

A — The Court of Justice in 2010: changes and activity

By Mr Vassilios Skouris, President of the Court of Justice

The first part of the Annual Report gives an overview of the activities of the Court of Justice of the European Union in 2010. 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. It includes, second, an analysis of the statistics relating to changes in the Court of Justice's workload and in the average duration of proceedings. It presents, third, as each year, the main developments in the case-law, arranged by subject-matter.

1. Since the Treaty of Lisbon provides that the European Union is to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR), the procedure for bringing about its accession was begun in 2010. The first stage of that procedure was concluded and a negotiating mandate was given to the European Commission to pursue negotiations with the Council of Europe. The accession of the European Union to the ECHR will incontestably have effects upon the European Union's judicial system as a whole.

For this reason, the Court of Justice has followed that procedure closely as it progresses and, with a view to contributing to the efforts being made to bring to fruition the proposed accession, which raises complex legal questions, it submitted its initial reflections on a particular aspect linked to the way in which the European Union's judicial system functions, in a document published on 5 May 2010 ⁽¹⁾. In this document, the Court concluded that, in order to observe the principle of subsidiarity which is inherent in the ECHR and at the same time to ensure the proper functioning of the judicial system of the European Union, a mechanism must be available which is capable of ensuring that the question of the validity of a European Union act can be brought effectively before the Court of Justice before the European Court of Human Rights rules on the compatibility of that act with the ECHR.

Finally, the amendments made to the Rules of Procedure of the Court of Justice on 23 March 2010 (OJ 2010 L 92, p. 2) are also worthy of mention. These amendments are intended to make the changes to the Rules of Procedure that became necessary following the entry into force of the Treaty of Lisbon.

2. The statistics concerning the Court's activity in 2010 show, overall, sustained productivity and a very significant improvement in efficiency as regards the duration of proceedings. The unprecedented increase in the number of cases brought in 2010, in particular the number of references for a preliminary ruling submitted to the Court, is also to be noted.

The Court completed 522 cases in 2010 (net figures, that is to say, taking account of the joinder of cases), a slight decrease compared with the previous year (543 cases completed in 2009). Of those cases, 370 were dealt with by judgments and 152 gave rise to orders.

In 2010, the Court had 631 new cases brought before it (without account being taken of the joinder of cases on the ground of similarity), which amounts to a very significant increase compared with 2009 (562 new cases) and constitutes the highest number of cases brought in the Court's history. The situation is identical as regards references for a preliminary ruling. In 2010 the number of references for a preliminary ruling submitted was, for the second year in succession, the

⁽¹⁾ http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention_en_2010-05-21_12-10-16_272.pdf

highest ever reached, and it exceeded the number in 2009 by 27.4% (385 cases in 2010 compared with 302 cases in 2009).

So far as concerns the duration of proceedings, the statistics prove very positive. In the case of references for a preliminary ruling, the average duration amounted to 16.1 months. A comparative analysis covering the entire period for which the Court has reliable statistical data shows that the average time taken to deal with references for a preliminary ruling reached its shortest in 2010. The average time taken to deal with direct actions and appeals was 16.7 months and 14.3 months respectively (compared with 17.1 months and 15.4 months in 2009).

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 wider use of the various procedural instruments at its disposal to expedite the handling of certain cases, in particular the urgent preliminary ruling procedure, priority treatment, the accelerated or expedited procedure, the simplified procedure and the possibility of giving judgment without an opinion of the Advocate General.

In 2010, use of the urgent preliminary ruling procedure was requested in six cases and the designated chamber considered that the conditions under Article 104b of the Rules of Procedure were met in five of them. Those cases were completed in an average period of 2.1 months.

Use of the expedited or accelerated procedure was requested 12 times in 2010, but the conditions under the Rules of Procedure were met in only four 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. In addition, priority treatment was granted in 14 cases.

The Court also continued to use the simplified procedure laid down in Article 104(3) of the Rules of Procedure to answer certain questions referred to it for a preliminary ruling. A total of 24 cases were brought to a close by orders made on the basis of that provision.

Finally, the Court made frequent use of the possibility offered by Article 20 of its Statute of determining cases without an opinion of the Advocate General where they do not raise any new point of law. About 50% of the judgments delivered in 2010 were delivered without an opinion (compared with 52% in 2009).

As regards the distribution of cases between the various formations of the Court, it may be noted that the Grand Chamber dealt with roughly 14%, chambers of five judges with 58%, and chambers of three judges with approximately 27%, of the cases brought to a close by judgments or by orders involving a judicial determination in 2010. Compared with the previous year, a considerable increase may be noted in the proportion of cases dealt with by the Grand Chamber (8% in 2009), while the proportion of cases dealt with by three-judge chambers decreased significantly (34% in 2009).

The section of this report devoted to statistics concerning the Court's judicial activity should be consulted for more detailed information regarding the statistics for 2010.

B — Case-law of the Court of Justice in 2010

This section of the Annual Report provides an overview of the case-law in 2010.

Constitutional or institutional issues

In 2010, significant additions were made to the case-law on fundamental rights.

In Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert* (judgment of 9 November 2010), the Court had the opportunity to explain the requirements flowing from the right to the protection of personal data when it was called upon to review the validity of Regulations (EC) Nos 1290/2005 and 259/2008 ⁽¹⁾ governing the financing of the common agricultural policy and requiring the publication of information on natural persons who receive aid from the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD). Those regulations required such information to be made available to the public, in particular through websites operated by the national offices. Asked to give a preliminary ruling concerning the relationship between the right, recognised by the Charter of Fundamental Rights of the European Union, to the protection of personal data and the obligation of transparency in relation to European funds, the Court stated that publication on a website of data naming the beneficiaries of the funds and indicating the precise amounts received by them constitutes, because the site is freely accessible to third parties, an interference with the right of the beneficiaries concerned to respect for their private life in general and to the protection of their personal data in particular. In order to be justified, such interference must be provided for by law, respect the essence of those rights and, pursuant to the principle of proportionality, be necessary and genuinely meet objectives of general interest recognised by the European Union, whilst derogations from and limitations on those rights must apply only in so far as is strictly necessary. In this context, the Court held that, whilst in a democratic society taxpayers have a right to be kept informed of the use of public funds, the Council and the Commission were nevertheless required to strike a proper balance between the various interests involved, and it was therefore necessary, before adopting the contested provisions, to ascertain whether publication of the data via a single website in a Member State went beyond what was necessary for achieving the legitimate aims pursued. The Court thus declared certain provisions of Regulation (EC) No 1290/2005, and Regulation (EC) No 259/2008 in its entirety, to be invalid, without prejudice to the effects of the publication of the lists of beneficiaries of EAGF and EAFRD aid carried out by the national authorities during the period prior to the date on which the judgment was delivered.

The Court delivered on 22 December 2010, in Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft*, another important judgment in the field of fundamental rights, concerning the interpretation of the principle of effective judicial protection as enshrined in Article 47 of the Charter of Fundamental Rights of the European Union.

The main proceedings were brought by the German commercial company DEB against the German State and concerned an application for legal aid submitted by that company to the German courts. DEB wished to bring an action for damages against the German State in order to obtain

⁽¹⁾ Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy (OJ 2005 L 209, p. 1), as amended by Council Regulation (EC) No 1437/2007 of 26 November 2007 (OJ 2007 L 322, p. 1), and Commission Regulation (EC) No 259/2008 of 18 March 2008 laying down detailed rules for the application of Regulation (EC) No 1290/2005 as regards the publication of information on the beneficiaries of funds deriving from the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD) (OJ 2008 L 76, p. 28).

compensation for the damage allegedly caused to it by that Member State's delay in the transposition of Directive 98/30/EC concerning common rules for the internal market in natural gas ⁽²⁾. It was refused legal aid, on the ground that the conditions laid down by German law for the grant of such aid to legal persons were not met. The court called upon to decide the appeal brought against that refusal submitted a reference for a preliminary ruling to the Court of Justice, in order to ascertain whether the principle of effectiveness of European Union law precludes, in the context of a procedure for pursuing a claim seeking to establish State liability under European Union law, a national rule under which the pursuit of a claim before the courts is subject to the making of an advance payment in respect of costs and which limits the grant of legal aid to a legal person that is unable to make that advance payment, by requiring compliance with very stringent conditions.

The Court stated that, in answering that question, account has to be taken of the Charter of Fundamental Rights of the European Union which, since the entry into force of the Treaty of Lisbon, has acquired the same legal value as the Treaties. More specifically, the Court referred to Article 47 of the Charter which provides for a right of effective access to justice for any persons wishing to assert the rights and freedoms that they are guaranteed by European Union law. The third paragraph of Article 47 states that 'legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice'. The Court held, first, that it is not impossible for the principle of effective judicial protection, as enshrined in Article 47 of the Charter, to be relied upon by legal persons to obtain dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer. Next, the Court explained, in light of the case-law of the European Court of Human Rights on Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which enshrines the right of effective access to justice, that it is for the national court to ascertain, first, whether the conditions for granting legal aid constitute a limitation on the right of access to the courts which is liable to undermine the very core of that right, second, whether those conditions pursue a legitimate aim and, finally, whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which it is sought to achieve. The Court then detailed the factors that the national court may take into account, taking up the factors used in the case-law of the European Court of Human Rights, inter alia the importance of what is at stake, the complexity of the applicable law and procedure and, with regard more specifically to legal persons, their form and whether they are profit-making or non-profit-making as well as the financial capacity of the partners or shareholders.

The manner in which a national court must implement State liability where the State infringes its Community obligations continues to give rise to questions.

In Case C-118/08 *Trasportes Urbanos y Servicios Generales* (judgment of 26 January 2010), the referring court wished to ascertain the Court's position regarding application of a rule under which an action for damages against the State, alleging a breach of European Union law by national legislation, can succeed only if domestic remedies are exhausted, when such a rule is not applicable to an action for damages against the State alleging breach of the Constitution. After recalling the principles governing the Member States' obligation to make reparation in the event of breach of European Union law, an obligation which arises by virtue of the latter's primacy, the Court replied that European Union law precludes the application of such a rule. Relying on the principle of equivalence, it held that all the rules applicable to actions are to apply without distinction to an action alleging infringement of European Union law and to an action alleging infringement of national law: the purpose of the two actions for damages is similar since they seek compensation for the loss suffered as a result of conduct of the State. In light of the principle of equivalence, the sole

⁽²⁾ Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 (OJ 1998 L 204, p. 1).

difference, relating to the court having jurisdiction to find the breach of law, is not sufficient to establish a distinction between those two actions.

In Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* (judgment of 22 June 2010), the Court had the opportunity to rule on whether the ‘priority question on constitutionality’, a procedural mechanism recently introduced in France, is compatible with European Union law. The Court recalled that, in order to ensure the primacy of European Union law, the functioning of the system of cooperation between it and national courts requires a national court to be free to refer to the Court for a preliminary ruling any question that it considers necessary, at whatever stage of the proceedings it considers appropriate, even at the end of an interlocutory procedure for the review of constitutionality. Accordingly, Article 267 TFEU does not preclude national legislation which establishes an interlocutory procedure for the review of the constitutionality of national laws, in so far as the other national courts or tribunals remain free to:

- make a reference to the Court at whatever stage of the proceedings they consider appropriate, even at the end of the interlocutory procedure for the review of constitutionality;
- adopt any measure necessary to ensure provisional judicial protection of the rights conferred under the European Union legal order; and
- disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be contrary to European Union law.

With regard to the issue, broached many times already, of the consequences attaching to an interpretation of European Union law that the Court provides when exercising its jurisdiction to give preliminary rulings, Case C-242/09 *Albron Catering* (judgment of 21 October 2010) provided the opportunity for the Court to recall that, when exercising the jurisdiction conferred upon it by Article 267 TFEU, it is only exceptionally that it may, in application of the general principle of legal certainty inherent in the legal order of the European Union, be moved to restrict for any person concerned the opportunity of relying on a provision which it has interpreted with a view to calling in question legal relationships established in good faith. Two essential criteria must be fulfilled before such a limitation can be imposed, namely that those concerned should have acted in good faith and that there should be a risk of serious difficulties. Accordingly, the Court held that, since it had not been presented with any concrete evidence capable of establishing a risk of serious difficulties in connection with massive litigation which might follow the judgment — which relates to the interpretation of Directive 2001/23/EC ⁽³⁾ — be brought against undertakings which had carried out a transfer covered by the directive, it was not appropriate to limit in time the effects of the judgment.

With regard to the contribution made by the Court in defining the effects of agreements concluded by the European Union with non-member countries, Case C-386/08 *Brita* (judgment of 25 February 2010) may be noted, in which several important questions relating to the interpretation of international agreements, in particular the EC–Israel Association Agreement ⁽⁴⁾, were raised.

⁽³⁾ Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ 2001 L 82, p. 16).

⁽⁴⁾ Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part, signed in Brussels on 20 November 1995 (OJ 2000 L 147, p. 3).

The Court explained that the rules laid down in the Vienna Convention on the Law of Treaties ⁽⁵⁾ apply to an agreement concluded between a State and an international organisation, such as the EC–Israel Association Agreement, in so far as the rules are an expression of general customary international law. In particular, the provisions of the association agreement which define its territorial scope must be interpreted in accordance with the principle *pacta tertiis nec nocent nec prosunt*. In light of those principles, the Court held that the customs authorities of an importing Member State may refuse to grant the preferential treatment provided for under the EC–Israel Association Agreement to goods that originate in the West Bank. It follows from another association agreement, the EC–PLO Association Agreement ⁽⁶⁾, that if the products concerned can be regarded as products originating in the West Bank or Gaza Strip, the customs authorities of the West Bank and Gaza Strip have sole competence to issue a movement certificate. To interpret the EC–Israel Association Agreement as meaning that the Israeli customs authorities enjoy competence in respect of products originating in the West Bank would be tantamount to imposing on the Palestinian customs authorities an obligation to refrain from exercising the competence conferred upon them by virtue of the provisions of the EC–PLO agreement. Such an interpretation would have the effect of creating an obligation for a third party without its consent and would thus be contrary to the abovementioned principle of general international law, *pacta tertiis nec nocent nec prosunt*, consolidated by the Vienna Convention.

In addition, the Court stated that, for the purposes of the procedure laid down by the EC–Israel Association Agreement, the customs authorities of the importing State are not bound by the proof of origin submitted or by the reply given by the customs authorities of the exporting State where that reply does not contain sufficient information to enable the real origin of the products to be determined.

As in previous years, access to documents of the institutions generated litigation and three judgments are particularly worthy of note. In Case C-28/08 P *Commission v Bavarian Lager* (judgment of 29 June 2010), the Court considered the relationship between Regulation (EC) No 1049/2001 ⁽⁷⁾ and Regulation (EC) No 45/2001 ⁽⁸⁾.

Regulation (EC) No 1049/2001 lays down as a general rule that the public may have access to the documents of the institutions, but provides for exceptions, including where disclosure would undermine the protection of privacy and the integrity of the individual in accordance with European Union legislation regarding the protection of personal data. According to the Court, where a request based on Regulation (EC) No 1049/2001 seeks to obtain access to documents including personal data, the provisions of Regulation (EC) No 45/2001 become applicable in their entirety. By not taking account of this reference to the European Union legislation concerning the protection of personal data and by limiting the application of the exception to situations in which privacy or the integrity of the individual would be infringed for the purposes of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of

⁽⁵⁾ Vienna Convention on the Law of Treaties of 23 May 1969 (*United Nations Treaty Series*, Vol. 1155, p. 331).

⁽⁶⁾ Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community, of the one part, and the Palestine Liberation Organisation (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, of the other part, signed in Brussels on 24 February 1997 (OJ 1997 L 187, p. 3).

⁽⁷⁾ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

⁽⁸⁾ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ 2001 L 8, p. 1).

the European Court of Human Rights, the Court of First Instance (now 'the General Court') gave Regulation (EC) No 1049/2001 a particular and restrictive interpretation which does not correspond to the equilibrium which the European Union legislature intended to establish between the two regulations in question.

On the substance, the Court held that the Commission rightly decided that the list of participants at a meeting held in the context of a procedure for failure to fulfil obligations contained personal data and that, in requiring, for persons who had not given their express consent, that the person requesting access establish the necessity of having those personal data transferred, the Commission complied with Article 8(b) of Regulation (EC) No 45/2001.

On the same day, the Court delivered another very important judgment on access to documents (judgment of 29 June 2010 in Case C-139/07 P *Commission v Technische Glaswerke Ilmenau*), this time concerning the relationship between Regulation (EC) No 1049/2001 and Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽⁹⁾. The Court held that, in order to justify refusal of access to a document the disclosure of which has been requested, it is not sufficient, in principle, for that document to fall within an activity mentioned in Article 4(2) of Regulation (EC) No 1049/2001. The institution concerned must also supply explanations as to how access to the document could specifically and effectively undermine the interest protected by an exception laid down in that article. The Court stated, however, that it is, in principle, open to the Community institution to base its decisions on general presumptions which apply to certain categories of documents.

