the contracts of the employees who are to be affected by those redundancies.

⁽²⁹⁾ Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1).

⁽³⁰⁾ Council Directive 98/59/EC of 20 July 1998 (OJ 1998 L 225, p. 16).

In Case C-12/08 *Mono Car Styling* (judgment of 16 July 2009), the Court ruled, here too for the first time, on the question whether Directive 98/59⁽³¹⁾ grants an individual right to employees who wish to query whether the information and consultation procedure has been complied with.

In its view, the right to information and consultation provided for in Directive 98/59, in particular in Article 2, is intended to benefit workers as a collective group and is therefore collective in nature. The level of protection of that collective right required by Article 6 of the directive is reached where the applicable national rules give workers' representatives a right to act which is not limited by specific conditions. Article 6 of Directive 98/59, read in conjunction with Article 2, is to be interpreted, therefore, as not precluding national rules which introduce procedures intended to permit both workers' representatives and the workers themselves as individuals to ensure compliance with the obligations laid down in that directive, but which limit the individual right of action of workers in regard to the complaints which may be raised and make that right subject to the requirement that workers' representatives should first have raised objections with the employer and that the worker concerned has informed the employer in advance of his intention to query whether the information and consultation procedure has been complied with.

The Court also noted that, in applying domestic law, the national court is required, applying the principle of interpreting national law in conformity with Community law, to consider all the rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of a directive in order to achieve an outcome consistent with the objective pursued by the directive. Accordingly, since Article 2 of Directive 98/59 precludes national rules which reduce the obligations of an employer who intends to proceed with collective redundancies below those laid down in that article, it is the task of the national court to ensure, within the limits of its jurisdiction, that the obligations binding such an employer are not reduced below those laid down in Article 2 of that directive.

In Case C-116/08 *Meerts* (judgment of 22 October 2009), the Court was presented with the opportunity to define more precisely the rights of an employee who has been dismissed while on part-time parental leave, as set out in Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC⁽³²⁾.

On the basis of the fact that Clause 2.6 of the framework agreement states that rights acquired or in the process of being acquired by the worker on the date on which parental leave starts are to be maintained as they stand until the end of parental leave, the Court held that it is apparent from both the wording of that provision and its context that that provision is intended to avoid the loss of or reduction in rights derived from an employment relationship, acquired or being acquired, to which the worker is entitled when he starts parental leave, and to ensure that, at the end of that leave, with regard to those rights, he will find himself in the same situation as that in which he was before the leave. Having regard to the objective of equal treatment between men and women which is pursued by the framework agreement on parental leave, the obligation to respect rights acquired or being acquired must be interpreted as articulating a particularly important principle of Community social law which cannot be interpreted restrictively. It is clear from the objectives of the framework agreement on parental leave that the concept of 'rights acquired or in the process of being acquired' in the framework agreement covers all the rights and benefits, whether in cash or in kind, derived directly or indirectly from the employment relationship, which the worker is

⁽³¹⁾ See preceding footnote.

⁽³²⁾ Council Directive 96/34/EC of 3 June 1996 (OJ 1996 L 145, p. 4), as amended by Council Directive 97/75/EC of 15 December 1997 (OJ 1998 L 10, p. 24).

entitled to claim from the employer at the date on which parental leave starts. Such rights and benefits include all those relating to employment conditions, such as the right of a full-time worker on part-time parental leave to a period of notice in the event of the employer's unilateral termination of a contract of indefinite duration, the length of which depends on the worker's length of service in the company and the aim of which is to facilitate the search for a new job. That body of rights and benefits would be compromised if, where the statutory period of notice was not observed in the event of dismissal during part-time parental leave, a worker employed on a full-time basis lost the right to have the compensation for dismissal due to him determined on the basis of the salary relating to his employment contract. National legislation which would result in the rights flowing from the employment relationship being reduced in the event of parental leave could discourage workers from taking such leave and could encourage employers to dismiss workers who are on parental leave rather than other workers. This would run directly counter to the aim of the framework agreement on parental leave, one of the objectives of which is to make it easier to reconcile working and family life.

