

A — The Court of Justice in 2011: 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 2011. It describes, first, how the institution evolved during the year, with the emphasis on the institutional changes affecting the Court of Justice and/or developments relating to its internal organisation. 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. In 2011, the Court of Justice submitted to the European Union legislature draft amendments to its Statute and a proposed recasting and updating of its Rules of Procedure. The main aim of both proposals is to improve the efficiency of proceedings before the Courts of the European Union.

The proposed amendments to the Statute seek in particular the establishment of the office of Vice-President of the Court of Justice, an increase in the number of judges forming the Grand Chamber to 15 as well as abolition of the automatic participation in the Grand Chamber of the presidents of the chambers of five judges, and the abandonment of reports for the hearing. In the provisions of the Statute relating to the General Court, the Court of Justice proposes to increase the number of General Court judges to 39, in order to respond to the constant increase in its caseload.

The proposed recasting of the Rules of Procedure has the objective of adapting both their structure and their content to changes in the caseload, of continuing the efforts already made over a number of years to maintain the Court's capacity in the face of an ever increasing and ever more complex caseload, of disposing of the cases brought before the Court within a reasonable period of time and of clarifying the procedural rules which the Court applies by making them easier to read.

This body of proposals is the fruit of a process of mature reflection on the basis of internal consultation. The proposals are currently being discussed within the European Union's legislative authorities. The full text of the proposals is available on the Court's website. ⁽¹⁾

In addition, the amendments made to the Rules of Procedure of the Court of Justice on 24 May 2011 should be noted (OJ 2011 L 162, p. 17). Those amendments provide, for the first time, for the possibility of the Court adopting a decision that determines criteria for a procedural document to be served by electronic means. The Court made use of that possibility in adopting the decision of 13 September 2011 on the lodging and service of procedural documents by means of e-Curia (OJ 2011 C 289, p. 7). This application, which will incontestably contribute to the modernisation of proceedings before the Courts of the European Union, was launched successfully on 21 November 2011.

It is also to be noted that citizens of the European Union now have access to a new search engine, which for the first time sweeps all the data relating to the body of case-law of the Courts of the European Union since the creation of the Court of Justice in 1952. This search engine may be used free of charge via the Court's website.

⁽¹⁾ http://curia.europa.eu/jcms/jcms/Jo2_7031

Finally, with a like aim in mind, the catalogue of the Court's library is now available via the Court's website.⁽²⁾ Persons using this catalogue can thus carry out online bibliographical research on European Union law and in the other fields of law covered by the catalogue, such as international law, comparative law, the law of the Member States of the European Union and certain non-member countries and the general theory of law. At the present time, the catalogue is one of the most complete in the world as regards European Union law. It currently includes approximately 340 000 bibliographical entries, including more than 80 000 concerning European Union law, and is growing at a rate of more than 20 000 entries per year.

2. The statistics concerning the Court's activity in 2011 show, overall, sustained efficiency and productivity on the part of the institution. They are also marked by a considerable increase in the number of cases brought.

The Court thus completed 550 cases in 2011 (net figures, that is to say, taking account of the joinder of cases), an increase compared with the previous year (522 cases completed in 2010). Of those cases, 370 were dealt with by judgments and 180 gave rise to orders.

In 2011, the Court had 688 new cases brought before it (without account being taken of the joinder of cases on the ground of similarity), which amounts to a significant increase compared with 2010 (631 cases brought) and, for the second year in succession, is the highest number in the Court's history. The situation is the same as regards references for a preliminary ruling. In 2011, the number of references for a preliminary ruling submitted was, for the third year in succession, the highest ever reached, and it exceeded the number in 2009 by almost 41% (423 cases in 2011 compared with 302 cases in 2009). Also the very marked increase in the number of appeals should be noted (162 in 2011 compared with 97 in 2010), as should the reduction, for the fifth consecutive year, in the number of direct actions. Now direct actions account for only about 12% of the cases brought before the Court, whereas they accounted for approximately 38% in 2007.