As regards procedures for reviewing State aid, such presumptions may arise from Regulation (EC) No 659/1999 and from the case-law concerning the right to consult documents on the Commission's administrative file. Regulation (EC) No 659/1999 does not lay down any right of access to documents in the Commission's administrative file for interested parties, with the exception of the Member State responsible for granting the aid. If those interested parties were able to obtain access to the documents in the Commission's administrative file on the basis of Regulation (EC) No 1049/2001, the system for the review of State aid would be called into question. Account should be taken of the fact that, in the procedures for reviewing State aid, interested parties other than the Member State concerned do not have the right to consult the documents in the Commission's administrative file and the existence of a general presumption that disclosure of documents in the administrative file in principle undermines protection of the objectives of investigation activities should therefore be acknowledged. That general presumption does not exclude the right of interested parties to demonstrate that a given document disclosure of which has been requested is not covered by the presumption, or that there is a higher public interest justifying the disclosure of the document concerned by virtue of Article 4(2) of Regulation (EC) No 1049/2001.

A presumption mechanism of that kind was also at the heart of Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden v API et Commission* (judgment of 21 September 2010), in which the Court considered the question of access to pleadings lodged before it by an institution in court proceedings. According to the Court, such pleadings display quite specific characteristics since they are inherently part of the judicial activities of the Court: they are drafted exclusively for the purposes of the court proceedings, in which they play the key role. Judicial activities are as such excluded from the scope, established by the European Union rules, of the right of access to documents. The protection of court proceedings implies, in particular, that compliance with

⁽⁹⁾ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1).

the principles of equality of arms and the sound administration of justice must be ensured. If the content of the institution's pleadings were to be open to public debate, there would be a danger that the criticism levelled against them might influence the position defended by the institution. Such a situation could well upset the vital balance between the parties to a dispute before the courts of the European Union since only the institution concerned by an application for access to its documents, and not all the parties to the proceedings, would be bound by the obligation of disclosure. Furthermore, the exclusion of judicial activities from the scope of the right of access to documents is justified in the light of the need to ensure that, throughout the court proceedings, the exchange of argument by the parties and the deliberations take place in an atmosphere of total serenity. Disclosure of the pleadings would have the effect of exposing judicial activities to external pressure, albeit only in the perception of the public, and would disturb the serenity of the proceedings. Consequently, the Court held that there is a general presumption that disclosure of the pleadings lodged by one of the institutions in court proceedings would undermine the protection of those proceedings, for the purposes of the second indent of Article 4(2) of Regulation (EC) No 1049/2001, while those proceedings remain pending, but such a general presumption does not exclude the right of an interested party to demonstrate that a given document is not covered by the presumption.

On the other hand, where the judicial activities of the Court have come to an end, there are no longer grounds for presuming that disclosure of the pleadings would undermine those activities, and a specific examination of the documents to which access is requested is then necessary to establish whether their disclosure may be refused on the basis of the second indent of Article 4(2) of Regulation (EC) No 1049/2001.

European citizenship

In this constantly developing field, Case C-145/09 *Tsakouridis* (judgment of 23 November 2010) raised before the Court the difficult issue of the conditions for expulsion of a citizen of the Union who has a right of permanent residence under Article 28 of Directive 2004/38/EC on freedom of movement and residence ⁽¹⁰⁾. The Court stated first of all that an expulsion measure must be founded on an individual examination of the situation of the person concerned, taking into account considerations such as his age, his state of health, the centre of his personal, family or occupational interests, the duration of his absences from the host Member State and the extent of his links with the country of origin, whilst the decisive criterion for the grant of enhanced protection against an expulsion measure remains that of residence in the host Member State for the 10 years preceding such a measure. The Court further pointed out that an expulsion measure can be justified on 'imperative grounds of public security' or 'serious grounds of public policy or public security' within the meaning of Article 28 of Directive 2004/38/EC only if, having regard to the exceptional seriousness of the threat, such a measure is necessary for the protection of the interests it aims to secure, provided that that objective cannot be attained by less restrictive means, having regard to the length of residence of the Union citizen in the host Member State. Finally, the Court also noted that the fight against crime in connection with dealing in narcotics as part of an organised group, the offence of which the person concerned was convicted, is capable of being covered by the concept of 'imperative grounds of public security' or 'serious grounds of public policy or public security' within the meaning of Article 28 of the directive.

⁽¹⁰⁾ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda at OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34).

Staying with the issue of the rights of free movement and residence that are attached to European citizenship, Case C-73/08 *Bressol and Others* (judgment of 13 April 2010) should be noted, in which the Court considered whether national legislation limiting the number of students on university medical and paramedical courses who, whilst being citizens of the Union, are regarded as non-residents is compatible with European Union law. The Court stated first that, irrespective of any application of Article 24 of Directive 2004/38/EC to the situation of some of the students at issue in the main proceedings, national legislation which limits the number of students regarded as non-resident in the host Member State who may enrol for the first time at higher education establishments is contrary to Articles 18 and 21 of the Treaty, since the legislation results in unequal treatment between resident and non-resident students and, therefore, in discrimination based indirectly on nationality. Second, the Court observed that restrictive legislation of that kind can be justified by the objective of protecting public health only if the competent authorities conduct a detailed three-stage examination of the legislation in question: they must establish that there are genuine risks to the objective pursued, that the legislation is appropriate for attaining that objective and that the legislation is proportionate to that objective, and the entire analysis must be based on objective and detailed criteria and supported by figures. Finally, the Court stated that the national authorities would be unable to rely on Article 13 of the International Covenant on Economic, Social and Cultural Rights, adopted by the United Nations General Assembly on 16 December 1966, if the referring court were to hold that the legislation at issue in the main proceedings is not compatible with Articles 18 and 21 TFEU.

In Case C-162/09 *Lassal* (judgment of 7 October 2010), the Court devoted attention to Article 16 of Directive 2004/38/EC. More specifically, the reference for a preliminary ruling related to whether, for the purposes of acquisition of the right of permanent residence provided for in Article 16, a continuous period of five years' residence completed before 30 April 2006 — the date for transposition of that directive — in accordance with earlier instruments of European Union law must be taken into account and, if so, whether temporary absences which occurred before 30 April 2006, but after the continuous period of five years' legal residence, prevent a right of permanent residence within the meaning of the directive from being obtained. The Court answered the first part of the question in the affirmative, holding that, even though the possibility of obtaining a right of residence subject to compliance with the five-year period did not appear in the instruments of European Union law prior to Directive 2004/38/EC, refusal to take account of that continuous period of residence would entirely deprive the directive of its effectiveness and would give rise to a situation that is incompatible with the idea behind the directive of integration through length of residence. The Court held, second, that the objectives and the purpose of Directive 2004/38/EC, which is intended in particular to facilitate the exercise of the primary right to move and reside freely on the territory of the Member States, to promote social cohesion and to strengthen the feeling of Union citizenship by means of the right of residence, would be seriously compromised if that right of residence were refused to citizens of the Union who had legally resided in the host Member State for a continuous period of five years completed before 30 April 2006, on the sole ground that there had been temporary absence of less than two consecutive years subsequent to that period but before that date.

The account of the case-law relating to European citizenship will be concluded by Case C-135/08 *Rottmann* (judgment of 2 March 2010), in which the Court ruled on the conditions under which a European citizen who has acquired by means of deception nationality of a Member State by naturalisation may have that nationality withdrawn. According to the Court, European Union law, in particular Article 17 EC, does not preclude a Member State from withdrawing from a citizen of the Union nationality acquired by naturalisation when that nationality has been obtained by deception, since the decision withdrawing nationality corresponds to a reason in the public interest by reason of the deception which breaks the tie of nationality between the Member State and

its national. Nevertheless, the withdrawal decision must observe the principle of proportionality. Where, as in the case in point, the citizen who practised the deception has already lost his nationality of origin because of the naturalisation, the national courts have the task of examining the consequences that the withdrawal decision entails for the person concerned and for the members of his family and, in particular, of assessing whether the loss of the rights enjoyed by a Union citizen is justified having regard to the gravity of the offence committed by the person concerned, to the lapse of time between the naturalisation decision and the withdrawal decision and to whether it might be possible for that person to recover his nationality of origin. Loss of the nationality of origin and loss of the nationality of naturalisation are therefore not incompatible in principle with European Union law even though the decision withdrawing nationality results in the loss of citizenship of the European Union.

Free movement of goods

In Case C-108/09 *Ker-Optika* (judgment of 2 December 2010), the Court held that national legislation prohibiting the sale of contact lenses from other Member States via the Internet and their delivery to the consumer's home deprives traders from other Member States of a particularly effective means of selling those products and thus significantly impedes their access to the national market; it therefore constitutes an obstacle to the free movement of goods. The Court accepted that a Member State may impose a requirement that contact lenses are to be supplied by qualified staff, capable of providing the customer with information on the correct use and care of those products and on the risks linked to wearing them. Allowing contact lenses to be supplied only by opticians' shops which offer the services of a qualified optician secures the attainment of the objective of ensuring protection of consumers' health. The Court observed, however, that those services can also be supplied by ophthalmologists in places other than opticians' shops. Furthermore, those services are required, as a general rule, only when contact lenses are first supplied. At the time of subsequent supplies, it is sufficient that the customer advise the seller of the type of lenses which were provided when lenses were first supplied and of any change in his vision recorded by an ophthalmologist. The Court accordingly held that the objective of ensuring protection of the health of users of contact lenses can be achieved by measures less restrictive than those provided for under the national legislation at issue. Consequently, such a prohibition on selling contact lenses via the Internet is not proportionate to the objective of ensuring the protection of public health and is thus contrary to the rules governing the free movement of goods.

Free movement of persons, services and capital

In 2010 the Court again delivered a large number of judgments concerning freedom of establishment, the freedom to provide services, the free movement of capital and freedom of movement for workers. In the interests of clarity, the judgments chosen will be grouped together on the basis of the freedom with which they deal and then, where appropriate, of the fields of activity concerned.

With regard to freedom of establishment, Joined Cases C-570/07 and C-571/07 *Blanco Pérez and Chao Gómez* (judgment of 1 June 2010) should be mentioned, which involved Spanish legislation requiring prior administrative authorisation to be obtained for the opening of new pharmacies in a given area. More specifically, grant of such a licence was tied to conditions relating to population density and the minimum distance between pharmacies in the area concerned. The Court held that Article 49 TFEU does not preclude such legislation in principle. According to the Court, a Member State might see a risk that some parts of its territory will be left with too few pharmacies and that, as a consequence, the provision of medicinal products might well not be reliable and of good quality. Accordingly, that State may, in view of the risk, adopt legislation under which only one pharmacy may be set up in relation to a certain number of inhabitants, so

as to distribute pharmacies evenly throughout the national territory. The Court stated, however, that Article 49 TFEU precludes such legislation in so far as it prevents, in any geographical area which has special demographic features, the establishment of a sufficient number of pharmacies to ensure adequate pharmaceutical services, that being a matter for the national court to ascertain. In addition, the Court held that 49 TFEU, read in conjunction with Article 1(1) and (2) of Directive 85/432/EEC concerning the coordination of provisions laid down by law, regulation or administrative action in respect of certain activities in the field of pharmacy and Article 45(2) (e) and (g) of Directive 2005/36/EC on the recognition of professional qualifications, precludes criteria, provided for in national legislation, for the selection of licensees for new pharmacies under which, first, points for professional qualifications are to be increased by 20% in the case of professional experience within a specified part of the national territory and, second, in the event that several candidates score an equal number of points on the scale, licences are to be granted in accordance with an order of priority in which precedence is given to pharmacists who have pursued their professional activities within that part of the national territory, since such criteria can obviously be more easily met by national pharmacists.

The principle of freedom of establishment was also the subject of a number of tax judgments. These include, first, Case C-337/08 *X Holding* (judgment of 25 February 2010), in which the Court held that Articles 43 EC and 48 EC do not preclude legislation of a Member State which makes it possible for a parent company to form a single tax entity with its resident subsidiary, but which prevents the formation of such a single tax entity with a non-resident subsidiary, in that the profits of that non-resident subsidiary are not subject to the fiscal legislation of that Member State. According to the Court, such a tax scheme is justified in view of the need to safeguard the allocation of the power to impose taxes between the Member States. Since the parent company is at liberty to decide to form a tax entity with its subsidiary and, with equal liberty, to dissolve such an entity from one year to the next, the possibility of including a non-resident subsidiary in the single tax entity would be tantamount to granting the parent company the freedom to choose the tax scheme applicable to the losses of that subsidiary and the place where those losses are taken into account. In addition, the fact that a Member State decides to permit the temporary offsetting of losses incurred by a foreign permanent establishment at the place of the company's registered office does not mean that that possibility must also be extended to non-resident subsidiaries of a resident parent company. As permanent establishments situated in another Member State and non-resident subsidiaries are not in a comparable situation with regard to the allocation of the power of taxation, the Member State of origin is not obliged to apply the same tax scheme to non-resident subsidiaries as that which it applies to foreign permanent establishments.

Second, Case C-440/08 *Gielen* (judgment of 18 March 2010) is to be noted, concerning the grant, by the Netherlands' income tax legislation, of a deduction for self-employed persons having performed a certain number of hours' work as a business operator. That legislation provided, however, that hours worked by non-resident taxable persons for an establishment situated in another Member State were not taken into account for that purpose. According to the Court, Article 49 TFEU precludes such legislation, which is discriminatory towards non-resident taxable persons, even if those taxable persons may opt for the regime applicable to resident taxable persons in order to benefit from that tax advantage. With regard to the last point, the Court stated that the existence of indirect discrimination on grounds of nationality for the purposes of Article 49 TFEU is not called into question by the fact that an option to be treated as a resident taxable person is available to non-resident taxable persons, enabling them to choose between the discriminatory tax regime and that applicable to residents, since such a choice is not capable of remedying the discriminatory effects of the first of those two tax regimes. If such a choice were to be recognised as having that effect, the consequence would be to validate a tax regime which, in itself, remains contrary to Article 49 TFEU by reason of its discriminatory nature. In addition, the fact that a national scheme

which restricts the freedom of establishment is optional does not mean that it is not incompatible with European Union law.

A third tax judgment delivered by the Court, relating, this time, to the freedom to provide services, should also be mentioned. In Case C-97/09 *Schmelz* (judgment of 26 October 2010), the Court was led to review the compatibility with Article 49 EC of the special scheme for small undertakings provided for in Articles 24(3) and 28i of sixth Directive 77/388/EC ⁽¹¹⁾ and in Article 283(1) (c) of Directive 2006/112/EC ⁽¹²⁾, which allow Member States to grant an exemption from value added tax, with loss of the right of deduction, to small undertakings established in their territory, but exclude that possibility for small undertakings established in other Member States. According to the Court, although that scheme constitutes a restriction on the freedom to provide services, at this stage in the evolution of the system of value added tax the objective which consists in guaranteeing the effectiveness of fiscal supervision in order to combat possible tax evasion, avoidance and abuse and the objective of the scheme for small undertakings, which is to support the competitiveness of such undertakings, nevertheless justify limiting the applicability of the exemption from value added tax to the activities of small undertakings established in the territory of the Member State in which the tax is due. In particular, effective supervision of activities pursued under the freedom to provide services of a small undertaking which is not established in that territory is not at all easy for the host Member State. Furthermore, the rules on administrative assistance laid down by Regulation (EC) No 1798/2003 on administrative cooperation in the field of value added tax and repealing Regulation (EEC) No 218/92 ⁽¹³⁾ and by Directive 77/799/EEC ⁽¹⁴⁾ are not capable of ensuring an exchange of useful data in relation to small undertakings pursuing their activities in the territory of a Member State which applies a value-added-tax exemption. Therefore, according to the Court, Article 49 EC does not preclude such a scheme.

In the case of the freedom to provide services, the Court delivered a large number of judgments in a wide variety of areas, including those of public health, the posting of workers and games of chance.

First, in Case C-512/08 *Commission v France* (judgment of 5 October 2010), the Court held that a Member State whose national legislation requires — except in special situations relating, in particular, to the insured person's state of health or to the urgency of the treatment needed — prior authorisation in order for the competent institution to be responsible for payment, in accordance with the rules governing cover in force in the Member State to which it belongs, for treatment planned in another Member State and involving the use of major medical equipment outside hospital infrastructures did not fail to fulfil its obligations under Article 49 EC. According to the Court, having regard to the dangers to the organisation of public health policy and to the financial balance of the social security system, such a requirement would appear, as European Union law now stands, to be a justified restriction. Those dangers are connected to the fact that, regardless of the setting, hospital or otherwise, in which it is intended to be installed and used, it must be possible for major medical equipment to be the subject of planning policy, with particular regard to quantity and geographical distribution, in order to help ensure throughout national territory a rationalised, stable, balanced and accessible supply of up-to-date treatment, and also to avoid,

⁽¹¹⁾ Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1).

⁽¹²⁾ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

⁽¹³⁾ Council Regulation (EC) No 1798/2003 of 7 October 2003 (OJ 2003 L 264, p. 1).

⁽¹⁴⁾ Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15).

so far as possible, any waste of financial, technical and human resources. On the other hand, the Court held in Case C-173/09 *Elchinov* (judgment of 5 October 2010) that legislation of a Member State which is interpreted as excluding, in all cases, reimbursement in respect of hospital treatment given in another Member State without prior authorisation is not consistent with Article 49 EC and Article 22 of Regulation (EEC) No 1408/71, amended and updated by Regulation (EC) No 118/97, as amended by Regulation (EC) No 1992/2006 ⁽¹⁵⁾. Although European Union law does not preclude, in principle, a system of prior authorisation, as the judgment in *Commission v France* shows, it is nevertheless necessary that the conditions attached to the grant of such authorisation be justified. According to the Court, that was not so in the case of the legislation at issue, in that it deprived an insured person who, for reasons relating to his state of health or to the need to receive urgent treatment in a hospital, was prevented from applying for such authorisation or was not able to wait for the answer of the competent institution, of reimbursement from that institution in respect of such treatment, even though all other conditions for such reimbursement to be made were met. Reimbursement in respect of such treatment is not likely to compromise achievement of the objectives of hospital planning, nor seriously to undermine the financial balance of the social security system. Therefore, the Court concluded that the legislation constituted an unjustified restriction on the freedom to provide services.