The Court came to the conclusion that the framework agreement on parental leave precludes, where an employer unilaterally terminates a worker's full-time employment contract of indefinite duration, without urgent cause or without observing the statutory period of notice, whilst the worker is on part-time parental leave, the compensation to be paid to the worker from being determined on the basis of the reduced salary being received when the dismissal takes place.

In Case C-88/08 *Hütter* (judgment of 18 June 2009), the Court held that national law which excludes periods of employment completed before the age of 18 from being taken into account for the purpose of determining the incremental step at which contractual public servants of a Member State are graded amounts to discrimination on the grounds of age which cannot legitimately be justified and which is, therefore, contrary to Community law.

In its judgment, it found that such legislation, which establishes a difference in treatment between persons based on the age at which they acquired their professional experience, establishes a difference in treatment directly based on the criterion of age, within the meaning of Article 2(1) and (2)(a) of Directive 2000/78/EC⁽³³⁾.

The Court then noted that the objectives pursued by the legislation at issue, namely to not treat a general secondary education less favourably than a vocational education and to promote integration into the labour market of young people who have pursued a vocational education, are legitimate objectives for the purposes of Article 6(1) of Directive 2000/78.

None the less, the Court found that those two objectives appeared contradictory in so far as the contested measure could not promote them both at the same time. In addition, as regards the aim of not treating a general secondary education less favourably than a vocational education, the Court pointed out that the criterion of the age at which previous experience was acquired applied irrespective of the type of education pursued. In those circumstances, that criterion did not appear appropriate for achieving the aim. As regards the aim of promoting integration into the labour market of young people who have pursued a vocational education, the Court pointed out that non-accreditation of experience acquired before the age of 18 applied without distinction to all contractual public servants, whatever the age at which they were recruited. Since it did not take into account people's age at the time of their recruitment, that rule was not therefore appropriate

⁽³³⁾ 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).

for the purposes of promoting the entry into the labour market of a category of workers defined by their youth.

The Court came to the conclusion that the discrimination brought about by the legislation at issue could not be regarded as justified and was, therefore, contrary to Articles 1, 2 and 6 of Directive 2000/78.

Environment

As in previous years, disputes relating to environmental law have been very prominent before the Court.

In Case C-76/08 *Commission v Malta* (judgment of 10 September 2009), the Court was required to examine whether, as submitted by the Commission, the Republic of Malta had failed to fulfil its obligations under Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds⁽³⁴⁾, by authorising the opening of the spring hunting season for quails and turtle doves from 2004 to 2007.

Under Article 7(1) and (4) of that directive, those two species must not be hunted during their return to their rearing grounds. However, Article 9(1) provides for a system of exemptions to those prohibitions where there is no other satisfactory solution.

The Court stated that, even though the two species at issue are actually present in autumn in Malta, in the years in question hunters were able to capture only an inconsiderable number of birds during that period. Moreover, in autumn, only a restricted part of Malta is visited by those birds. Finally, the population of those two species of bird is not below a satisfactory level. It is apparent, in particular, from the International Union for Conservation of Nature and Natural Resources' Red List of Threatened Species that the species in question are listed in the 'least concern' category. The Court considered that, in those very specific circumstances, the hunting of those two species during the autumn season could not be regarded as constituting, in Malta, a satisfactory alternative solution to the opening of the spring hunting season.

However, that finding, far from opening up, without limit, the possibility of authorising hunting in spring, does so only so far as it is strictly necessary and provided that the other objectives pursued by the directive are not jeopardised. Thus, the Court considered that the opening of a spring hunting season — during which the two hunted species are returning to their rearing grounds — which resulted in a mortality rate three times higher for quails and eight times higher for turtle doves than for the autumn hunting season did not constitute an adequate solution that was strictly proportionate to the directive's objective of conservation of the species.

In those circumstances, the Court found that the Republic of Malta had failed to comply with the conditions for a derogation and, therefore, had failed to fulfil its obligations under the directive.