So far as concerns the duration of proceedings, the statistics are, in broad terms, as positive as the previous year's. The average time taken to deal with references for a preliminary ruling was 16.4 months, which amounts to a statistically insignificant increase compared with the figure for 2010 (16 months). The average time taken in 2011 to deal with direct actions and appeals was 20.2 months and 15.4 months respectively (compared with 16.7 months and 14.3 months in 2010).

In addition to the reforms in its working methods that have been undertaken in recent years, maintenance of the Court's efficiency in dealing with cases is also due to the increased use of the various procedural instruments at its disposal to expedite the handling of certain cases (the urgent preliminary ruling procedure, priority treatment, the accelerated or expedited procedure, the simplified procedure and the possibility of giving judgment without an Opinion of the Advocate General).

Use of the urgent preliminary ruling procedure was requested in five cases and the designated chamber considered that the conditions under Article 104b of the Rules of Procedure were met in two of them. Those cases were completed in an average period of 2.5 months.

Use of the expedited or accelerated procedure was requested 13 times, but the conditions under the Rules of Procedure were met in only two of those cases. Following a practice established in 2004, requests for the use of the expedited or accelerated procedure are granted or refused by

⁽²⁾ <http://bib-curia.eu/>

reasoned order of the President of the Court. In addition, priority treatment was granted in seven cases.

Also, the Court utilised frequently 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 30 cases were brought to a close by orders made on the basis of that provision.

Finally, the Court is continuing to make 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 46% of the judgments delivered in 2011 were delivered without an Opinion (compared with 50% in 2010).

As regards the distribution of cases between the various formations of the Court, it may be noted that the Grand Chamber dealt with roughly 11%, chambers of five judges with 55%, and chambers of three judges with approximately 33%, of the cases brought to a close by judgments or by orders involving a judicial determination in 2011. There are no significant differences compared with the previous year in the proportion of cases dealt with by the various formations of the Court.

For more detailed information regarding the statistics for the past judicial year the section of the report devoted solely to that topic should be consulted.

B — Case-law of the Court of Justice in 2011

This section of the Annual Report provides an overview of the case-law in 2011.

Constitutional or institutional issues

In a number of cases, the Court was called upon to specify the conditions under which it exercises jurisdiction. The first judgments noted here relate to actions for failure to fulfil obligations.

In Case C-52/08 *Commission v Portugal* (judgment of 24 May 2011), the Court ruled on the Commission's application alleging that Portugal, by failing to adopt the laws, regulations and administrative provisions necessary to comply with Directive 2005/36 on the recognition of professional qualifications, ⁽¹⁾ had failed to fulfil its obligations.

Regarding the admissibility of the action, the Court noted that, although the subject of the Commission's application was an alleged failure to transpose Directive 2005/36, its letters of formal notice and reasoned opinion related to Directive 89/48 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration. ⁽²⁾

The Court then recalled that, although the claims as stated in the application cannot as a rule be extended beyond the infringements alleged in the operative part of the reasoned opinion and in the letter of formal notice, the fact nevertheless remains that the Commission has standing to seek a declaration that a Member State has failed to fulfil obligations which were created in the original version of a European Union measure, subsequently amended or repealed, and which were maintained in force under the provisions of a new European Union measure. Conversely, the subject-matter of the dispute cannot be extended to obligations arising under new provisions which do not correspond to those arising under the original version of the measure concerned, for otherwise there would be a breach of the essential procedural requirements of infringement proceedings.

Next, as to the substance, the Court held that, where particular circumstances during the legislative procedure — for instance if the legislature did not adopt a clear position or the scope of a provision of European Union law was not precisely determined — give rise to a situation of uncertainty, it is not possible to conclude that, at the end of the period prescribed in the reasoned opinion, there existed a sufficiently clear obligation for the Member States to transpose a directive. Accordingly, the Court dismissed the Commission's action.

In Case C-496/09 *Commission v Italy* (judgment of 17 November 2011), the Commission brought an action for failure to fulfil obligations against the Italian Republic for its failure to comply with a previous judgment of the Court ⁽³⁾ relating to the recovery, from the recipients, of State aid found unlawful and incompatible with the common market by a decision of the Commission. The

⁽¹⁾ Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255, p. 22).

⁽²⁾ Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration (OJ 1989 L 19, p. 16).