Next, in relation to the posting of workers, Case C-515/08 *Santos Palhota and Others* (judgment of 7 October 2010) is to be noted, in which the Court held that Articles 56 TFEU and 57 TFEU preclude legislation of a Member State requiring an employer, established in another Member State and posting workers to its territory, to send a prior declaration of posting, in so far as the employer must be notified of a registration number for the declaration before the planned posting may take place and the national authorities of the host State have a period of five working days from receipt of the declaration to issue that notification. The Court took the view that a procedure of that kind must be regarded as an administrative authorisation procedure which may, in particular by reason of the period laid down for issuing the notification, impede the planned posting and, consequently, the provision of services by the employer of the workers who are to be posted, in particular where the services to be provided necessitate a certain speed of action. On the other hand, Articles 56 TFEU and 57 TFEU do not, according to the Court, preclude legislation of a Member State requiring an employer, established in another Member State and posting workers to the territory of the first Member State, to keep available to the national authorities of the latter, during the posting, copies of documents equivalent to the social or labour documents required under the law of the first Member State and also to send those copies to the authorities at the end of that period. Such measures are proportionate to the aim of protecting workers since they are appropriate for enabling the authorities to monitor compliance with the terms and conditions of employment of posted workers as set out in Article 3(1) of Directive 96/71/EC ⁽¹⁶⁾ and, therefore, to ensure that the latter are protected.

The Court also had the opportunity, in several cases, to consider the difficult issue of national monopolies over games of chance and sports betting and to set out the conditions which such monopolies must meet in order to be regarded as justified. First of all, in Case C-203/08 *Sporting Exchange* (judgment of 3 June 2010) and Case C-258/08 *Ladbrokes Betting & Gaming and Ladbrokes International* (judgment of 3 June 2010), the Court held that Article 49 EC does not preclude legislation of a Member State under which exclusive rights to organise and promote games of chance

⁽¹⁵⁾ Regulation (EC) No 1992/2006 of the European Parliament and of the Council of 18 December 2006 amending Council Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ 2006 L 392, p. 1).

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

are conferred on a single operator, and which prohibits any other operator, including an operator established in another Member State, from offering via the Internet services within the scope of that regime in the territory of the first Member State. According to the Court, since the Internet gaming industry has not been the subject of harmonisation within the European Union, a Member State is entitled to take the view that the mere fact that an 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, does not amount 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 against consumers compared with the traditional markets for such games. In the light of the specific features associated with the provision of games of chance via the Internet, the restriction may therefore be regarded as justified by the objective of combating fraud and crime. In *Ladbrokes Betting & Gaming and Ladbrokes International*, the Court added that national legislation which seeks to curb addiction to games of chance and to combat fraud, and which in fact contributes to the achievement of those objectives, can be regarded as limiting betting activities in a consistent and systematic manner even where the holder(s) of an exclusive licence are entitled to make what they are offering on the market attractive by introducing new games and by means of advertising. It is for the national court to determine whether unlawful gaming activities constitute a problem in the Member State concerned which might be solved by the expansion of authorised and regulated activities, and whether that expansion is on such a scale as to make it impossible to reconcile with the objective of curbing such addiction.

Next, in Case C-46/08 *Carmen Media Group* (judgment of 8 September 2010) and Joined Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 *Stoß and Others* (judgment of 8 September 2010), the Court addressed German legislation prohibiting any organisation or arrangement of public games of chance on the Internet. The Court held, following the line of case-law set out in *Sporting Exchange* and *Ladbrokes Betting & Gaming and Ladbrokes International*, that, in order to confine the desire to gamble and the exploitation of gambling within controlled channels, the Member States are free to establish public monopolies, as such a monopoly is capable of controlling the risks connected with the gambling sector more effectively than a system under which private operators are authorised to organise betting, subject to compliance by them with the applicable legislation. The Court stated in particular that the fact that some types of games of chance were subject to a public monopoly whilst others were subject to a system of authorisations issued to private operators could not, in itself, call the coherence of the German regime into question, since those games had different characteristics. Nevertheless, the Court observed that, having regard to the findings made by the German courts in these cases, the latter were entitled to take the view that the German legislation did not limit games of chance in a consistent and systematic manner. Those courts had found, first, that the holders of public monopolies engaged in intensive advertising campaigns in order to maximise profits from lotteries, thus straying from the objectives justifying the existence of the monopolies, and, second, that in the case of games of chance, such as casino games and automated games, which were not covered by the public monopoly but possessed a higher potential risk of addiction than the games of chance subject to that monopoly, the German authorities conducted or tolerated policies aimed at encouraging participation in those games. According to the Court, in such circumstances the preventive objective of that monopoly could no longer be effectively pursued and the monopoly could therefore no longer be justified.

In addition, the Court pointed out in *Stoß and Others* that the Member States enjoy a broad discretion when setting the level of protection against the dangers from games of chance. Thus, and in

the absence of any Community harmonisation in the matter, the Member States are not obliged to recognise authorisations issued by other Member States in this field. For the same reasons and given the risks presented by games of chance on the Internet compared with traditional games of chance, the Member States may also prohibit games of chance from being offered on the Internet. Nevertheless, the Court specified in *Carmen Media Group* that a system of authorisation, which derogates from the freedom to provide services, must be based on criteria which are objective, non-discriminatory and known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion so that it is not used arbitrarily. Furthermore, any persons affected by a restrictive measure based on such a derogation must have an effective judicial remedy available to them.

Finally, in Case C-409/06 *Winner Wetten* (judgment of 8 September 2010), the Court held that, by reason of the primacy of directly applicable European Union law, such national legislation concerning a public monopoly on bets on sporting competitions which comprises restrictions that are incompatible with the freedom of establishment and the freedom to provide services, because those restrictions do not contribute to limiting betting activities in a consistent and systematic manner as required by the Court's case-law, cannot continue to apply during a transitional period.

As regards, last, the free movement of capital, Case C-171/08 *Commission v Portugal* (judgment of 8 July 2010) is particularly worthy of note. In this case, the Court had to determine whether the specific regime governing the 'golden' shares held by the Portuguese State in the privatised company Portugal Telecom was compatible with Article 56 EC. That regime entailed special rights relating to the election of a third of the total number of directors, the election of a given number of members of the executive committee chosen from the board of directors, the nomination of at least one of the directors elected to deal specifically with certain management questions, and the adoption of important decisions of the general meeting. The Court held that, in view of the influence, not justified by the size of the shareholding, that the special rights conferred over the management of the company, the Portuguese State had, by maintaining such rights, failed to fulfil its obligations under Article 56 EC. The Court recalled, in relation to the derogations permitted by Article 58 EC, that public security or, in the case in point, the need to ensure the security of the availability of the telecommunications network in case of crisis, war or terrorism, could be relied on only if there was a genuine and sufficiently serious threat to a fundamental interest of society. Finally, as regards the proportionality of the restriction at issue, the uncertainty created by the fact that neither national legislation nor the articles of association of the company concerned laid down any criteria determining when the special powers could be exercised constituted serious interference with the free movement of capital in that it conferred on the national authorities, as regards the use of such powers, a latitude so discretionary in nature that it could not be regarded as proportionate to the objectives pursued.

With regard to the freedom to provide services, the case-law was also developed in the specific sector of public procurement. Following on from the well-known judgments in Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union, 'Viking Line'* [2007] ECR I-10779 and in Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, Case C-271/08 *Commission v Germany* (judgment of 15 July 2010) posed the question of how to reconcile the right to bargain collectively and the principles of freedom of establishment and of the freedom to provide services, in relation to public procurement. In this case, the Commission sought a declaration that the Federal Republic of Germany had failed to fulfil its obligations flowing from Directives 92/50/EEC ⁽¹⁷⁾

⁽¹⁷⁾ 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).

and 2004/18/EC ⁽¹⁸⁾, in the context of the award of service contracts that concerned occupational old-age pensions and implemented a collective agreement negotiated between management and labour. The Commission considered that, by awarding such contracts directly, without a call for tenders at European Union level, to bodies and undertakings referred to in paragraph 6 of the collective agreement on the conversion, for local authority employees, of earnings into pension savings, the Member State had failed to fulfil its obligations under those directives and had offended against the principles of freedom of establishment and the freedom to provide services. The Federal Republic of Germany contended that the contracts at issue had been awarded in the particular context of implementation of a collective labour agreement.

The Court held in this judgment that the fact that the right to bargain collectively is a fundamental right, and the social objective of a collective agreement on the conversion, for local authority employees, of earnings into pension savings, cannot, in themselves, mean that local authority employers are automatically excluded from the obligation to comply with the requirements stemming from Directives 92/50/EEC and 2004/18/EC on public procurement, which implement freedom of establishment and the freedom to provide services in the field of public procurement. Exercise of the fundamental right to bargain collectively must therefore be reconciled with the requirements stemming from the freedoms protected by the Treaty on the Functioning of the European Union Treaty and be in accordance with the principle of proportionality. After examining, point by point, the various considerations that could justify excluding the contract awards at issue from the European Union provisions on public procurement, such as the workers' participation in selecting the body to implement the salary conversion measure, the elements of solidarity underlying the tenders of the bodies and undertakings referred to in the collective agreement in question, and the experience and financial soundness of those bodies and undertakings, the Court concluded that compliance with the abovementioned public procurement directives was not, in the case in point, irreconcilable with the social objective pursued by that collective agreement. Finally, the Court established that the conditions for classification as a 'public contract' that are laid down by those directives were met in the case in point. First, it stated that even if the local authority employers gave effect, in the field of occupational old-age pensions, to a choice predetermined by a collective agreement, they were nevertheless contracting authorities since they were represented when the collective agreement implemented in the case in point was negotiated. Second, it held that the group insurance contracts entailed a direct economic interest for the employers which concluded them, so that they were contracts for pecuniary interest. Consequently, the Court concluded that the Federal Republic of Germany had failed to fulfil the obligation, imposed by the European Union public procurement directives, requiring the contract awards at issue, made pursuant to a collective agreement, to be preceded by a call for tenders.

The interpretation of Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts was at issue in another important decision of the Court, in Case C-226/09 *Commission v Ireland* (judgment of 18 November 2010). Here, the problem arose from the fact that, whilst the contracting authority was not obliged to specify in the contract notice the relative weighting given by it to each of the award criteria, it nevertheless did specify their weighting, after the closing date set for the submission of tenders. The Commission brought an action for failure to fulfil obligations against the Member State responsible for the award of the contract, alleging that it had infringed the principle of equal treatment and the obligation of transparency.

⁽¹⁸⁾ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

The Court established first of all that, while the requirement to state the relative weighting for each of the award criteria for a contract falling within the ambit of Annex II A to Directive 2004/18/EC meets the requirement of ensuring compliance with the principle of equal treatment and the consequent obligation of transparency, it cannot legitimately be considered that, in the absence of specific provisions for contracts covered by Annex II B, it is necessary to go so far as to require that a contracting authority which nevertheless decides to indicate the relative weighting for the criteria must so indicate before the closing date set for the submission of tenders. According to the Court, by attributing weightings to the criteria, the contracting authority simply set out the terms on which the tenders submitted were to be evaluated. On the other hand, the Court held that the alteration that was made to the weighting of the criteria for award of the contract at issue after the initial review of the tenders submitted infringed the principle of equal treatment and the consequent obligation of transparency. That alteration was contrary to the Court's case-law according to which those fundamental principles of European Union law imply an obligation on the part of contracting authorities to interpret the award criteria in the same way throughout the procedure.

As regards freedom of movement for workers, Case C-325/08 *Olympique Lyonnais* (judgment of 16 March 2010), relating to whether rules applicable in the field of professional football were compatible with Article 45 TFEU, should be noted. Under those rules, a *joueur espoir* (a trainee between the ages of 16 and 22) could be ordered to pay damages if, at the end of his training period, he signed a professional contract not with the club which provided his training but with a club in another Member State. In its judgment, the Court first of all verified that the rules at issue did indeed fall within the scope of Article 45 TFEU. The case concerned the Professional Football Charter of the French Football Federation. According to the Court, that document had the status of a collective agreement aimed at regulating gainful employment and, as such, was covered by European Union law. Next, the Court found that the rules under examination were likely to discourage a *joueur espoir* from exercising his right of free movement. Consequently, they were a restriction on freedom of movement for workers. However, as the Court has already held in *Bosman* ⁽¹⁹⁾, in view of the considerable social importance of sporting activities and in particular football in the European Union, the objective of encouraging the recruitment and training of young players must be accepted as legitimate. The Court accordingly concluded that Article 45 TFEU does not preclude a scheme which, in order to attain such an objective, guarantees compensation to the club which provided the training if, at the end of his training period, a young player signs a professional contract with a club in another Member State, provided that the scheme is suitable to ensure the attainment of that objective and does not go beyond what is necessary to attain it. On the other hand, a scheme such as the one that was at issue is not necessary to ensure the attainment of that objective, since the amount of damages that the *joueur espoir* may be ordered to pay is unrelated to the actual costs of the training.

Remaining in the field of workers, the Court delivered on the same day two judgments (Cases C-310/08 *Ibrahim* and C-480/08 *Teixeira*, judgments of 23 February 2010) relating to the interpretation of Article 12 of Regulation (EEC) No 1612/68 on freedom of movement for workers ⁽²⁰⁾, more specifically to its relationship with Directive 2004/38/EC on freedom of movement of citizens of the Union ⁽²¹⁾. In these two cases, the national authorities refused to grant the claimants housing assistance for them and their children, on the ground that the claimants did not have a right of residence in the United Kingdom pursuant to European Union law. One of the claimants was sepa-

⁽¹⁹⁾ Case C-415/93 *Bosman* [1995] ECR I-4921.

⁽²⁰⁾ Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).

⁽²¹⁾ See footnote 10.

rated from her husband who, after working in the United Kingdom, had finally left the country, and the other, also separated from her husband, had herself lost the status of worker. However, since their children were in education in the United Kingdom, the claimants pleaded Article 12 of Regulation (EEC) No 1612/68, as interpreted by the Court in *Baumbast and R* ⁽²²⁾. Confirming its case-law, the Court observed that Article 12 of the regulation means that the child of a migrant worker can, in connection with his right of access to education in the host Member State, have an independent right of residence and, for that purpose, it requires only that the child has lived with at least one of his parents in a Member State while that parent resided there as a worker. The fact that the parents of the child have meanwhile divorced and the fact that only one parent is a citizen of the Union and that that parent has ceased to be a migrant worker in the host Member State are irrelevant in this regard. Thus, according to the Court, Article 12 of the regulation must be applied independently of the provisions of European Union law which expressly govern the conditions of exercise of the right to reside in another Member State, an independence which was not called into question by the entry into force of the new directive on freedom of movement of European citizens. Drawing the appropriate conclusions from that independence, the Court then found that the right of residence of the parent who is the primary carer of a migrant worker's child in education is not subject to the condition requiring that that parent have sufficient resources not to become a burden on the social assistance system of the host Member State. Finally, in the second case (*Teixeira*), the Court also explained that whilst, as a general rule, the right of residence of the parent who is the primary carer for a child of a migrant worker ends, where that child is in education in the host Member State, when the child reaches the age of majority, it may be otherwise if the child continues to need the presence and care of that parent in order to be able to pursue and complete his education. It is then for the national court to assess whether that is actually the case.

Approximation of laws

Since it is not possible to set out all the case-law developments in this area which, reflecting the ever increasing range of the European Union legislature's activity, displays the greatest diversity, it has been decided to place emphasis on two sectors, namely on commercial practices in general, paying particular attention to consumer protection, and on telecommunications, whilst a few other decisions of evident interest are also mentioned.

As regards unfair business-to-consumer commercial practices, Directive 2005/29/EC ⁽²³⁾ was interpreted twice in 2010. This directive harmonises fully the rules relating to unfair business-to-consumer commercial practices and contains, in Annex I, an exhaustive list of 31 commercial practices which, in accordance with Article 5(5), are to be regarded as unfair in all circumstances. As recital 17 in the preamble to the directive expressly states, those commercial practices alone can be deemed to be unfair without a case-by-case assessment against the provisions of Articles 5 to 9 of the directive.

In the first case to be covered, namely Case C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag* (judgment of 9 November 2010), the Court consequently ruled that the directive must be interpreted as precluding a national provision which lays down a general prohibition on sales with bonuses and is not only designed to protect consumers but also pursues other objectives. Practices consisting in offering consumers bonuses associated with the purchase of products or services do not appear

⁽²²⁾ Case C-413/99 *Baumbast and R* [2002] ECR I-7091.

⁽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).

in Annex I to the directive and they therefore cannot be prohibited in all circumstances, but only following a specific assessment allowing the unfairness of those practices to be established. Thus, the possibility of participating in a prize competition, linked to the purchase of a newspaper, does not constitute an unfair commercial practice within the meaning of Article 5(2) of the directive simply on the ground that, for at least some of the consumers concerned, that possibility of participating in a competition represents the factor which determines them to buy that newspaper.