In Case C-165/08 *Commission v Poland* (judgment of 16 July 2009), the Court was required to examine whether, as claimed by the Commission, the Republic of Poland had failed to fulfil its obli-

⁽³⁴⁾ OJ 1979 L 103, p. 1.

gations under Directives 2001/18/EC⁽³⁵⁾ and 2002/53/EC⁽³⁶⁾ by imposing a general prohibition on the marketing of genetically modified seed varieties and their inclusion in the national catalogue of varieties.

The Republic of Poland submitted, in an original manner, that Directives 2001/18 and 2002/53 could not be applied in the case in point because they pursued the objectives of freedom of movement, protection of the environment and public health, whereas the national legislation pursued ethical or religious objectives. In other words, the contested national provisions were actually outside the scope of those directives, which meant that the obstacles to the free circulation of GMOs to which they gave rise, potentially in breach of Article 28 EC, could in some circumstances be justified under Article 30 EC.

The Court considered that, for the purposes of deciding the case, it was not necessary to rule on the question whether the Member States retained an option to rely on ethical or religious arguments in order to justify the adoption of internal measures which derogated from the provisions of Directives 2001/18 or 2002/53. It was sufficient to hold that the Republic of Poland had failed to establish that the true purpose of the contested national provisions was in fact to pursue the objectives relied upon. In those circumstances, general prohibitions such as those laid down in the contested national provisions infringed the obligations of the Republic of Poland under Articles 22 and 23 of Directive 2001/18 and Articles 4(4) and 16 of Directive 2002/53. The Court concluded that a Member State which prohibited the free circulation of genetically modified seed varieties and the inclusion of genetically modified varieties in the national catalogue of varieties failed to fulfil its obligations under Articles 22 and 23 of Directive 2001/18 and under Articles 4(4) and 16 of Directive 2002/53.

In Case C-254/08 *Futura Immobiliare and Others* (judgment of 16 July 2009) which concerned the calculation of waste tax, giving rise to the application of the 'polluter pays' principle, the Court interpreted Article 15(a) of Directive 2006/12/EC⁽³⁷⁾ as meaning that, as Community law currently stands, that provision does not preclude national legislation which, for the purposes of financing an urban waste management and disposal service, provides for a tax or charge calculated on the basis of an estimate of the volume of waste generated by users of that service and not on the basis of the quantity of waste which they have actually produced and presented for collection.

The national court based its reasoning on the fact that, in a situation where holders of waste have it handled by a collector, Article 15(a) of Directive 2006/12 provides that, in accordance with the 'polluter pays' principle, the cost of disposing of the waste must be borne by those holders. It is often difficult, indeed onerous, to determine the precise volume of urban waste presented for collection by each 'holder'. Accordingly, recourse to criteria founded, first, on the waste-production capacity of the 'holders', calculated on the basis of the surface area of the property which they occupy and of its use, and/or, second, on the nature of the waste produced can provide a means of calculating the costs of disposing of that waste and allocating them among the various 'holders', since those two parameters are such as to have a direct impact on the amount of the costs.

⁽³⁵⁾ Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC (OJ 2001 L 106, p. 1).

⁽³⁶⁾ Council Directive 2002/53/EC of 13 June 2002 on the common catalogue of varieties of agricultural plant species (OJ 2002 L 193, p. 1).

⁽³⁷⁾ Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste (OJ 2006 L 114, p. 9).

However, the Court stated that it was incumbent upon the national court to review, on the basis of the matters of fact and law placed before it, whether the tax for the disposal of private solid urban waste resulted in the allocation to certain 'holders', in the case in point hotel establishments, of costs which were manifestly disproportionate to the volumes or nature of the waste that they were liable to produce.

Visas, asylum and immigration

Cases in the field of asylum are increasing in number and the Court has had the opportunity to interpret several directives in this field for the first time.