Second, in Case C-304/08 *Plus Warenhandelsgesellschaft* (judgment of 14 January 2010), the Court held that Directive 2005/29/EC also precludes national legislation which provides for a prohibition in principle, without taking account of the specific circumstances of individual cases, of commercial practices under which the participation of consumers in a prize competition or lottery is made conditional on the purchase of goods or the use of services. The Court observed first that promotional campaigns which enable consumers to take part free of charge in a lottery subject to their purchasing a certain quantity of goods or services constitute commercial acts that clearly form part of an operator's commercial strategy and relate directly to the promotion of the operator's sales. They therefore do indeed constitute commercial practices within the meaning of the directive and, consequently, come within its scope. The Court then pointed out that the directive, which harmonises the rules fully, provides expressly that Member States may not adopt stricter rules than those provided for by it, even in order to achieve a higher level of consumer protection. Since the practice at issue in this case is likewise not referred to in Annex I, it cannot be prohibited without it being determined, having regard to the facts of each particular instance, whether it is 'unfair' in the light of the criteria laid down by the directive. Those criteria include whether the practice materially distorts, or is likely materially to distort, the economic behaviour of the average consumer with regard to the product.

In 2010 the Court was also required on two occasions to interpret Directive 93/13/EEC ⁽²⁴⁾ on unfair terms in consumer contracts.

In the first case, namely Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid* (judgment of 3 June 2010), the Court recalled that the system of protection introduced by Directive 93/13/EEC is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms. The directive carried out only a partial and minimum harmonisation of national legislation concerning unfair terms, while recognising that Member States have the option of affording consumers a higher level of protection than that for which the directive provides. The Court thus pointed out that the Member States may retain or adopt, in the entire area covered by the directive, rules more stringent than those laid down by the directive itself, provided that they are designed to ensure a greater degree of consumer protection. Consequently, the Court concluded that the directive does not preclude national legislation which authorises a judicial review as to the unfairness of contractual terms which relate to the definition of the main subject-matter of the contract or to the adequacy of the price and remuneration, on the one hand, as against the services or goods to be supplied in exchange, on the other hand, even in the case where those terms are drafted in plain, intelligible language.

Second, in Case C-137/08 *VB Pénzügyi Lízing* (judgment of 9 November 2010), the Court was required to expand upon the judgment in Case C-243/08 *Pannon GSM* [2009] ECR I-4713 (see *Annual Report 2009*). It stated that Article 267 TFEU must be interpreted as meaning that the jurisdiction of the Court of Justice of the European Union extends to the interpretation of the concept of 'unfair

⁽²⁴⁾ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

term' used in Article 3(1) of Directive 93/13/EEC and in the annex thereto, and to the criteria which the national court may or must apply when examining a contractual term in the light of the provisions of that directive, whilst it is for the national court to determine, in the light of those criteria, whether a particular contractual term is actually unfair in the circumstances of the case. The unfairness of a contractual term is to be assessed taking into account the nature of the goods or services for which the contract was concluded and by referring, as at the time of conclusion of the contract, to all the circumstances attending the conclusion of it, among which are the fact that a term which is contained in a contract concluded between a consumer and a seller or supplier and which confers exclusive jurisdiction on the court in the territorial jurisdiction of which the seller or supplier has his principal place of business has been included without being individually negotiated. The Court also ruled that the national court must investigate of its own motion whether a term conferring exclusive territorial jurisdiction in a contract concluded between a seller or supplier and a consumer, which is the subject of a dispute before it, falls within the scope of Directive 93/13/EEC and, if it does, assess of its own motion whether such a term is unfair. In order to safeguard the effectiveness of the consumer protection intended by the European Union legislature in a situation characterised by the imbalance between the consumer and the seller or supplier, which may be corrected only by positive action unconnected with the actual parties to the contract, the national court must, in all cases and whatever the rules of its domestic law, determine whether or not the contested term was individually negotiated between a seller or supplier and a consumer.

In relation, now, to protection of the consumer in respect of contracts negotiated away from business premises, the Court ruled in Case C-215/08 *E. Friz* (judgment of 15 April 2010) that Directive 85/577/EEC ⁽²⁵⁾ applies to a contract, concluded between a trader and a consumer during a doorstep-selling visit to the latter's home, concerning the consumer's entry to a closed-end real property fund established in the form of a partnership when the principal purpose of joining is not to become a member of that partnership, but is a means of capital investment. The Court stated that Article 5(2) of Directive 85/577/EEC does not preclude a national law according to which, in the event of cancellation of membership of such a real property fund, entered into following a doorstep-selling visit by a trader to a consumer's home, the consumer has a claim against the partnership, to his severance balance, calculated on the basis of the value of his interest at the date of his retirement from membership of the fund, and may therefore get back less than the value of his capital contribution or have to participate in the losses of the fund. It explained that, while there is no doubt that the aim of the directive is to protect consumers, that does not imply that that protection is absolute. Both the general structure of the directive and the wording of several of its provisions indicate that such protection is subject to certain limits. As regards the consequences of the exercise of the right of renunciation in particular, notification of the cancellation has the effect, both for the consumer and for the trader, of the restoration of the *status quo ante*. However, the fact remains that there is nothing in the directive to preclude the consumer, in certain specific cases, from having obligations to the trader and, depending on the circumstances, from having to bear certain consequences resulting from the exercise of his right of cancellation.

On a related issue, the Court held in Case C-511/08 *Heinrich Heine* (judgment of 15 April 2010), concerning the protection of consumers in respect of distance contracts, that Article 6(1), first subparagraph, second sentence, and Article 6(2) of Directive 97/7/EC ⁽²⁶⁾ must be interpreted as precluding national legislation which allows the supplier under a distance contract to charge the costs

⁽²⁵⁾ Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ 1985 L 372, p. 31).

⁽²⁶⁾ 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).

of delivering the goods to the consumer where the latter exercises his right of withdrawal. The directive's provisions on the legal consequences of withdrawal clearly have as their purpose not to discourage consumers from exercising their right of withdrawal. It would therefore be contrary to that objective to interpret those provisions as authorising the Member States to allow delivery costs to be charged to consumers in the event of withdrawal. Moreover, charging consumers the delivery costs, in addition to the direct costs for returning the goods, would compromise a balanced sharing of the risks between parties to distance contracts, by making consumers liable to bear all of the costs related to transporting the goods.

Lastly in relation to commercial practices, Case C-159/09 *Lidl* (judgment of 18 November 2010), which arose from an advertising campaign launched by a supermarket, is to be noted. The supermarket had placed in a local newspaper an advertisement that compared till receipts listing products, in the main foodstuffs, respectively purchased from two supermarket chains and showing different total costs, a method contested by the competitor referred to. The Court stated first that the directive concerning misleading and comparative advertising ⁽²⁷⁾ is to be interpreted as meaning that the fact alone that food products differ in terms of the extent to which consumers would like to eat them and the pleasure to be derived from consuming them, according to the conditions and place of production, their ingredients and who produced them, cannot preclude the possibility that the comparison of such products may meet the requirement that the products compared meet the same needs or are intended for the same purpose, and hence display a sufficient degree of interchangeability ⁽²⁸⁾. To decide that, unless they are identical, two food products cannot be regarded as comparable would effectively rule out any real possibility of comparative advertising regarding a particularly important category of consumer goods. The Court added that advertising relating to a comparison of the prices of food products marketed by two competing retail store chains may be misleading ⁽²⁹⁾, in particular, if it is found, in the light of all the relevant circumstances of the specific case, in particular the information contained in or omitted from the advertisement, that the decision to buy on the part of a significant number of consumers to whom the advertisement is addressed may be made in the mistaken belief that the selection of goods made by the advertiser is representative of the general level of his prices as compared with those charged by his competitor and that such consumers will therefore make savings of the kind claimed by the advertisement by regularly buying their everyday consumer goods from the advertiser rather than the competitor, or in the mistaken belief that all of the advertiser's products are cheaper than those of his competitor. Such advertising may also be misleading if it is found that, for the purposes of a comparison based solely on price, food products were selected which, nevertheless, have different features capable of significantly affecting the average consumer's choice, without such differences being apparent from the advertising concerned. Finally, the Court held that the condition of verifiability ⁽³⁰⁾ requires, in the case of an advertisement which compares the prices of two selections of goods, that it must be possible to identify the goods on the basis of information contained in the advertisement, thus enabling the persons to whom the advertisement is addressed to satisfy themselves that they have been correctly informed with regard to the purchases of basic consumables which they are prompted to make.

⁽²⁷⁾ Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (OJ 1984 L 250, p. 17), as amended by Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 so as to include comparative advertising (OJ 1997 L 290, p. 18).

⁽²⁸⁾ Article 3a(1)(b) of Directive 84/450/EEC concerning misleading and comparative advertising, as amended by Directive 97/55/EC.

⁽²⁹⁾ Article 3a(1)(a) of Directive 84/450/EEC concerning misleading and comparative advertising, as amended by Directive 97/55/EC.

⁽³⁰⁾ Article 3a(1)(c) of Directive 84/450/EEC concerning misleading and comparative advertising, as amended by Directive 97/55/EC.

Case-law relating to the telecommunications sector was particularly plentiful in 2010. First of all, Case C-99/09 *Polska Telefonia Cyfrowa* (judgment of 1 July 2010) gave the Court the opportunity to interpret Article 30(2) of Directive 2002/22/EC (the Universal Service Directive) ⁽³¹⁾ in relation to the costs of the mobile telephone number portability that enables a telephone subscriber to retain the same number when changing operator. According to the Court, that provision is to be interpreted as obliging the national regulatory authority to take account of the costs incurred by mobile telephone network operators in implementing the number portability service when it assesses whether the direct charge to subscribers for the use of that service is a disincentive. However, the authority retains the power to fix the maximum amount of that charge levied by operators at a level below the costs incurred by them, when a charge calculated only on the basis of those costs is liable to dissuade users from making use of the portability facility.

Still with regard to telecommunications, Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08 *Alassini and Others* (judgment of 18 March 2010) will be noted, in which the Court replied to a question referred to it for a preliminary ruling regarding the interpretation of the principle of effective judicial protection in relation to national legislation under which an attempt to achieve an out-of-court settlement is a mandatory condition for the admissibility before the courts of actions in certain disputes between providers and end-users under the Universal Service Directive ⁽³²⁾. According to the Court, Article 34(1) of that directive assigns Member States the objective of establishing out-of-court procedures for dealing with disputes involving consumers that relate to matters covered by that directive. National legislation which has put in place an out-of-court settlement procedure and has made it mandatory to have recourse to that procedure before any action is brought before a court is not such as to compromise the objective in the general interest pursued by the directive and is even designed to strengthen the directive's effectiveness, by reason of the quicker and less expensive settlement of disputes and the lightening of the courts' workload which are achieved by that legislation. The Court thus stated that the additional step for access to the courts, in the form of a prior settlement procedure made mandatory by the legislation in question, is not contrary to the principles of equivalence, effectiveness and effective judicial protection, provided that it does not result in a decision which is binding on the parties, that it does not cause a delay to the conducting of legal proceedings or costs for consumers that are too high, that electronic means are not the only means by which the settlement procedure may be accessed and that interim measures are possible in exceptional urgent cases.

Next, in Case C-58/08 *Vodafone and Others* (judgment of 8 June 2010), the Court had to rule on the validity of Regulation (EC) No 717/2007 on roaming on public mobile telephone networks ⁽³³⁾, in the context of proceedings between several operators of public mobile telephone networks and the national authorities concerning the validity of national provisions for the implementation of that regulation. The Court, to which three questions had been referred for a preliminary ruling, noted first of all that the regulation, adopted on the basis of Article 95 EC, introduces a common approach so that users of terrestrial public mobile telephone networks do not pay excessive prices for Community-wide roaming services and so that operators in the various Member States can operate within a single coherent regulatory framework based on objectively established criteria, thereby contributing to the smooth functioning of the internal market in order to achieve a high level of consumer protection and maintain competition among operators. Then the Court — which

⁽³¹⁾ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (OJ 2002 L 108, p. 51).

⁽³²⁾ See the preceding footnote.

⁽³³⁾ Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC (OJ 2007 L 171, p. 32).

had been asked whether the principles of proportionality and subsidiarity were complied with because the regulation imposes not only a ceiling for average wholesale charges per minute, but also for retail charges, and imposes an obligation to provide information to roaming customers — held that, in the light of the broad discretion which the Community legislature has in the area at issue, the latter could legitimately take the view, having regard to objective criteria and an exhaustive economic study, that regulation of the wholesale market alone would not achieve the same result as regulation which covered at the same time the wholesale and the retail markets, a fact which rendered the latter regulation necessary, and that the obligation to provide information reinforces the effectiveness of imposing ceilings for the charges. The Court then continued that appraisal by stating that there was no breach of the principle of subsidiarity, given the interdependence of wholesale and retail charges and the effects of the common approach laid down in the regulation, the objective of which could best be achieved at Community level.

Finally, in Case C-222/08 *Commission v Belgium* (judgment of 6 October 2010), in the context of Treaty infringement proceedings brought by the Commission concerning the Kingdom of Belgium's partial transposition of Articles 12(1) and 13(1) and Annex IV, Part A, of the Universal Service Directive⁽³⁴⁾, the Court held first that, since the directive lays down only the rules for calculating the net costs of the provision of universal service where the national authorities have considered that such provision may represent an unfair burden, the Member State in question had not failed to fulfil its obligations by laying down itself the conditions for determining whether or not that burden is unfair. Second, the Court stated that, in linking the mechanisms for the recovery of net costs which an undertaking may incur by the provision of universal service to the existence of an unfair burden on that undertaking, the Community legislature wished to exclude the automatic conferral of a right to compensation for any net cost of universal service provision, since it took the view that the net cost of that service does not necessarily represent an unfair burden for all the undertakings concerned. In those circumstances, the unfair burden which must be found to exist by the national regulatory authority before any compensation is paid can only be a burden which, for each undertaking concerned, is excessive in view of the undertaking's ability to bear it, account being taken of the undertaking's own characteristics (equipment, economic and financial situation, market share and so forth). Furthermore, the Court held that the relevant Member State, which is bound by the directive to establish the mechanisms necessary to compensate undertakings suffering an unfair burden, fails to fulfil its obligations if it makes a general finding on the basis of the calculation of the net costs of the erstwhile sole provider of universal service that all undertakings now responsible for the provision of universal service are in fact subject to an unfair burden on account of that provision, without carrying out a specific assessment both of the net cost of the service for each operator concerned and of all the characteristics particular to each operator. Finally, the Court indicated that a Member State also fails to fulfil its obligations under the directive where it fails to take into consideration, in the calculation of the net cost of provision of the social component of universal service, the market benefits, including intangible benefits, accruing to the undertakings responsible.

Whilst a homogeneous body of case-law can thus be seen to be developing in two particularly sensitive sectors, case-law in the area of approximation of laws is far from limited to those sectors, as is attested by a number of cases.

Case C-428/08 *Monsanto Technology* (judgment of 6 July 2010) raised, for the first time, the question of the scope of a European patent relating to a DNA sequence. Monsanto, which has held since 1996 a European patent relating to a DNA sequence which, once introduced into the DNA of a soy plant, makes that plant resistant to a certain herbicide, sought to oppose imports into

⁽³⁴⁾ See footnote 31.

a Member State of soy meal produced from such genetically modified soy in Argentina, where there is no patent protection for Monsanto's invention. The national court before which proceedings were brought asked the Court of Justice whether the mere presence of the DNA sequence protected by a European patent is sufficient to constitute an infringement of Monsanto's patent when the meal is marketed in the European Union. According to the Court, Directive 98/44/EC ⁽³⁵⁾ makes the protection conferred by a European patent subject to the condition that the genetic information contained in the patented product or constituting that product is currently performing its function in the material in which it is contained. The Court observed in this regard that the function of Monsanto's invention is performed when the genetic information protects the soy plant in which it is incorporated against the effect of the herbicide. This function of the protected DNA sequence can no longer be performed when it is in a residual state in the soy meal, which is a dead material obtained after the soy has undergone several treatment processes. Consequently, the protection under the European patent is not available when the genetic information has ceased to perform the function it had in the initial plant from which it is derived. Nor can such protection be granted on the ground that the genetic information contained in the soy meal could possibly perform its function again in another plant, as it would be necessary that the DNA sequence actually be introduced in that other plant in order for protection under a European patent to be conferred in relation to that plant. In those circumstances, Monsanto cannot rely on Directive 98/44/EC to prohibit the marketing of soy meal originating from Argentina which contains its biotechnological invention in a residual state. Lastly, the Court stated that the directive precludes a national rule from granting absolute protection to a patented DNA sequence as such, regardless of whether it performs its function in the material containing it. The provisions of the directive providing for a requirement of actual performance of that function constitute exhaustive harmonisation of the matter in the European Union.

In Case C-62/09 *Association of the British Pharmaceutical Industry* (judgment of 22 April 2010), the Court was required to interpret Directive 2001/83/EC ⁽³⁶⁾. Whilst, in principle, that directive prohibits pecuniary advantages or benefits in kind from being supplied, offered or promised to doctors or pharmacists when medicinal products are being promoted to them, the Court held that the directive does not preclude financial incentive schemes implemented by the national public health authorities in order to reduce their public health expenditure and designed to encourage, for the purpose of treating certain conditions, the prescription by doctors of specific named medicinal products containing an active substance which is different from the active substance of the medicinal product which was previously prescribed or which might have been prescribed but for such an incentive scheme. In general terms, the health policy defined by a Member State and the public expenditure devoted to it do not pursue any profit-making or commercial aim. Since a financial incentive scheme forms part of such a policy, it cannot be regarded as falling within the commercial promotion of medicinal products. The Court nevertheless observed that the public authorities are required to make available to professionals in the pharmaceutical industry information showing that the scheme in question is based on objective criteria and that there is no discrimination between national medicinal products and those from other Member States. Furthermore, those authorities must make such a scheme public and make available to those professionals the evaluations establishing the therapeutic equivalence of the active substances available belonging to the same therapeutic class covered by the scheme.