Thus, in Case C-19/08 *Petrosian and Others* (judgment of 29 January 2009), the Court dealt with the procedure for transferring an application for asylum and had the opportunity, in that regard, to interpret Regulation (EC) No 343/2003⁽³⁸⁾. The Petrosian family, of Armenian origin, had applied for asylum in France, then in Sweden. The Swedish national authorities wanted to send the family back to France. However, that decision was challenged several times by the Petrosian family, with the result that the six-month period laid down in Article 20(1)(d) of the regulation had expired. That period, which 'runs as from the time of the decision on an appeal or review', is intended to enable the Member State in which the application for asylum was made to transfer that application, whereas the expiry of that period makes that Member State responsible. The main issue in the case was the determination of the event which could trigger the six-month period.

In its answer the Court made a distinction between two hypotheses, namely where national legislation provides for an appeal with suspensive effect and where it does not. Thus, it decided that, where there is no provision for an appeal to have suspensive effect, the period for implementation of the transfer starts to run as from the time of the decision, explicit or presumed, by which the Member State requested to agree to the transfer agrees to take back the person concerned. By contrast, if the legislation of the Member State requesting the transfer provides for suspensive effect of an appeal, the period for implementation of the transfer begins to run, not as from the time of the provisional judicial decision suspending the implementation of the transfer procedure, but only as from the time of the judicial decision which rules on the merits of the procedure and which is no longer such as to prevent its implementation. In the light of the objective pursued by setting a period for the Member States, the start of that period should be determined in such a manner as to allow the Member States a six-month period which they are deemed to require in full in order to determine the practical details for carrying out the transfer. In addition, the Court took account of the observance of judicial protection and of the principle of procedural autonomy of the Member States.

Then, in Case C-465/07 *Elgafaji* (judgment of 17 February 2009), the Court had to give judgment on the extent of the subsidiary protection granted by Article 15 of Directive 2004/83/EC⁽³⁹⁾ on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees. The question referred asked whether the condition that there be a 'serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict' laid down in Article 15(c) must, as required by the European Court of Hu-

⁽³⁸⁾ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1).

⁽³⁹⁾ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12).

man Rights, be understood as meaning that the applicant for subsidiary protection has to adduce evidence that he is specifically targeted by reason of factors particular to his circumstances.

The Court answered that question in the negative. First of all, it affirmed the autonomy of Article 15 by stating that its content is different from that of Article 3 of the European Convention of Human Rights (ECHR) and must therefore be interpreted independently. Then, it held that the harm defined in Article 15(c) as consisting of a 'serious and individual threat to the applicant's life or person' covers a more general risk of harm than the other two types of harm defined in that article, such as the death penalty, which cover situations in which the applicant is specifically exposed to the risk of a particular type of harm. In addition, the threats referred to are inherent in a general situation of 'international or internal armed conflict'.

Lastly, the violence in question which gives rise to those threats is described as 'indiscriminate', a term which implies that it may extend to people irrespective of their personal circumstances. In that regard, the Court stated that the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection. The Court concluded by noting that the interpretation given of Article 15(c) was fully compatible with the European Convention of Human Rights and in particular with the case-law relating to Article 3 thereof.

Finally, the question referred in Joined Cases C-261/08 and C-348/08 *Zurita García and Choque Cabrera* (judgment of 22 October 2009) concerned the issue whether the Convention implementing the Schengen Agreement ('the CISA') and the Schengen Borders Code require the competent authorities in the Member States to adopt a decision to expel any third-country national who has been determined to be unlawfully present on the territory of a Member State. In that case, two expulsion orders were adopted against Mrs Garcia and Mr Cabrera because they were unlawfully present on Spanish territory. According to Spanish law and the interpretation thereof, the penalty imposed in such an instance is to be restricted to a fine, except where there is an additional factor which would justify replacing the fine with expulsion. Mrs Garcia and Mr Cabrera brought an action before the relevant national court, which, in turn, made a reference to the Court.