⁽³⁵⁾ Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions (OJ 1998 L 213, p. 13).

⁽³⁶⁾ 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), as amended by Directive 2004/27/EC of the European Parliament and of the Council of 31 March 2004 (OJ 2004 L 136, p. 34).

In Case C-518/07 *Commission v Germany* (judgment of 9 March 2010), relating to the processing of personal data, the Court held that the guarantee of the independence of national supervisory authorities, which is provided for by Directive 95/46/EC ⁽³⁷⁾, is intended to ensure the effectiveness and reliability of the supervision of compliance with the provisions on protection of individuals with regard to the processing of personal data, and it must be interpreted in the light of that aim. It was established not to grant a special status to those authorities themselves as well as their agents, but in order to strengthen the protection of individuals and bodies affected by their decisions, and the supervisory authorities must therefore act objectively and impartially when carrying out their duties. Consequently, the supervisory authorities responsible for supervising the processing of personal data outside the public sector must enjoy an independence allowing them to perform their duties free from external influence. That independence precludes not only any influence exercised by the supervised bodies, but also any directions or any other external influence, whether direct or indirect, which could call into question the performance by those authorities of their task consisting of establishing a fair balance between the protection of the right to private life and the free movement of personal data. The mere risk that the scrutinising authorities could exercise a political influence over the decisions of the competent supervisory authorities is enough to hinder the independent performance of their tasks. First, there could be 'prior compliance' on the part of those authorities in the light of the scrutinising authority's decision-making practice. Second, for the purposes of the role adopted by the supervisory authorities as guardians of the right to private life, it is necessary that their decisions, and therefore the authorities themselves, remain above any suspicion of partiality. State scrutiny exercised over the national supervisory authorities is thus not consistent with the requirement of independence.

In Case C-467/08 *Padawan* (judgment of 21 October 2010) concerning the field of copyright and related rights, the Court provided explanation of the concept of fair compensation for private copying and of the criteria applicable to, and limits of, such compensation. Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society ⁽³⁸⁾ allows the private copying exception introduced into domestic law by certain Member States, provided that the holders of the reproduction right receive fair compensation. In this judgment, the Court stated, first of all, that the concept of 'fair compensation' referred to in Article 5(2)(b) of Directive 2001/29/EC is an autonomous concept of European Union law which must be interpreted uniformly in all the Member States that have introduced a private copying exception. It then explained that the 'fair balance' between the persons concerned means that fair compensation must be calculated on the basis of the criterion of the harm caused to authors of protected works by the introduction of the private copying exception. The Court also indicated that the 'private copying levy' is imposed directly not on private users of the reproduction equipment, devices and media, but on persons who have such equipment, devices and media, inasmuch as those persons are easier to identify and are able to pass on to private users the actual burden of financing the fair compensation. Finally, the Court ruled that a link is necessary between the application of the levy intended to finance fair compensation with respect to equipment and the deemed use of the equipment for the purposes of private copying. Consequently, the indiscriminate application of the private copying levy, in particular with respect to digital reproduction equipment, devices and media not made available to private users and clearly reserved for uses other than private copying, is incompatible with Directive 2001/29/EC. On the other hand, where the equipment at issue has been made available to natural persons for private purposes it is unnecessary to show that

⁽³⁷⁾ Second subparagraph of Article 28(1) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31).

⁽³⁸⁾ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 (OJ 2001 L 167, p. 10).

they have in fact made private copies with the help of that equipment and have therefore actually caused harm to the author of the protected work. Those natural persons are rightly presumed to benefit fully from the making available of that equipment, that is to say that they are deemed to take full advantage of the functions associated with that equipment, including copying.

In C-233/08 *Kyrian* (judgment of 14 January 2010), the order for reference related, first, to whether, in the light of Article 12(3) of Directive 76/308/EEC on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures ⁽³⁹⁾, as amended by Directive 2001/44/EC ⁽⁴⁰⁾, the courts of the Member State in which the requested authority is situated have jurisdiction to review the enforceability of an instrument, issued in another Member State, permitting enforcement of a claim. The Court explained, in this judgment, that the courts of the requested Member State do not, in principle, have jurisdiction to review the enforceability of an instrument permitting enforcement, except in order to review whether the instrument is consistent with the public policy of that State. On the other hand, the Court held that, inasmuch as the notification constitutes an 'enforcement measure' referred to in Article 12(3) of Directive 76/308/EEC, the court of the requested Member State has jurisdiction to review whether that measure was correctly effected in accordance with the laws and regulations of that Member State. Second, the Court had to rule on whether, in order to be properly given, the notification of the instrument permitting enforcement of a claim must be addressed to the debtor in an official language of the Member State in which the requested authority is situated. Directive 76/308/EEC is silent on this point. According to the Court, however, in the light of the purpose of the directive, which is to ensure the effective notification of all instruments and decisions, it must be held that, in order for the addressee of an instrument permitting enforcement to be placed in a position to enforce his rights, he must receive the notification of that instrument in an official language of the requested Member State. The Court also ruled that, in order to ensure compliance with that right, it is for the national court to apply national law while taking care to ensure the full effectiveness of European Union law.

Competition

There have been interesting developments in the case-law in relation both to State aid and to the competition rules applicable to undertakings.

With regard to State aid, in Case C-399/08 P *Commission v Deutsche Post* (judgment of 2 September 2010), the Court considered the method used by the Commission to conclude that there was an advantage constituting State aid in favour of a private undertaking responsible for a service of general economic interest ('SGEI'). While the Commission had taken the view that the public resources received by the undertaking concerned as compensation for the provision of an SGEI were greater than the additional costs generated by that service and that that overcompensation constituted State aid incompatible with the common market, the General Court annulled that decision on the ground that the Commission had not shown sufficiently that there was an advantage for the purposes of Article 87(1) EC and was not entitled to assume that an advantage had been conferred on the undertaking by public funds without first ascertaining whether those funds actually exceeded all the additional costs associated with the provision of an SGEI that were borne by that undertaking. The Court of Justice confirmed the General Court's analysis in rejecting the Commission's plea alleging breach of Articles 87(1) EC and 86(2) EC. The Court of Justice observed at the outset that, in order for financial compensation awarded to an undertaking responsible for an SGEI to be able to escape classification as State aid, specific conditions must be fulfilled,

⁽³⁹⁾ Council Directive 76/308/EEC of 15 March 1976 (OJ 1976 L 73, p. 18).

⁽⁴⁰⁾ Council Directive 2001/44/EC of 15 June 2001 (OJ 2001 L 175, p. 17).

requiring in particular that such compensation should not exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations (conditions laid down in Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraphs 74 and 75), and it concluded from this that, when examining the validity of the financing of such a service in the light of the law on State aid, the Commission is required to check whether that condition has been satisfied. The Court of Justice went on to find that the General Court had relied upon deficiencies in that respect in the method used by the Commission and had, therefore, correctly concluded that the Commission's analysis was defective without, however, reversing the burden of proof or substituting its own method of analysis for the Commission's. The restrictive nature of the conditions under which compensation for an SGEI is capable of escaping classification as State aid does not, therefore, exempt the Commission from being put to strict proof when it takes the view that those conditions have not been observed.

In Case C-290/07 P *Commission v Scott* (judgment of 2 September 2010), an appeal was brought before the Court of Justice against a judgment of the General Court annulling a Commission decision declaring that State aid granted by the French authorities to an American company which had arisen from the sale of land on terms that did not reflect the reality of the market was incompatible, and it was necessary for the Court of Justice to clarify the limits of the General Court's review jurisdiction where the identification of State aid raises serious valuation difficulties. The Commission complained that the General Court had exceeded the limits of its review in identifying errors of method and calculation characteristic of a breach of the obligation to conduct in a diligent manner the formal investigation procedure provided for in Article 88(2) of the EC Treaty. The Court of Justice upheld that plea, recalling, first, the principles laid down in Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-987, paragraph 39, from which it follows that the courts of the European Union must establish not only whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it. That reminder is coupled with an important limitation, according to which, when conducting such a review, the courts of the European Union must not substitute their own economic assessment for that of the Commission. Second, the Court of Justice pointed out that the Commission had to apply the private investor test to determine whether the price paid by the presumed recipient of aid corresponded to the selling price which a private investor, operating in normal competitive conditions, would be likely to have fixed. The Court held that, in this instance, the General Court had not identified the manifest errors of assessment on the part of the Commission which could have justified annulment of the decision as to the incompatibility of the aid, thus exceeding its review jurisdiction. Finally, according to the Court of Justice, the General Court could not criticise the Commission for having overlooked certain information which could have been useful, since that information had been provided only after the formal investigation procedure and the Commission was not obliged to reopen the procedure after obtaining that new information.

In Case C-322/09 P *NDSHT v Commission* (judgment of 18 November 2010), the Court of Justice was called upon to define the concept of an act open to challenge, the act being that of a Community institution. An appeal had been lodged by which the appellant sought to have set aside a judgment of the General Court declaring inadmissible an action for annulment of a decision contained in Commission letters to the company NDSHT, relating to a complaint concerning allegedly unlawful State aid granted by the City of Stockholm to a competitor company. The appellant, NDSHT, claimed that the General Court had erred in law in considering that the letters at issue, in which the Commission had decided not to pursue NDSHT's complaint, were an informal communication that was not open to challenge for the purposes of Article 230 EC. Under the procedure in force, where the Commission finds, following examination of a complaint, that an investigation has revealed no grounds

for concluding that there is State aid within the meaning of Article 87 EC, it refuses by implication to initiate the procedure provided for by Article 88(2) EC. According to the Court of Justice, the act in question could not be described as a mere informal communication or provisional measure in so far as it expressed the Commission's definitive decision to terminate its preliminary examination and thus its refusal to initiate the formal investigation procedure, thereby resulting in significant consequences for the appellant. In that context, the Court of Justice confirmed that the appellant was an undertaking in competition with the company benefiting from the measures complained of and, as such, an interested party for the purposes of Article 88(2) EC, and it attributed to the General Court an error of law in respect of its finding that the act at issue did not have the characteristics of a decision under Article 4 of Regulation (EC) No 659/1999 that was open to challenge although, irrespective of status or form, it produced binding legal effects such as to affect the appellant's interests. The Court of Justice therefore set aside the judgment concerned, dismissed the objection of inadmissibility alleging that the act at issue was not open to challenge in an action for annulment and referred the case back to the General Court for judgment on its merits.

As regards the rules on competition applicable to undertakings, two judgments are particularly noteworthy, the first relating to the application of the competition rules to groups of companies, the second relating to the scope of the principle of legal professional privilege.

By its judgment of 1 July 2010 in Case C-407/08 P *Knauf Gips v Commission*, the Court held that, in the case of a group of companies at the apex of which were a number of legal persons, the Commission made no error of assessment in considering one of those companies to be solely responsible for the actions of the companies in that group which, as a whole, constituted an economic unit. The fact that there is no single legal person at the apex of a group is no obstacle to a company being held liable for the actions of that group. The legal structure particular to a group of companies, which is characterised by the absence of a single legal person at the apex of that group, is not decisive where that structure does not reflect the effective functioning and actual organisation of the group. In particular, the Court held that the lack of subordinating legal links between two companies at the apex of the group did not cast any doubt on the conclusion that one of those two companies had to be held liable for the activities of the group, since, in reality, the second company did not determine its conduct on the relevant market independently.

The judgment in *Knauf Gips v Commission* also clarifies the rights of undertakings during the administrative procedure and in the exercise of rights of appeal. The Court of Justice stated in its judgment that there is no requirement under the law of the European Union that the addressee of a statement of objections must challenge its various matters of fact or law during the administrative procedure, if it is not to be barred from doing so later at the stage of judicial proceedings, since such a restriction is contrary to the fundamental principles of the rule of law and of respect for the rights of the defence.

In Case C-550/07 P *Akzo Nobel Chemicals and Akros Chemicals v Commission* (judgment of 14 September 2010) a question also arose concerning the rights of undertakings during Commission investigations. The Commission had carried out inspections and seized numerous documents, including copies of e-mails exchanged between the general manager and Akzo Nobel's competition law coordinator, a lawyer enrolled as an Advocaat of the Netherlands Bar and employed by Akzo Nobel. In that context, the Court of Justice was called upon to clarify whether the communications of in-house lawyers employed by an undertaking are protected by legal professional privilege in the same way as those of external lawyers. It held that neither the evolution of the legal situation within the Member States of the European Union nor the adoption of Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of

the Treaty ⁽⁴¹⁾ supported the notion of a change in the case-law ⁽⁴²⁾ resulting in in-house lawyers being covered by legal professional privilege. The Court recalled that that protection is subject to two cumulative conditions. First, the exchange with the lawyer must be connected to the client's rights of defence and, second, the exchange must be with an independent lawyer, that is to say, a lawyer who is not bound to the client by a relationship of employment. The requirement of independence means the absence of any employment relationship between the lawyer and his client, so that legal professional privilege does not cover exchanges within a company or group with in-house lawyers. An in-house lawyer, despite his enrolment with a bar or law society and the professional ethical obligations to which he is, as a result, subject, does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his client. Consequently, an in-house lawyer is less able to deal effectively with any conflicts between his professional obligations and the aims of his client. Owing to the in-house lawyer's economic dependence and the close ties with his employer, he does not enjoy a level of professional independence comparable to that of an external lawyer.

Taxation

In three cases (judgments of 4 March 2010 in Cases C-197/08, C-198/08 and C-221/08), the Court was called upon to rule on actions for failure to fulfil obligations brought by the Commission against the French Republic, the Republic of Austria and Ireland in relation to the fixing of minimum prices for the retail sale of certain types of manufactured tobacco (cigarettes and other tobacco products in the case of France, cigarettes and fine-cut tobacco in the case of Austria and cigarettes in the case of Ireland). The Commission had brought these cases before the Court because it took the view that the national legislation at issue was contrary to Directive 95/59/EC ⁽⁴³⁾, which imposes certain rules on customs duties which affect the consumption of those products, in that the national legislation undermined the freedom of manufacturers and importers to determine the maximum retail selling price of their products, and thus free competition.

The Court held that a system of minimum prices cannot be regarded as compatible with that directive unless it is structured in such a way as to ensure, in any event, that the competitive advantage which could result for some producers and importers of those products from lower cost prices is not impaired. It ruled that the Member States which imposed minimum retail selling prices for cigarettes were failing to fulfil their obligations under Article 9(1) of Directive 95/59/EC, since that system did not make it possible to ensure, in any event, that the minimum price imposed did not impair the competitive advantage which could result for some producers and importers of tobacco products from lower cost prices. According to the Court, such a system, which furthermore fixed the minimum price by reference to the average price on the market for each category of cigarette, was likely to eliminate price differences between competing products and to cause prices to converge around the price of the most expensive product. That system therefore undermined the freedom of producers and importers to determine their maximum retail selling price, guaranteed by the second subparagraph of Article 9(1) of Directive 95/59/EC.

⁽⁴¹⁾ Council Regulation (EC) No 1/2003 of 16 December 2002 (OJ 2003 L 1, p. 1).

⁽⁴²⁾ Case 155/79 *AM & S Europe v Commission* [1982] ECR 1575.

⁽⁴³⁾ Council Directive 95/59/EC of 27 November 1995 on taxes other than turnover taxes which affect the consumption of manufactured tobacco (OJ 1995 L 291, p. 40), as amended by Council Directive 2002/10/EC of 12 February 2002 (OJ 2002 L 46, p. 26).

The Member States had attempted to justify their legislation by invoking the Framework Convention of the World Health Organisation (WHO) ⁽⁴⁴⁾. The Court held that that convention cannot affect the compatibility or otherwise of such a system with Article 9(1) of Directive 95/59/EC since the convention imposes no actual obligation on the contracting parties with regard to price policies for tobacco products, and merely describes possible approaches by which to take account of national health objectives concerning tobacco control. Article 6(2) of the convention provides only that the contracting parties are to adopt or maintain measures which 'may include' implementing tax policies and, 'where appropriate', price policies, concerning tobacco products. The Member States had also relied on the provisions of Article 30 EC in order to justify an infringement of Article 9(1) of Directive 95/59/EC with reference to the objective of protection of health and life of humans. The Court held that Article 30 EC cannot be understood as authorising measures other than the quantitative restrictions on imports and exports and the measures having equivalent effect envisaged by Articles 28 EC and 29 EC.

Finally, the Court considered that Directive 95/59/EC does not prevent the Member States from taking measures to combat smoking, which forms part of the objective of protecting public health, and recalled that fiscal legislation is an important and effective instrument for discouraging consumption of tobacco products and, therefore, for the protection of public health, given that the objective of ensuring that a high price level is fixed for those products may adequately be attained by increased taxation of those products, the excise duty increases sooner or later being reflected in an increase in the retail price, without undermining the freedom to determine prices. The Court added that the prohibition against fixing minimum prices does not prevent the Member States from prohibiting the sale of manufactured tobacco at a loss in so far as this does not undermine the freedom of producers and importers to fix the maximum retail selling price of their products. Those economic players will thus not be able to absorb the impact of taxes on those prices by selling their products at a price below the sum of the cost price and all taxes.