In its response, the Court noted, first of all, that there was a discrepancy between the wording of the Spanish-language version and the other language versions of the provision concerned. However, given that the Spanish version appeared to be the only language version in which expulsion appeared as an obligation and not an option for the authorities, the Court concluded that the real intention of the legislature was not to impose an obligation on the Member States to expel. In addition, the Court noted that the CISA favours the voluntary departure of a third-country national who is in a Member State unlawfully. Furthermore, although the CISA provides that, in certain circumstances, a third-country national must be expelled from a Member State on the territory of which he was apprehended, that consequence is, however, subordinate to the conditions laid down in the national law of the Member State concerned. Consequently, the Court considered that it is for the national law of each Member State to adopt, particularly with regard to the conditions under which expulsion may take place, the means for applying the basic rules established in the CISA relating to third-country nationals who do not fulfil, or no longer fulfil, the short-stay conditions for its territory. The Court concluded that neither the CISA nor the Schengen Borders Code obliges the Member States to adopt a decision to expel a third-country national who is unlawfully present on the territory of a Member State.

Judicial cooperation in civil matters and private international law

A number of important judgments were delivered in 2009 in the field of private international law. Worthy of mention, first of all, is Case C-133/08 *ICF* (judgment of 6 October 2009) in which the Court was required to interpret, for the first time, the Rome Convention on the law applicable to contractual obligations⁽⁴⁰⁾. Several questions relating to Article 4 of the Convention were referred to the Court, which began by noting that the Convention was concluded in order to continue, in the field of private international law, the work of unification of law set in motion by the adoption of the Brussels Convention on jurisdiction and the enforcement of judgments⁽⁴¹⁾. According to the Rome Convention, the parties are free to choose the law applicable to the contract which they enter into. If no choice is made, the contract is to be governed by the law of the country with which it is most closely connected. The Convention also provides for a presumption in favour of the place of residence of the party who effects the performance characteristic of that contract and for special connecting criteria, in particular as regards contracts for the carriage of goods. In that regard, the Court held that the connecting criterion provided for in Article 4(4) of the Convention applies to a charter-party, other than a 'single voyage charter-party', only when the main purpose of the contract is not merely to make available a means of transport, but the actual carriage of goods. In addition, the Court held that Article 4(5) of the Convention must be construed as meaning that, where it is clear from the circumstances as a whole that the contract is more closely connected with a country other than that determined on the basis of one of the criteria set out in Article 4(2) to (4) of the Convention, it is for the court to disregard those criteria and apply the law of the country with which the contract is most closely connected. Finally, the Court held that a part of a contract may exceptionally be governed by a law other than that which applies to the rest of the contract where the object of that part is independent.

The interpretation of Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation)⁽⁴²⁾ and of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention) has also given rise to several judgments which are worthy of mention. Case C-420/07 *Apostolides* (judgment of 28 April 2009) originated in the partition of Cyprus following the intervention of Turkish troops in 1974. The Republic of Cyprus, which joined the European Union in 2004, has control of only the southern part of the island, whereas the northern part became the Turkish Republic of Northern Cyprus, which is recognised only by Turkey. In those circumstances, a protocol annexed to the Act of Accession of the Republic of Cyprus suspends the application of Community law in the areas over which the government of that Member State does not exercise effective control. A Cypriot national applied for the recognition and enforcement of two judgments delivered by a court established in the southern part of the island, ordering two British citizens to vacate a property situated in the northern part. The referring court, a court in the United Kingdom, referred several questions to the Court of Justice concerning the interpretation and application of Regulation No 44/2001. The Court held, first of all, that the derogation laid down in the protocol does not preclude the application of Regulation No 44/2001 to a judgment which is given by a Cypriot court sitting in the government-controlled area, but concerns land situated in the northern area. The Court then noted that the fact that the property is situated in an area over which the government does not exercise effective control and, therefore,

⁽⁴⁰⁾ Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (OJ 1980 L 266, p. 1).

⁽⁴¹⁾ Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1972 L 299, p. 32).

⁽⁴²⁾ Council Regulation (EC) No 44/2001 of 22 December 2000 (OJ 2001 L 12, p. 1).

that the judgments at issue cannot, as a practical matter, be enforced where the land is situated does not constitute a ground for refusal of recognition and enforcement of judgments in another Member State. Article 22(1) of Regulation No 44/2001 concerns the international jurisdiction of the courts of the Member States and not their domestic jurisdiction. The Court also noted, in relation to the exception of public policy of the Member State in which recognition is sought, that a court cannot, without undermining the aim of Regulation No 44/2001, refuse recognition of a judgment emanating from a court in another Member State solely on the ground that it considers that national or Community law was misapplied in that judgment. In such a situation, the exception applies only where the error of law means that the recognition or enforcement of the judgment constitutes a manifest breach of an essential rule of law in the national legal order of the Member State concerned. Finally, the Court held that the recognition or enforcement of a default judgment cannot be refused where the defendant was able to commence proceedings to challenge the default judgment and those proceedings enabled him to argue that he had not been served with the document which instituted the proceedings or with the equivalent document in sufficient time and in such a way as to enable him to arrange for his defence.

In Case C-185/07 *Allianz (formerly Riunione Adriatica di Sicurta)* (judgment of 10 February 2009), the Court held that it is incompatible with Regulation No 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State (anti-suit injunction) ⁽⁴³⁾ on the ground that such proceedings would be contrary to an arbitration agreement. The Court noted that proceedings which lead to the making of an anti-suit injunction cannot come within the scope of Regulation No 44/2001 but may have consequences which undermine its effectiveness. This is so, *inter alia*, where such proceedings prevent a court of another Member State from exercising the jurisdiction conferred on it by Regulation No 44/2001. The Court thus held that, if, because of the subject matter of the dispute, that is, the nature of the rights to be protected in proceedings, those proceedings come within the scope of Regulation No 44/2001, a preliminary issue concerning the applicability of an arbitration agreement also comes within its scope of application. It follows that the objection of lack of jurisdiction on the basis of the existence of an arbitration agreement comes within the scope of Regulation No 44/2001 and that it is therefore exclusively for that court to rule on the objection and on its own jurisdiction, pursuant to the regulation. The use of an anti-suit injunction to prevent a court of a Member State, which normally has jurisdiction to resolve a dispute under Regulation No 44/2001, from ruling on the very applicability of the regulation to the dispute brought before it necessarily amounts to stripping that court of the power to rule on its own jurisdiction. An anti-suit injunction is therefore contrary to the general principle that every court seised itself determines, under the rules which it must apply, whether it has jurisdiction to resolve the dispute before it. In addition, it runs counter to the trust which the Member States accord to one another's legal systems and judicial institutions. It is therefore not compatible with Regulation No 44/2001.

The scope of Regulation No 44/2001 was also at the centre of Case C-111/08 *SCT Industri* (judgment of 2 July 2009). The Court held that that regulation was not applicable to an action to recover ownership brought in the context of insolvency proceedings. More specifically, taking into account the close link which it has with bankruptcy proceedings, an action seeking the annulment of a transfer of shares effected by a liquidator in the context of insolvency proceedings falls under the exception to the application of Regulation No 44/2001 concerning bankruptcy.

After having considered, in Case C-386/05 *Color Drack* [2007] ECR I-3699, contracts for the sale of goods providing for several places of delivery, in Case C-204/08 *Rehder* (judgment of 9 July 2009)

⁽⁴³⁾ See also Case C-159/02 *Turner* [2004] ECR I-3565.

the Court was faced with contracts for the provision of services providing for several places at which services are provided, and more specifically, air transport contracts. It held, in this case, that the application of the rule of special jurisdiction in matters relating to a contract, laid down in Article 5(1) of Regulation No 44/2001, reflects an objective of proximity and the reason for that rule is the existence of a close link between the contract and the court called upon to hear and determine the case. In the light of the objectives of proximity and foreseeability, it is therefore necessary, where there are several places at which services are provided in different Member States, to identify the place with the closest linking factor between the contract in question and the court having jurisdiction, in particular the place where, under the contract, the main provision of services is to be carried out. In the case of air transport of passengers from one Member State to another, carried out on the basis of a contract with only one airline, the court having jurisdiction to deal with a claim for compensation founded on that transport contract and on Regulation (EC) No 261/2004 establishing common rules on compensation to passengers⁽⁴⁴⁾ is that, at the applicant's choice, which has territorial jurisdiction over the place of departure or place of arrival of the aircraft.