Trade marks

In Case C-398/08 P *Audi v OHIM* (judgment of 21 January 2010), the Court held that an advertising slogan can be regarded, in certain circumstances, as a distinctive sign and can constitute on that basis a valid trade mark in accordance with the provisions of Article 7(1)(b) of Regulation (EC) No 40/94 ⁽⁴⁵⁾. It therefore annulled the decision refusing registration of the trade mark in question consisting of the slogan *Vorsprung durch Technik* (meaning, inter alia, advance or advantage through technology). The fact that a mark is made up of a promotional formula which could be used by other undertakings is not sufficient for that mark to be devoid of any distinctive character. Such a mark can therefore be perceived by the relevant public both as a promotional formula and as an indication of the commercial origin of goods and/or services, which is the function of the mark. The Court went on to list certain criteria applicable to advertising slogans: an expression which can have a number of meanings, constitute a play on words or be perceived as imaginative, surprising and unexpected and, in that way, be easily remembered. Although the presence of such characteristics is not necessary, it is nevertheless likely to endow the sign in question with distinctive character. In the Court's view, even if the advertising slogans are made up of an objective message, the trade marks formed from that slogan are not, by virtue of that fact alone, devoid of distinctive character in so far as they are not descriptive. Thus, according to the Court, in order for an advertising slogan submitted as a trade mark to have distinctive character, it must possess

⁽⁴⁴⁾ WHO Framework Convention on Tobacco Control approved by the Community by Council Decision 2004/513/EC of 2 June 2004 (OJ 2004 L 213, p. 8).

⁽⁴⁵⁾ Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1).

a certain originality or resonance, require at least some interpretation by the relevant public, or set off a cognitive process in the minds of that public. The Court therefore held that, however simple the slogan in question may be, it cannot be categorised as ordinary to the point of excluding, from the outset and without any further analysis, the possibility that the mark comprising that slogan is capable of indicating to the consumer the commercial origin of the goods or services covered by its registration.

In Joined Cases C-236/08 to C-238/08 *Google France SARL and Google Inc. v Louis Vuitton Malletier SA, Google France SARL v Viaticum SA and Luteciel SARL and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others* (judgment of 23 March 2010), the Court, on a reference for a preliminary ruling from the French Cour de cassation (Court of Cassation), ruled on the respective liability of providers of referencing services and advertisers in the event of use of 'AdWords'. The Court thus had to interpret the provisions of Regulation (EC) No 40/94 ⁽⁴⁶⁾ and Directive 89/104/EEC ⁽⁴⁷⁾ in order to clarify the concept of use of a mark for the purposes of Article 9(1) of Regulation (EC) No 40/94 and Article 5(1) and (2) of Directive 89/104/EEC. Google operates an Internet search engine based on the use of keywords and offers a paid referencing service called 'AdWords'. That service enables any economic operator, by means of the reservation of one or more keywords, to obtain the placing — in the event of a correspondence between one or more of those words and that/those entered as a request in the search engine by an Internet user — of an advertising link to its site, accompanied by an advertising message. The entry by Internet users of terms constituting trade marks into Google's search engine triggers the display, under the heading 'sponsored links', of links to sites offering imitations of the products of Louis Vuitton Malletier and to the sites of competitors of Viaticum and of the Centre national de recherche en relations humaines, respectively. Those companies, proprietors of the trade marks used as 'AdWords', therefore brought proceedings against Google with a view to obtaining a declaration that Google had infringed their trade marks.

The Cour de cassation, ruling at last instance in the proceedings brought against Google by the trade mark proprietors, asked the Court of Justice about the lawfulness of the use, as keywords in an Internet referencing service, of signs which correspond to trade marks, without consent having been given by the proprietors of those trade marks. The advertisers use those signs in respect of their goods or services. That is not, however, the case as regards the referencing service provider when it permits advertisers to select, as keywords, signs identical with trade marks, stores those signs and displays its clients' advertisements on the basis thereof.

The Court stated that the use, by a third party, of a sign identical with, or similar to, the proprietor's trade mark implies, at the very least, that that third party uses the sign in its own commercial communication. According to the Court, a referencing service provider allows advertisers to use signs which are identical with, or similar to, trade marks held by third parties, without itself using those signs. While a trade mark proprietor may not be able to rely on his marks as against the referencing service provider, which does not use them itself, he can nonetheless rely on them as against advertisers who, by means of the keyword corresponding to the marks, have advertisements placed by Google which do not enable Internet users, or enable them only with difficulty, to identify the undertaking from which the goods or services covered by the advertisements originate. The Internet user may err as to the origin of the goods or services in question. The function of the mark — to guarantee to consumers the origin of the goods or services ('function of indicating [the] origin' of

⁽⁴⁶⁾ See the preceding footnote.

⁽⁴⁷⁾ First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1).

the mark) — is then adversely affected. The Court stated that it is for the national court to assess, on a case-by-case basis, whether the facts of the dispute before it indicate such adverse effects, or a risk thereof, on the function of indicating origin. With regard to the use by Internet advertisers of a sign corresponding to another person's trade mark as a keyword for the purposes of displaying advertising messages, the Court considered that that use is liable to have certain repercussions on the advertising use of the mark by its proprietor and on the latter's commercial strategy. Nevertheless, those repercussions of use by third parties of a sign identical with the trade mark do not of themselves constitute an adverse effect on the 'advertising function' of the trade mark.

The Court was also asked about the liability of an operator such as Google for its customers' data which are stored on its server. Questions of liability are governed by national law. However, European Union law lays down limitations of the liability of intermediary providers of information society services ⁽⁴⁸⁾. In relation to whether an Internet referencing service, such as 'AdWords', constitutes an information society service consisting in the storage of information supplied by the advertiser and whether, therefore, the referencing service provider's liability is limited, the Court observed that the referring court had to examine whether the role played by the service provider was neutral, in the sense that its conduct was merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stored. Furthermore, according to the Court, if it transpires that an Internet referencing service provider has not played an active role, it cannot be held liable for the data which it has stored at the request of an advertiser, unless, having obtained knowledge of the unlawful nature of those data or of that advertiser's activities, it failed to act expeditiously to remove or to disable access to those data.

Social policy

The Court has considered various aspects of social policy as reflected in the numerous directives introduced in this area.

In Case C-242/09 *Albron Catering* (judgment of 21 October 2010), the Court had to clarify the meaning of 'transferor' in Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses ⁽⁴⁹⁾. According to recital 3 in the preamble thereto, the directive is intended 'to provide for the protection of employees in the event of a change of employer'. To that effect, Article 3(1) provides that '[t]he transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee'. The question put to the Court in this case was whether, in the case of a transfer, within the meaning of Directive 2001/23/EC, of an undertaking belonging to a group to an undertaking outside that group, it is possible to regard as a 'transferor', within the meaning of Article 2(1)(a) of that directive, the group company to which the employees were assigned on a permanent basis without, however, being linked to the latter by a contract of employment, given that there exists within that group an undertaking with which the employees concerned were linked by such a contract of employment. The Court answered in the affirmative. The requirement under Article 3(1) of Directive 2001/23/EC that there be either an em-

⁽⁴⁸⁾ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1).

⁽⁴⁹⁾ Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ 2001 L 82, p. 16).

ployment contract or, in the alternative and thus as an equivalent, an employment relationship at the date of the transfer suggests that, in the mind of the European Union legislature, a contractual link with the transferor is not required in all circumstances for employees to be able to benefit from the protection conferred by that directive.

In Case C-104/09 *Roca Álvarez* (judgment of 30 September 2010), the Court held that a national measure which provides that female workers who are mothers and whose status is that of an employed person are entitled, in various ways, to take leave during the first nine months following the child's birth, whereas male workers who are fathers with that same status are not entitled to the same leave unless the child's mother is also an employed person, is contrary to European Union law and, in particular, to Article 2(1), (3) and (4) and Article 5 of Directive 76/207/EEC⁽⁵⁰⁾. The Court noted that, since that leave can be taken by the employed father or the employed mother without distinction, meaning that feeding and devoting time to the child can be carried out just as well by the father as by the mother, it appears to be accorded to workers in their capacity as parents of the child. It cannot therefore be regarded as ensuring the protection of the biological condition of the woman following pregnancy or the protection of the special relationship between a mother and her child. Moreover, according to the Court, to refuse entitlement to such leave to fathers whose status is that of an employed person, on the sole ground that the child's mother does not have that status, could have as its effect that a woman who is self-employed would have to limit her self-employed activity and bear the burden resulting from the birth of her child alone, without the child's father being able to ease that burden. Consequently, the Court held that such a measure cannot be considered to be a measure eliminating or reducing existing inequalities in society within the meaning of Article 2(4) of Directive 76/207/EEC, nor a measure seeking to achieve substantive as opposed to formal equality by reducing the real inequalities that can arise in society and thus, in accordance with Article 157(4) TFEU, to prevent or compensate for disadvantages in the professional careers of the relevant persons.

In Case C-232/09 *Danosa* (judgment of 11 November 2010), the Court was asked, first, whether a person who provides services to a capital company, while being a member of its board of directors, must be regarded as a worker within the meaning of Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding⁽⁵¹⁾. The Court answered in the affirmative, provided that the activity of the person concerned is carried out, for some time, under the direction or supervision of another body of that company and if, in return for those activities, the board member receives remuneration. It also stated that the *sui generis* nature of the employment relationship under national law is of no consequence as regards whether or not a person is a worker for the purposes of European Union law. Next, the Court had to ascertain whether national legislation under which a member of the board of directors of a capital company may be dismissed without any account being taken of the fact that she is pregnant is in conformity with the prohibition of dismissal laid down in Article 10 of Directive 92/85/EEC. According to the Court, if the person concerned is a 'pregnant worker' within the meaning of that directive, the legislation must be considered incompatible with the directive. The Court added that if the applicant were not a 'pregnant worker' within the meaning of that directive, the applicant could potentially rely on

⁽⁵⁰⁾ Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40).

⁽⁵¹⁾ Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (10th individual directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1).

Directive 76/207/EEC, as amended by Directive 2002/73/EC⁽⁵²⁾. By virtue of the principle of non-discrimination and, in particular, the provisions of Directive 76/207/EEC, protection against dismissal must be afforded to women not only during maternity leave, but also throughout the period of the pregnancy. Consequently, according to the Court, even if the board member concerned is not a 'pregnant worker', the fact remains that her removal on account of pregnancy or essentially on account of pregnancy can affect only women and therefore constitutes direct discrimination on grounds of sex, contrary to Article 2(1) and (7) and Article 3(1)(c) of Directive 76/207/EEC.

Cases C-194/08 *Gassmayr* and C-471/08 *Parviainen* (judgments of 1 July 2010) also resulted in rulings by the Court on the interpretation of Directive 92/85/EEC, cited above⁽⁵³⁾. Specifically, the Court was called upon to rule on issues relating to the calculation of the income which must be paid to workers during their pregnancy or maternity leave when they are temporarily transferred to another job or granted leave from work. According to the Court, Article 11(1) of Directive 92/85/EEC does not preclude national legislation which provides that a pregnant worker temporarily granted leave from work on account of her pregnancy is entitled to pay equivalent to the average earnings she received during a reference period prior to the beginning of her pregnancy with the exception of the on-call duty allowance. A pregnant worker who, in accordance with Article 5(2) of Directive 92/85/EEC, has been temporarily transferred on account of her pregnancy to a job in which she performs tasks other than those she performed prior to that transfer is not entitled to the pay she received on average prior to that transfer. The Member States and, where appropriate, management and labour are not required pursuant to Article 11(1) of Directive 92/85/EEC to maintain, during the temporary transfer, the pay components or supplementary allowances which are dependent on the performance by the worker concerned of specific functions in particular circumstances and which are intended essentially to compensate for the disadvantages related to that performance. By contrast, the Court held that, in addition to the maintenance of her basic salary, a pregnant worker granted leave from work or who is prohibited from working is entitled, pursuant to Article 11(1), to pay components or supplementary allowances relating to her professional status, such as allowances relating to her seniority, her length of service and her professional qualifications.

Furthermore, in Case C-149/10 *Chatzi* (judgment of 16 September 2010), the Court clarified the scope of clause 2.1 of the framework agreement on parental leave annexed to Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC⁽⁵⁴⁾. First, the Court held that that provision cannot be interpreted as conferring an individual right to parental leave on the child, on account of both the wording and the purpose of the framework agreement. Second, the Court rejected the interpretation of clause 2.1 of the framework agreement on parental leave that the birth of twins confers entitlement to a number of periods of parental leave equal to the number of children born. Nonetheless, the Court stated that, read in the light of the principle of equal treatment, this clause obliges the national legislature to establish a parental leave regime which, according to the situation obtaining in the Member State concerned, ensures that the parents of twins receive treatment that takes due account of their particular needs. It then

⁽⁵²⁾ Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40) and Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Directive 76/207/EEC (OJ 2002 L 269, p. 15).

⁽⁵³⁾ See footnote 51.

⁽⁵⁴⁾ Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (OJ 1996 L 145, p. 4), as amended by Council Directive 97/75/EC of 15 December 1997 amending and extending, to the United Kingdom, Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (OJ 1998 L 10, p. 24).

left it to national courts to determine whether the national rules meet that requirement and, if necessary, to interpret them, so far as possible, in conformity with European Union law.

A number of cases have served to enable the Court to reaffirm the existence of the principle of non-discrimination on grounds of age, and to clarify further the scope of that principle.

In Case C-499/08 *Andersen* (judgment of 12 October 2010), the Court had the opportunity to rule on the interpretation of Articles 2 and 6(1) of Directive 2000/78/EC⁽⁵⁵⁾ establishing a general framework for equal treatment in employment and occupation. According to the Court, those provisions preclude national legislation pursuant to which workers who are eligible to draw an old-age pension from their employer under a pension scheme which they have joined before attaining the age of 50 years cannot, on that ground alone, claim a severance allowance aimed at assisting workers with more than 12 years of service in the undertaking in finding new employment. The Court found that the legislation at issue operated a difference of treatment based directly on age which deprived certain workers of their right to the severance allowance on the sole ground that they were entitled to draw an old-age pension. The Court went on to consider the possible justification for that difference of treatment, under the conditions laid down by Directive 2000/78/EC. It held that while the legislation is proportionate in the light of legitimate employment policy and labour market objectives, it goes beyond what is necessary to attain those aims. It excludes from entitlement to the allowance not only all workers who are actually going to receive an old-age pension from their employer but also all those who are eligible for such a pension but who wish to continue with their career. The legislation is therefore not justified and, accordingly, is incompatible with Directive 2000/78/EC.

In Case C-555/07 *Kücükdevici* (judgment of 19 January 2010), the Court held that the principle of non-discrimination on grounds of age as given expression by Directive 2000/78/EC must be interpreted as precluding national legislation which provides that periods of employment completed by an employee before reaching the age of 25 are not taken into account in calculating the notice period for dismissal. The Court also observed that a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual. However, it noted that Directive 2000/78/EC merely gives expression to the principle of equal treatment in employment and occupation, and that the principle of non-discrimination on grounds of age is a general principle of European Union law. Consequently, it concluded that it is for the national court, hearing a dispute involving the principle of non-discrimination on grounds of age as given expression in Directive 2000/78/EC, to provide, within the limits of its jurisdiction, the legal protection which individuals derive from European Union law and to ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to that principle.

Finally, in Cases C-229/08 *Wolf* and C-341/08 *Petersen* (judgments of 12 January 2010) and in Case C-45/09 *Rosenbladt* (judgment of 12 October 2010), the Court ruled on the scope to be attributed to the principle of non-discrimination on grounds of age, in terms of Directive 2000/78/EC. In the first case, the Court held that, although national legislation which sets the maximum age for recruitment to intermediate career posts in the fire service at 30 years introduces a difference of treatment on grounds of age for the purposes of Article 2(2)(a) of Directive 2000/78/EC, such legislation may be regarded as appropriate to the objective of ensuring the operational capacity and proper functioning of the professional fire service, which constitutes a legitimate objective within the meaning of Article 4(1) of that directive. Furthermore, that legislation appears not to go beyond what is necessary to achieve that objective, since the possession of especially high physical

⁽⁵⁵⁾ 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).

capacities may, for the purposes of Article 4(1) of the directive, be regarded as a genuine and determining occupational requirement for carrying on the occupation of a person in the intermediate career of the fire service, and the need to possess full physical capacity to carry on that occupation is related to the age of the persons in that career.

In the second case, the Court held that Article 2(5) of Directive 2000/78/EC precludes a national measure setting a maximum age for practising as a panel dentist, in this case 68 years, if its sole aim is ostensibly to protect the health of patients against the decline in performance of those dentists after that age and that age-limit does not apply to non-panel dentists. By contrast, Article 6(1) of that directive does not preclude such a measure where its aim is to share out employment opportunities among the generations in the profession of panel dentist, if, taking into account the situation in the labour market concerned, the measure is appropriate and necessary for achieving that aim. In the third case, the Court held that Article 6(1) of Directive 2000/78/EC does not preclude a national provision under which clauses on automatic termination of employment contracts on the ground that the employee has reached the age of retirement are considered to be valid, in so far as, first, that provision is objectively and reasonably justified by a legitimate aim relating to employment policy and the labour market and, second, the means of achieving that aim are appropriate and necessary.

Environment

In Case C-297/08 *Commission v Italy* (judgment of 4 March 2010), the Court had to consider whether, as the Commission claimed, the Italian Republic had failed to fulfil its obligations under Directive 2006/12/EC⁽⁵⁶⁾. The allegations against Italy related to the disposal of waste by the region of Campania only.

With regard to facilities for the recovery or disposal of urban waste, the Court observed that, for the purposes of establishing an integrated and adequate network of waste disposal installations, the Member States enjoy a measure of discretion as to the territorial basis which they consider appropriate for achieving national self-sufficiency. It may be appropriate for certain categories of waste, owing to their specific characteristics, to be treated at one or more dedicated national installations or even in cooperation with other Member States. By contrast, in the case of non-hazardous urban waste — which does not require specialised installations — the Member States must organise a disposal network as close as possible to the places where the waste is produced, although that does not alter the fact that it is also possible to establish interregional or even cross-border co-operation, where that is consistent with the principle of proximity. The opposition of inhabitants, the non-performance of contractual obligations or even the existence of criminal activity do not constitute cases of *force majeure* that might justify either the failure to fulfil obligations under that directive or the failure actually to construct the infrastructure on time.

With regard to danger to human health and harm to the environment, the Court observed that, whilst the directive lays down the objectives of preservation of the environment and protection of human health, it does not specify the actual content of the measures to be taken and leaves a certain margin of discretion to the Member States. It follows that, in principle, it cannot be inferred directly from the fact that a situation is not in conformity with the objectives laid down in Article 4(1) of Directive 2006/12/EC that the Member State concerned has necessarily failed to fulfil its obligations under that provision, that is to say, to take the requisite measures to ensure that waste is disposed of without endangering human health and without harming the environment. However,

⁽⁵⁶⁾ Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste (OJ 2006 L 114, p. 9).

if that situation persists and, in particular, if it leads to a significant deterioration in the environment over a protracted period without any action being taken by the competent authorities, this may be an indication that Member States have exceeded the discretion conferred on them by that provision. Consequently, by failing to establish an integrated and adequate network of waste recovery and disposal installations close to the place where that waste is produced, and by failing to adopt all the measures necessary to ensure that human health is not endangered or the environment harmed in the region of Campania, the Italian Republic failed to fulfil its obligations in two respects.

In the two judgments of 9 March 2010 in Case C-378/08 *ERG and Others* and Joined Cases C-379/08 and C-380/08 *ERG and Others*, respectively, the Court was able to consider the interpretation of Directive 2004/35/EC on environmental liability ⁽⁵⁷⁾.

In Case C-378/08, the Court held that that environmental liability directive does not preclude national legislation which allows the competent authority to operate on the presumption that there is a causal link between operators and the pollution found on account of the fact that the operators' installations are located close to the polluted area. However, in accordance with the 'polluter pays' principle, in order for such a causal link to be presumed, that authority must have plausible evidence capable of justifying its presumption, such as the fact that the operator's installation is located close to the pollution found and that there is a correlation between the pollutants identified and the substances used by the operator in connection with his activities. Furthermore, the competent authority is not required to establish fault on the part of operators whose activities are held to be responsible for the environmental damage. On the other hand, that authority must carry out a prior investigation into the origin of the pollution found, and it has a discretion as to the procedures, means to be employed and length of such an investigation.

In Joined Cases C-379/08 and C-380/08, the Court held that the competent authority is permitted to alter substantially the measures for remedying environmental damage which were chosen at the conclusion of a procedure carried out on a consultative basis with the operators concerned and which have already been implemented or begun to be put into effect. However, in order to adopt such a decision, that authority must:

- give the operators the opportunity to be heard, except where the urgency of the environmental situation requires immediate action on the part of the competent authority;
- invite, amongst others, the persons on whose land those measures are to be carried out to submit their observations and take them into account; and
- state in its decision the grounds on which its choice is based, and, where appropriate, the grounds which justify the fact that there was no need for a detailed examination or that it was not possible to carry out such an examination due, for example, to the urgency of the environmental situation.

Also, the Court held that the directive on environmental liability did not preclude national legislation which permitted the competent authority to make the exercise by operators of the right to use their land subject to the condition that they carry out the environmental recovery works required, even though that land was not affected by those works because it had already been decontaminated or had never been polluted. However, such a measure had to be justified by the

⁽⁵⁷⁾ Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (OJ 2004 L 143, p. 56).

objective of preventing a deterioration of the environmental situation or, pursuant to the precautionary principle, by the objective of preventing the occurrence or resurgence of further environmental damage on the land belonging to the operators which was adjacent to the whole shoreline at which the remedial measures were directed.

Visas, asylum and immigration

A number of judgments relating to this constantly developing area deserve particular attention. In Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* (judgment of 22 June 2010), the Court stated that Article 67(2) TFEU and Articles 20 and 21 of Regulation (EC) No 562/2006⁽⁵⁸⁾ preclude national legislation which grants to the police authorities of the Member State in question the power to check, solely within an area of 20 kilometres from the land border of that State with States party to the Convention implementing the Schengen Agreement, the identity of any person, irrespective of his behaviour and of specific circumstances giving rise to a risk of breach of public order, in order to ascertain whether the obligations laid down by law to hold, carry and produce papers and documents are fulfilled, where that legislation does not provide the necessary framework for that power to guarantee that its practical exercise cannot have an effect equivalent to border checks.

In Case C-578/08 *Chakroun* (judgment of 4 March 2010), the Court had an opportunity to clarify its case-law concerning family reunification.

It held, first of all, that the phrase 'recourse to the social assistance system' in Article 7(1)(c) of Directive 2003/86/EC⁽⁵⁹⁾ must be interpreted as precluding a Member State from adopting rules in respect of family reunification which result in such reunification being refused to a sponsor who has proved that he has stable and regular resources which are sufficient to maintain himself and the members of his family, but who, given the level of his resources, will nevertheless be entitled to claim special assistance in order to meet exceptional, individually determined, essential living costs, tax refunds granted by local authorities on the basis of his income, or income-support measures in the context of local-authority minimum-income policies.

Second, the Court held that Directive 2003/86/EC, in particular Article 2(d) thereof, must be interpreted as precluding national legislation which, in applying the income requirement set out in Article 7(1)(c) of that directive, draws a distinction according to whether the family relationship arose before or after the sponsor entered the territory of the host Member State.

In Case C-31/09 *Bolbol* (judgment of 17 June 2010), the Court interpreted the first sentence of Article 12(1)(a) of Directive 2004/83/EC⁽⁶⁰⁾. It is a specific feature of this directive that it sets out, in the context of the European Union, the obligations arising under the Geneva Convention⁽⁶¹⁾. The Court recalled that the particular convention rules applicable to displaced Palestinians relate only to persons who are at present receiving protection or assistance from the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). Consequently, only

⁽⁵⁸⁾ Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1).

⁽⁵⁹⁾ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12).

⁽⁶⁰⁾ 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).

⁽⁶¹⁾ Geneva Convention of 28 July 1951 Relating to the Status of Refugees (*United Nations Treaty Series*, Vol. 189, p. 150, No 2545 (1954)).

those persons who have actually availed themselves of the assistance provided by UNRWA come within those particular rules. By contrast, persons who are or have been eligible to receive protection or assistance from that agency are still covered by the general provisions of the convention. Thus, their applications for refugee status must be examined individually and can be granted only if there has been persecution for reasons of race, religion, nationality or political persecution. As regards proof that assistance has actually been received from UNRWA, the Court stated that, while registration with UNRWA is sufficient proof, the beneficiary must be permitted to adduce evidence of that assistance by other means.

In Joined Cases C-57/09 and C-101/09 *B and D* (judgment of 9 November 2010), the Court clarified the rules for the application of the clauses excluding a person from refugee status laid down in Article 12(2)(b) and (c) of Directive 2004/83/EC ⁽⁶²⁾. It was faced with an applicant for refugee status, on the one hand, and a recognised refugee, on the other, both of whom had been members of organisations included in the European Union list of persons, groups and entities involved in acts of terrorism drawn up in the context of combating terrorism in accordance with a resolution of the United Nations Security Council.

The Court began by considering whether it constitutes a 'serious non-political *crime*' or an '*act contrary to the purposes and principles of the United Nations*' within the meaning of Directive 2004/83/EC if the person concerned was a member of an organisation which is included in the list and actively supported the armed struggle pursued by that organisation, possibly in a prominent position. The Court stated that the exclusion from refugee status of a person who has been a member of an organisation which uses terrorist methods is conditional on an individual assessment of the specific facts, making it possible for the competent authority to determine whether there are serious reasons for considering that that person has, in the context of his activities within that organisation, committed a serious non-political crime or has been guilty of acts contrary to the purposes and principles of the United Nations, or that he has instigated such a crime or such acts, or participated in them in some other way, within the meaning of the directive.

It follows, first, that the mere fact that the person concerned was a member of such an organisation cannot automatically mean that that person must be excluded from refugee status. Second, the Court observed that participation alone in the activities of a terrorist group is not such as to trigger the automatic application of the exclusion clauses laid down in the directive, since the directive presupposes a full investigation into all the circumstances of each individual case.

The Court went on to find that exclusion from refugee status pursuant to one of the exclusion clauses concerned is not conditional on the person concerned representing a present danger to the host Member State. The exclusion clauses are intended as a penalty only for acts committed in the past. Within the scheme of the directive, there are other provisions enabling the competent authorities to adopt the necessary measures if a person represents a present danger.

Finally, the Court interpreted Directive 2004/83/EC as meaning that Member States may grant a right of asylum under their national law to a person who is excluded from refugee status pursuant to one of the exclusion clauses under that directive, provided that that other kind of protection does not entail a risk of confusion with refugee status within the meaning of the directive.

In Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahadin Abdulla and Others* (judgment of 2 March 2010), the Court considered the conditions governing the cessation of refugee

⁽⁶²⁾ See footnote 60.

status in connection with a change of the circumstances that had warranted its recognition, as provided for in Article 11(1)(e) of Directive 2004/83/EC.

The Court held that refugee status ceases to exist when, following a change of circumstances of a significant and non-temporary nature in the third country concerned, the circumstances which justified the fear of persecution no longer exist and the person has no other reason to fear persecution. In order to conclude that a refugee's fear of persecution is no longer justified, the competent authorities must verify that the third country's actor or actors of protection, referred to in Article 7(1) of Directive 2004/83/EC, have taken reasonable steps to prevent the persecution. They must therefore operate, *inter alia*, an effective legal system for the detection, prosecution and punishment of acts constituting persecution. The competent authorities must also ensure that the national concerned will have access to such protection if he ceases to have refugee status.

Next, the Court examined the situation where the circumstances which resulted in the granting of refugee status have ceased to exist, and clarified the circumstances in which the competent authorities must verify, if necessary, whether there are no other circumstances which could justify the person concerned reasonably fearing persecution. In the context of that analysis, the Court noted, *inter alia*, that both at the stage of the granting of refugee status and at the stage of the examination of the question of whether that status should be maintained, the assessment relates to the same question of whether or not the established circumstances constitute such a threat of persecution that the person concerned may reasonably fear, in the light of his individual situation, that he will in fact be subjected to acts of persecution. Consequently, the Court concluded that the standard of probability used to assess the risk of persecution is the same as that applied when refugee status was granted.

Judicial cooperation in civil matters and private international law

The 'Communitarisation' of judicial cooperation in civil matters has been accompanied, as was to be expected, by a strengthening of the role of the Community courts.

In the course of 2010, the Court of Justice delivered a number of important judgments concerning the interpretation of the special provisions applicable to contracts laid down by Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ⁽⁶³⁾.

Reference must be made, first of all, to Case C-381/08 *Car Trim* (judgment of 25 February 2010), in which the Court was required to rule on the interpretation of Article 5(1)(b) of Regulation (EC) No 44/2001, which contains two independent definitions — the first in matters relating to a contract for the sale of goods and the second in matters relating to a contract for the provision of services — in order to facilitate the application of the rule of special jurisdiction in matters relating to a contract laid down in Article 5(1) of Regulation (EC) No 44/2001, a rule which designates the courts for the place of performance of the obligation in question. In matters relating to a contract for the sale of goods, the first indent of Article 5(1)(b) of the regulation defines the place of performance of that obligation as being the place of delivery of the goods, as provided for in the contract. In matters relating to a contract for the provision of services, the second indent of Article 5(1)(b) of the regulation refers to the place of provision of the services, as provided for in the contract. The question referred to the Court for a preliminary ruling in this case related, first, to the definition of the criteria for distinguishing between 'sale of goods' and 'provision of services' within the mean-

⁽⁶³⁾ Council Regulation (EC) No 44/2001 of 22 December 2000 (OJ 2001 L 12, p. 1).

ing of Article 5(1)(b) of the regulation and, second, to the determination of the place of performance of the delivery obligation in the case of contracts involving carriage of goods, particularly if no provision has been made for this in the contract.

With regard to the first part of the question, the Court answered that Article 5(1)(b) of Regulation (EC) No 44/2001 must be interpreted as meaning that where the purpose of contracts is the supply of goods to be manufactured or produced and, even though the purchaser has specified certain requirements with regard to the provision, fabrication and delivery of the components to be produced, the purchaser has not supplied the materials and the supplier is responsible for the quality of the goods and their compliance with the contract, those contracts must be classified as a 'sale of goods' within the meaning of the first indent of Article 5(1)(b) of that regulation. In response to the second part of the question referred — concerning the determination of the place of performance of the contract in the case of contracts involving carriage of goods — the Court answered that, in accordance with the first indent of Article 5(1)(b) of Regulation (EC) No 44/2001, in the case of a sale involving carriage of goods, the place where, under the contract, the goods sold were delivered or should have been delivered must be determined on the basis of the provisions of the contract. It went on to clarify that where it is impossible to determine the place of delivery on that basis, without reference to the substantive law applicable to the contract, that place is the place where the physical transfer of the goods took place, as a result of which the purchaser obtained, or should have obtained, actual power of disposal over those goods at their final destination. The Court considers not only that that outcome meets the objectives of predictability and proximity, but also that it is consistent with the principal aim of a contract for the sale of goods, which is the transfer of those goods from the seller to the purchaser, an operation which is not fully completed until the arrival of those goods at their final destination.

Equally worthy of note are Joined Cases C-585/08 and C-144/09 *Pammer and Hotel. Alpenhof* (judgment of 7 December 2010), which also concern the application of Regulation (EC) No 44/2001 in matters relating to contracts. This judgment contains the Court's ruling on the interpretation of Article 15 of the regulation in relation to consumer contracts. More particularly, the question referred for a preliminary ruling that was common to both cases concerned the definition of the concept of 'activity directed' to the Member State in which the consumer is domiciled, as referred to in Article 15(1)(c) of Regulation (EC) No 44/2001. That concept, which is intended to allow the application of the regulation's special provisions protecting consumers to contracts concluded via the Internet, is not defined in the regulation. A joint declaration by the Council and the Commission on Article 15 of Regulation (EC) No 44/2001 states that 'the mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means'. The declaration also states that factors such as the language or currency used on a website are not sufficient evidence.

In order to clarify the terms of that regulation, the Court provided a general definition of the concept of 'directed activity' in the context of electronic commerce and then a non-exhaustive list of evidence from which it may be concluded that the trader's activity is directed to the Member State of the consumer's domicile. In the first place, the Court confirmed that the concept of 'directed activity' must be interpreted independently, and established that a trader directs his activity, via the Internet, to the Member State of the defendant's domicile if, before the conclusion of any contract with the consumer, it is apparent from the websites and the trader's overall activity that the trader was envisaging doing business with consumers domiciled in one or more Member States, including the Member State of that consumer's domicile, in the sense that he was minded to conclude a contract with them. In the second place, the Court specified, non-exhaustively, the matters to be verified by the national court constituting a clear expression of the trader's intention to solicit

the custom of consumers established in a Member State other than his own, namely the international nature of the activity, mention of itineraries from other Member States for going to the place where the trader is established, use of a language or a currency other than the language or currency generally used in the Member State in which the trader is established with the possibility of making and confirming the reservation in that other language, mention of telephone numbers with an international code, outlay of expenditure on an Internet referencing service in order to facilitate access to the trader's site or that of his intermediary by consumers domiciled in other Member States, use of a top-level domain name other than that of the Member State in which the trader is established, and mention of an international clientele composed of customers domiciled in various Member States. Finally, in the third place, the Court confirmed in this judgment the insufficiency of matters such as the accessibility of the trader's website in the Member State of the consumer's domicile, mention of an e-mail address or other contact details, or the use of the language or currency generally used in the Member State of the trader's establishment.

Furthermore, in *Pammer*, the Court also determined that a voyage by freighter can be classified as 'package travel' for the purposes of Article 15(3) of Regulation (EC) No 44/2001 if it fulfils the necessary conditions for a 'package' within the meaning of Article 2(1) of Directive 90/314/EEC⁽⁶⁴⁾, according to which the voyage must involve, at an inclusive price, not only transport but also accommodation, and must last more than 24 hours. It will be noted that, with a view to ensuring consistency in the European Union's international private law, the Court decided to interpret Article 15(3) of Regulation (EC) No 44/2001 in the light of the corresponding provision in Regulation (EC) No 593/2008 on the law applicable to contractual obligations, which expressly refers to the concept of 'package travel' within the meaning of Directive 90/314/EEC.