In Case C-394/07 *Gambazzi* (judgment of 2 April 2009), the Court ruled on the notion of 'judgment' for the purposes of the provisions on recognition and execution in the Brussels Convention and on the scope of the ground for refusal of recognition and enforcement based on an infringement of the public policy of the State in which enforcement is sought. First, it held that judgments and orders given in default of appearance are 'judgments' where they are given in civil proceedings which, as a rule, adhere to the adversarial principle. Article 25 of the Brussels Convention refers, without distinction, to all judgments given by a court or tribunal of a Contracting State. For such decisions to fall within the scope of the Convention, it is sufficient that, before their recognition and enforcement are sought, they have been, or have been capable of being, the subject in the State of origin of an inquiry in adversarial proceedings. The Court stated that the fact that the court has entered judgment as if the defendant, who entered appearance, was in default, is not sufficient to call into question categorisation as a 'judgment'. Second, the Court held that the court of the State in which enforcement is sought may take into account, with regard to the exception of public policy, the fact that the court of the State of origin ruled on the applicant's claims without hearing the defendant, who entered appearance but who was excluded from the proceedings by order on the ground that he had not complied with the obligations imposed by other orders made earlier in the same proceedings. The exception of public policy may be used if it appears to it that the exclusion measure constituted a manifest and disproportionate infringement of the defendant's right to be heard. Review by the national court must relate not only to the circumstances in which the decisions were taken, but also to the circumstances in which the injunctive orders were adopted, and in particular to verifying the legal remedies made available to the defendant and the possibility for him to be heard.

The Court was also required to interpret certain provisions 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 No 1347/2000⁽⁴⁵⁾. First of all, reference shall be made to Case C-168/08 *Hadadi* (judgment of 16 July 2009), in which the Court gave judgment on the nationality criterion of couples in choosing the court which has jurisdiction in divorce matters. In that case, two spouses, both of Franco-Hungarian nationality, had both applied for a divorce in one of those countries. The Court noted, first of all, that Regulation No 2201/2003 does not make

⁽⁴⁴⁾ 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 No 295/91 (OJ 2004 L 46, p. 1).

⁽⁴⁵⁾ 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 (OJ 2003 L 338, p. 1).

a distinction according to whether a person holds one or several nationalities. Consequently, the provision of that regulation under which the courts of the Member State of which the spouses hold the nationality are to have jurisdiction cannot be interpreted in one way where the two spouses have the same dual nationality and another way where they have only the same, single, nationality. Where the spouses hold both the nationality of the Member State of the court seised and that of another Member State, the court seised must take into account the fact that the spouses both have the nationality of the other Member State and that the courts of that other Member State could properly have been seised of the case under that regulation. The Court then stated that the rules governing jurisdiction in divorce matters laid down in that regulation are based on a number of alternative objective grounds with no hierarchy being established between them. Therefore, the coexistence of several courts having jurisdiction is permitted, without any hierarchy being established between them. The Court concluded that, where spouses each hold the nationality of the same two Member States, the regulation precludes the jurisdiction of the courts of one of those Member States from being rejected on the ground that the applicant does not put forward other links with that State. It continued by stating that the courts of the Member States of which the spouses hold the nationality have jurisdiction under that regulation and the spouses may seise the court of the Member State of their choice.

Second, in Case C-523/07 A (judgment of 2 April 2009), the Court interpreted, for the first time, the concept of ‘habitual residence’ of the child as a criterion for the jurisdiction of the courts in matters of parental responsibility. Since Regulation No 2201/2003 makes no express reference to the law of the Member States for the purpose of determining the meaning and scope of the notion of ‘habitual residence’, the Court held that it is an autonomous concept. Having regard to the context and the objective of that regulation, the habitual residence corresponds to the place which reflects some degree of integration by the child in a social and family environment. In particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family’s move to that State, the child’s nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. The Court then noted that it is for the national court to determine the habitual residence of the child, taking account of all the circumstances specific to each individual case. In addition, the Court explained the system of urgent or protective measures within the meaning of Article 20 of Regulation No 2201/2003. Such measures may be decided by a national court if they are urgent. They must be taken in respect of persons in the Member State concerned and must be provisional. The taking of those measures, adopted in the best interests of the child, and their binding nature are determined in accordance with national law. Once the protective measure has been taken, the national court is not required to transfer the case to the court of another Member State having jurisdiction. However, if the protection of the best interests of the child so requires, the national court which declared that it did not have jurisdiction must inform the court of another Member State having jurisdiction that such a measure has been taken.