The interpretation of Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000⁽⁶⁵⁾, has given rise to three judgments worthy of note. These judgments concern applications relating to the return of a child where that child has been wrongfully removed from the country of the child's habitual residence. It will also be noted that two of those judgments were delivered in the context of the urgent preliminary ruling procedure under Article 104b of the Court's Rules of Procedure. That procedure has applied since 1 March 2008 to references concerning the area of freedom, security and justice, enabling the Court to deal within a considerably reduced timescale with the most sensitive issues, such as those which can arise, for example, in certain situations where a person has been deprived of his liberty, where the answer to the question raised is decisive as to the assessment of the legal situation of the person in custody or deprived of his liberty or, in matters of parental responsibility or the custody of children, where the identity of the court having jurisdiction under European Union law depends on the answer to the question referred for a preliminary ruling.

In Case C-211/10 *Povse* (judgment of 1 July 2010), the referring Austrian court put a series of questions to the Court of Justice for a preliminary ruling, in the context of the urgent procedure referred to above, relating to the interpretation of the provisions concerning the custody and return of a child contained in Regulation (EC) No 2201/2003. The main proceedings were between the parents of a child who had been unlawfully removed by her mother from the family home in Italy to Austria. The complexity of the case arose from the fact that two sets of proceedings, one before the Italian courts and the other before the Austrian courts, had been conducted in parallel with different outcomes. The first question referred for a preliminary ruling related to whether a provisional

⁽⁶⁴⁾ Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ 1990 L 158, p. 59).

⁽⁶⁵⁾ Council Regulation (EC) No 2201/2003 of 27 November 2003 (OJ 2003 L 338, p. 1).

measure, such as that handed down by the Italian court revoking the prohibition on the mother leaving Italy with the child and provisionally awarding custody to both parents, while authorising the child to reside in Austria pending final judgment, is a 'judgment on custody that does not entail the return of the child' within the meaning of Article 10(b)(iv) of Regulation (EC) No 2201/2003. The effect of such a decision by the court of the Member State where the child was previously habitually resident is to transfer jurisdiction from that court to the courts of the Member State to which the child was taken. The Court of Justice held that a provisional judgment does not constitute a 'judgment on custody that does not entail the return of the child' within the meaning of Article 10(b)(iv) of that regulation, and cannot be the basis of a transfer of jurisdiction to the courts of the Member State to which the child has been unlawfully removed. That conclusion follows from the structure of the regulation and is also in the interests of the child. The converse solution might deter the court which has jurisdiction in the Member State where the child was previously resident from adopting the provisional measures required in the interests of the child. Second, the Court of Justice was asked to rule on the interpretation of Article 11(8) of Regulation (EC) No 2201/2003. According to that provision, a decision of non-return pursuant to Article 13 of the 1980 Hague Convention, such as that issued in this instance by the Austrian courts on the application of the father, cannot preclude the enforcement of any subsequent judgment which requires the return of the child issued by a court having jurisdiction under Regulation (EC) No 2201/2003, such as that which the father obtained from the Italian courts in the main proceedings after the delivery of the Austrian decision of non-return. The question put to the Court of Justice was whether, in order to be enforceable, the decision ordering the return of the child had to be based on a final judgment of the same court relating to rights of custody of the child. The Court answered in the negative, holding that such an interpretation is scarcely compatible with the objective of Article 11 of that regulation and the priority given to the jurisdiction of the court of origin. Third, the Court stated that the second subparagraph of Article 47(2) of Regulation (EC) No 2201/2003 must be interpreted as meaning that a judgment delivered subsequently by a court in the Member State of enforcement which awards provisional custody rights and is deemed to be enforceable under the law of that State cannot preclude enforcement of a certified judgment delivered previously by the court which has jurisdiction in the Member State of origin and ordering the return of the child. As to whether a certified judgment is irreconcilable, within the meaning of the second subparagraph of Article 47(2) of the regulation, with a subsequent enforceable judgment, that question must be addressed only in relation to any judgments subsequently handed down by the courts with jurisdiction in the Member State of origin. Finally, fourth, the Court held that enforcement of a certified judgment cannot be refused in the Member State of enforcement because, as a result of a subsequent change of circumstances, it might be seriously detrimental to the best interests of the child. Such a change constitutes an issue of substance which must be resolved by the court with jurisdiction in the Member State of origin.

The issue of rights of custody and wrongful removal of a child in the context of the application of Regulation (EC) No 2201/2003 was also at the heart of Case C-400/10 *McB*. (judgment of 5 October 2010), which was also dealt with under the urgent preliminary ruling procedure. This case highlights the differences between the national laws of the Member States in relation to the rights of custody of a father who is not married to the child's mother. In certain national legal systems, the natural father of a child does not, by operation of law, have rights of custody; the acquisition of those rights is dependent on his obtaining a judgment from a national court with jurisdiction awarding him such rights. That is the case under Irish law which was applicable to the substance of the dispute. It follows from this that, in the absence of a decision awarding him custody of the child, the father cannot establish that the child's removal was wrongful within the meaning of Article 2(11) of Regulation (EC) No 2201/2003 in order to apply for the return of the child in its country of habitual residence. The question referred to the Court for a preliminary ruling in *McB*. related to whether the law of a Member State which makes the grant of rights of

custody to the father of a child who is not married to the mother subject to his obtaining a judicial decision is compatible with Regulation (EC) No 2201/2003, interpreted in accordance with Article 7 of the Charter of Fundamental Rights of the European Union relating to respect for private and family life.

The Court emphasised, first of all, that while ‘rights of custody’ is defined autonomously by the regulation in question, it follows from Article 2(11)(a) of that regulation that the question of who has such rights is governed by the national law applicable, which is defined as being the law of the Member State where the child was habitually resident immediately before its removal or retention. Next, the Court held that the fact that, unlike the mother, the natural father is not a person who automatically possesses rights of custody in respect of his child within the meaning of Article 2 of Regulation (EC) No 2201/2003 does not affect the essence of his right to private and family life set out in Article 7 of the Charter of Fundamental Rights of the European Union, provided that his right to apply for rights of custody to the national court with jurisdiction is safeguarded.

Finally, in Case C-256/09 *Purrucker* (judgment of 15 July 2010), the Court of Justice was called upon to rule on the applicability of the provisions of Regulation (EC) No 2201/2003 relating to the recognition and enforcement of judgments given by the court of another Member State to provisional measures adopted in relation to rights of custody on the basis of Article 20 of the regulation. In the first place, the Court recalled the distinction between the rules under Articles 8 to 14 of the regulation, which establish jurisdiction as to the substance of the matter, and the rule under Article 20(1) of the regulation, under which a court of a Member State may adopt provisional, including protective, measures, even if its jurisdiction as to the substance is not established, subject to the threefold condition that the measures adopted are urgent, are taken in respect of persons and assets in the Member State where that court is situated and are provisional. In the second place, the Court held that the system of recognition and enforcement provided for in Article 21 et seq. of Regulation (EC) No 2201/2003 is not applicable to provisional measures adopted on the basis of Article 20 of that regulation. The Court stated that it was not the intention of the European Union legislature that there should be such applicability, as is clear both from the legislative history and from equivalent provisions in earlier instruments, such as Regulation (EC) No 1347/2000 and the Brussels II Convention. Furthermore, the Court accepted that the application in all other Member States, including the State which has substantive jurisdiction, of the system of recognition and enforcement provided for by Regulation (EC) No 2201/2003 in regard to provisional measures would create a risk of circumvention of the rules of jurisdiction laid down by that regulation and of forum shopping. That situation would be contrary to the objectives pursued by the regulation and, in particular, to the objective of making sure that the best interests of the child are taken into consideration by ensuring that decisions concerning the child are taken by the court geographically close to his habitual residence, that court being regarded by the European Union legislature as the court best placed to assess the measures to be taken in the interests of the child. Finally, in the third place, the Court ruled on the need to allow the defendant in the urgent procedure to bring an appeal against the judgment ordering provisional measures. The Court considered that, in view of the importance of the provisional measures — whether they are adopted by a court which has substantive jurisdiction or not — which may be ordered in matters of parental responsibility, it is vital that a person affected by such a procedure, even if that person has been heard by the court which adopted the provisional measures, be able to take steps to bring an appeal against the judgment ordering those measures. It is essential that that person be able to have the substantive jurisdiction which that court attributed to itself, or — if it is not evident from the judgment that that court had, or had attributed to itself, substantive jurisdiction on the basis of that regulation — compliance with the conditions set out in Article 20 of the

regulation, reviewed by a court which is different from the court which adopted the measures and which is capable of ruling promptly.

Police and judicial cooperation in criminal matters

The instrument that epitomises police and judicial cooperation in criminal matters, the European arrest warrant, continues to generate case-law.

In Case C-261/09 *Mantello* (judgment of 16 November 2010), the Court interpreted Article 3(2) of Framework Decision 2002/584/JHA ⁽⁶⁶⁾, which allows the judicial authority of the Member State of execution to refuse to execute a European arrest warrant if the executing judicial authority is informed that the requested person has been ‘finally judged by a Member State in respect of the same acts’. Asked, first of all, about the interpretation of ‘same acts’, the Court held that, for the purposes of the issue and execution of a European arrest warrant, the concept of the ‘same acts’ in Article 3(2) of Framework Decision 2002/584/JHA is an autonomous concept of European Union law. That concept of the ‘same acts’ also appears, moreover, in Article 54 of the Convention implementing the Schengen Agreement and has, in that context, been interpreted as referring only to the nature of the acts, encompassing a set of concrete circumstances which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected. In view of the shared objective of Article 54 of that convention and of Article 3(2) of the framework decision, which is to ensure that a person is not prosecuted or tried more than once in respect of the same acts, the interpretation of that concept given in the context of the Convention implementing the Schengen Agreement is therefore equally valid for the purposes of Framework Decision 2002/584/JHA.

Next, the Court stated that a requested person is considered to have been finally judged in respect of the same acts where, following criminal proceedings, further prosecution is definitively barred or the accused is finally acquitted. Whether a person has been ‘finally’ judged is determined by the law of the Member State in which judgment was delivered. Consequently, a decision which, under the law of the Member State which instituted the criminal proceedings, does not definitively bar further prosecution at national level in respect of certain acts does not constitute a procedural obstacle to the possible opening or continuation of criminal proceedings in respect of the same acts in one of the Member States of the European Union. When, in response to a request for information from the executing judicial authority, the authority which issued the arrest warrant has expressly stated, on the basis of its national law, that the earlier judgment delivered in its legal order is not a final judgment covering the acts referred to in the arrest warrant, the executing judicial authority cannot, in principle, refuse execution of the European arrest warrant.

Foreign and security policy

In the context of the common foreign and security policy, the Court, on a reference from the Oberlandesgericht Düsseldorf (Düsseldorf Higher Regional Court), clarified the scope of the specific restrictive measures directed against certain persons and entities with a view to combating terrorism (judgment of 29 June 2010 in Case C-550/09 *E and F*), and provided its interpretation of Articles 2 and 3 of Regulation (EC) No 2580/2001 ⁽⁶⁷⁾.

⁽⁶⁶⁾ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1).

⁽⁶⁷⁾ Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ 2001 L 344, p. 70).

In order to implement certain United Nations Organisation resolutions, the Council adopted Common Position 2001/931/CFSP ⁽⁶⁸⁾ and Regulation (EC) No 2580/2001, which order the freezing of funds as against persons and entities included on a list established and regularly updated by decisions of the Council. Regulation (EC) No 2580/2001, moreover, prohibits funds from being made available, directly or indirectly, to persons or entities included on that list.

Until June 2007, decisions were adopted without any notice to the persons or entities on the list of the specific reasons for their inclusion on that list. Following a judgment of the General Court ⁽⁶⁹⁾ in which the listing of a group was held to be illegal on the grounds, in particular, that the Council had failed to state reasons for that listing and substantive review by the courts of the European Union was therefore impossible, the Council changed its listing procedure. On the adoption of a new decision updating the list ⁽⁷⁰⁾, which entered into force on 29 June 2007, the Council therefore provided the persons and groups concerned with a statement of reasons justifying their inclusion on the list. The General Court, in subsequent judgments, held the listing of a number of other entities to be illegal on the same grounds as those set out in its judgment in Case T-228/02. On 2 May 2002, the organisation Devrimci Halk Kurtulus Partisi-Cephesi (DHKP-C) was included on the list in question. The Council has since adopted various decisions updating that list. DHKP-C has always remained on it.

The case in which the Court was requested to rule concerned two German nationals against whom criminal proceedings had been brought in Germany. Mr E. and Mr F. were accused of being members of DHKP-C between 30 August 2002 and 5 November 2008. They had been placed in pre-trial detention for membership of a terrorist group and criminal proceedings had been brought against them. Since it had doubts concerning the legality of DHKP-C's inclusion on the list, the referring court asked the Court of Justice whether, in the context of the General Court's judgments annulling the listing of certain persons and entities owing to infringement of basic procedural guarantees, DHKP-C's listing must also be regarded as illegal for the period prior to 29 June 2007, notwithstanding the fact that DHKP-C had not sought annulment of that listing.

At the outset, the Court observed that the case before the national court could lead to criminal penalties entailing custodial sentences. In that context, it noted that the European Union is based on the rule of law and the acts of its institutions are subject to review by the Court of their compatibility with the Treaty on the Functioning of the European Union and the general principles of law. In proceedings before the national courts, every party has the right to plead the illegality of the provisions contained in legislative acts of the European Union which serve as the basis for a decision or act of national law relied upon against him and to prompt the national court to put that question to the Court by means of a reference for a preliminary ruling if the party in question had no right of direct action by which it could challenge those provisions before the General Court.

Regarding the legality of the Council's decisions prior to June 2007, the Court noted that none of those decisions was accompanied by a statement of reasons relating to the legal conditions for the application to DHKP-C of the regulation or an explanation of the actual and specific reasons for which the Council considered that the inclusion of DHKP-C on the list was justified, or remained

⁽⁶⁸⁾ Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93).

⁽⁶⁹⁾ Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Council* [2006] ECR II-4665.

⁽⁷⁰⁾ Council Decision 2007/445/EC of 28 June 2007 implementing Article 2(3) of Regulation (EC) No 2580/2001 and repealing Decisions 2006/379/EC and 2006/1008/EC (OJ 2007 L 169, p. 58).

so. The accused were therefore denied the information necessary to enable them to verify whether the inclusion of DHKP-C on the list during the period prior to 29 June 2007 was well founded, and to satisfy themselves, in particular, as to the accuracy and relevance of the evidence on which that listing was based, despite the fact that it was one of the grounds of the indictment drawn up against them. The lack of a statement of reasons which vitiated the listing was also liable to frustrate the attempts of the courts to carry out an adequate review of the substantive legality of that listing. The possibility of an adequate review by the courts is indispensable if a fair balance between the requirements of the fight against international terrorism, on the one hand, and the protection of fundamental liberties and rights, on the other, is to be ensured.

As to whether the decision of June 2007 legitimated DHKP-C's inclusion on the list *ex-post facto*, the Court held that that decision could not, in any circumstances, be relied upon as a basis for a criminal conviction in respect of acts relating to the period prior to its entry into force. Such an interpretation would infringe the principle of the non-retroactivity of provisions which may form the basis for a criminal conviction. In those circumstances, the Court held that it was for the national court to decline to apply, in the proceedings before it, the decisions of the Council adopted before June 2007, which consequently could not form any part of the basis for criminal proceedings against Mr E. or Mr F. in respect of the period prior to 29 June 2007.

Finally, the Court provided a wide interpretation of the prohibition laid down by Article 2(1)(b) of Regulation (EC) No 2580/2001 on making funds available for the benefit of persons or entities included on the list. According to the Court, that prohibition encompasses all the acts necessary if a person, a group or an entity on the list provided for in Article 2(3) of Regulation (EC) No 2580/2001 is effectively to obtain full power of disposal in respect of the funds, other financial assets and economic resources concerned. According to the Court, that meaning is independent of the existence or absence of a relationship between the perpetrator of the act of 'making available' and the beneficiary.

In Case C-340/08 *M and Others* (judgment of 29 April 2010), the Court addressed the question whether social security and social assistance benefits — such as living allowance, child benefit, housing benefit — granted to the spouses of presumed terrorists included on the list of Regulation (EC) No 881/2002 ⁽⁷¹⁾ are covered by the freezing of funds under that regulation.

The Court held that, given that there are certain divergences between the various language versions of that regulation and of the United Nations Security Council resolution which it is designed to implement, the regulation must be construed in terms of its purpose, which is to combat international terrorism. The objective of the freezing of funds is to stop the persons concerned having access to economic or financial resources, whatever their nature, that they could use to support their terrorist activities. In particular, that objective has to be understood as meaning that the freezing of funds applies only to those assets that can be turned into funds, goods or services capable of being used to support terrorist activities. The Court observed that it had not been argued that the spouses concerned handed over those funds to their husbands instead of allocating them to their basic household expenses, and it was not disputed that the funds in question were in fact used by the spouses to meet the essential needs of the households to which the persons included on the list belonged. It was hard to imagine how those funds could be turned into means that

⁽⁷¹⁾ Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan (OJ 2002 L 139, p. 9).

could be used to support terrorist activities, since benefits were fixed at a level intended to meet only the strictly vital needs of the persons concerned. Therefore, the Court concluded that the benefit that a listed person might indirectly derive from the social payments made to his spouse does not compromise the objective pursued by that regulation. In consequence, Regulation (EC) No 881/2002 does not apply to the grant of social security or social assistance benefits to the spouses of persons included on the freezing of funds list.