The service of notarial acts in the absence of legal proceedings was at issue in Case C-14/08 *Roda Golf & Beach Resort* (judgment of 25 June 2009). The Court held in that case that the term ‘extrajudicial document’, within the meaning of Article 16 of Regulation No 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters⁽⁴⁶⁾, is a Community law concept. The objective pursued by the Treaty of Amsterdam of creating an area of freedom, security and justice and the transfer, from the EU Treaty to the EC Treaty, of the body of rules enabling measures in the field of judicial cooperation in civil matters having cross-border implications to be adopted testifies to the will of the Member States to anchor such measures firmly

⁽⁴⁶⁾ Council Regulation (EC) No 1348/2000 of 29 May 2000 (OJ 2000 L 160, p. 37).

in the Community legal order and thus to lay down the principle that they are to be interpreted autonomously. The Court held that the service of notarial acts in the absence of legal proceedings falls within the scope of Regulation No 1348/2000. Given that the system for intra-Community service seeks to ensure the proper functioning of the internal market, the judicial cooperation referred to in Article 65 EC and Regulation No 1348/2000 cannot be limited to legal proceedings alone. That cooperation may also manifest itself in the absence of legal proceedings if it has cross-border implications and is necessary for the proper functioning of the internal market. The Court noted that the broad definition of the concept of extrajudicial document is unlikely to place an excessive burden on the resources of the national courts since, first, the Member States may also designate as transmitting agencies and receiving agencies for the purpose of service bodies other than those courts and, second, the Member States may provide for the option of effecting service directly by post to persons residing in another Member State.

Police and judicial cooperation in criminal matters

In Case C-123/08 *Wolzenburg* (judgment of 6 October 2009), the Court was asked to give a ruling on the issue of the compatibility with European Union law of national legislation providing for differential treatment of nationals of one Member State and those from other Member States in relation to the refusal to execute a European arrest warrant. Contrary to the system in place for Netherlands nationals, the Netherlands legislation implementing Framework Decision 2002/584/JAI on the European arrest warrant⁽⁴⁷⁾ provides an exception to such execution for nationals of other Member States only if they have lawfully resided in the Netherlands for a continuous period of five years and they are in possession of a residence permit of indefinite duration. The Court began by noting that the first paragraph of Article 12 EC is applicable since the Member States cannot, in the context of the implementation of a framework decision adopted on the basis of the EU Treaty, infringe Community law, in particular the provisions of the EC Treaty relating to the freedom accorded to every citizen of the Union to move and reside freely within the territory of the Member States. The Court then stated that Article 4(6) of Framework Decision 2002/584 is to be interpreted as meaning that, where a citizen of the Union is at issue, the Member State of execution of the warrant cannot, in addition to a condition as to the duration, make application of the ground for non-execution of the warrant subject to supplementary administrative requirements, such as possession of a residence permit of indefinite duration. Finally, the Court came to the conclusion that the principle of non-discrimination laid down in Article 12 EC does not preclude legislation of a Member State of execution under which the competent judicial authority of that State is to refuse to execute a European arrest warrant issued against one of its nationals with a view to the enforcement of a custodial sentence, whilst such a refusal is, in the case of a national of another Member State having a right of residence as a citizen of the Union, subject to the condition that that person has lawfully resided for a continuous period of five years in that Member State of execution. The Court justified that solution by stating that that condition, first, aims to ensure that nationals of another Member State are sufficiently integrated in the Member State of execution and, second, does not go beyond what is necessary to attain that objective.

⁽⁴⁷⁾ Council Framework Decision 2002/584/JAI of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1).