⁽³⁾ Judgment of 1 April 2004 in Case C-99/02 *Commission v Italy* [2004] ECR I-3353.

Commission also sought an order for payment, by the Italian Republic, of a penalty payment and a lump sum.

First of all, the Court recalled, referring to the previous judgment given against the Italian Republic in the matter, that where a Commission decision requiring the cessation of State aid that is incompatible with the common market has not been the subject of a direct action or where such an action has been dismissed, the only defence available to a Member State against an action for failure to fulfil obligations is that it was absolutely impossible for it to implement the decision properly. Neither the apprehension of even insuperable internal difficulties nor the fact that the Member State in question intends to examine the individual situation of each undertaking concerned can justify a failure by that Member State to comply with its obligations under European Union law. Accordingly, the delay in implementing the Commission decision by the Member State concerned, essentially attributable to the lateness with which it acted to remedy the difficulties of identifying and recovering the amounts of unlawful aid, cannot be a valid justification. In that regard, the Court added that it is not relevant that the Member State concerned informed the Commission of the difficulties encountered in recovering the aid and the solutions adopted for remedying them.

Next, regarding the imposition of financial penalties, the Court held that, in the context of the procedure under Article 228(2) EC, it is for the Court, in each case, in the light of the circumstances of the case before it and the degree of persuasion and deterrence which appears to it to be required, to determine the financial penalties appropriate for making sure that the judgment which previously established a breach is complied with as swiftly as possible and preventing similar infringements of European Union law from recurring. It added that the legal and factual context of the infringement established may be an indication that effective prevention of future repetition of similar infringements of European Union law may require the adoption of a deterrent measure. Regarding the amount of the penalty payment, the Court stated that it is for the Court, in exercising its discretion, to set the penalty payment so that it is both appropriate to the circumstances and proportionate to the infringement established and the ability to pay of the Member State concerned.

Finally, the Court recalled that, in view of the objectives of the procedure provided for in Article 228(2) EC, the Court is empowered, in the exercise of the discretion conferred on it in connection with that article, to impose a penalty payment and a lump sum payment cumulatively.

The next case to be mentioned, Case C-83/09 P *Commission v Kronoply and Kronotex* (judgment of 24 May 2011), concerns actions for annulment.

In that case, the Court had to rule on the admissibility of an action for annulment brought by third parties in respect of a Commission decision to raise no objections to State aid granted to a company by a Member State. According to the Court, the lawfulness of such a decision, adopted under Article 4(3) of Regulation No 659/1999,⁽⁴⁾ depends on whether there are doubts as to the compatibility of the aid with the common market. Since such doubts must trigger the initiation of a formal investigation procedure in which the interested parties referred to in Article 1(h) of Regulation No 659/1999 can participate, it must be held that any interested party within the meaning of the latter provision is directly and individually concerned by such a decision. If the beneficiaries of the procedural guarantees provided for in Article 88(2) EC and Article 6(1) of Regulation No 659/1999

⁽⁴⁾ 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).

are to be able to ensure that those guarantees are respected, it must be possible for them to challenge the decision not to raise objections before the European Union judicature. Accordingly, the Court held that, in the context of an action for annulment, the specific status of 'interested party' within the meaning of Article 1(h) of Regulation No 659/1999, in conjunction with the specific subject-matter of the action, is sufficient to distinguish individually, for the purposes of the fourth paragraph of Article 230 EC, the applicant contesting a decision not to raise objections.

Moreover, the Court stated that Article 1(h) of Regulation No 659/1999 does not rule out the possibility that an undertaking which is not a direct competitor of the beneficiary of the aid, but which requires the same raw material for its production process as the beneficiary, can be categorised as an interested party, provided that that undertaking demonstrates that its interests could be adversely affected by the grant of the aid. Finally, the Court held that the requirement to define the subject-matter of the action under Article 44(1)(c) of the Rules of Procedure of the General Court is satisfied to the requisite legal standard where the applicant identifies the decision which he seeks to have annulled. It matters little whether the application initiating proceedings states that it is seeking the annulment of 'a decision not to raise objections' — the term used in Article 4(3) of Regulation No 659/1999 — or of a decision not to initiate the formal investigation procedure, since the Commission takes a position on both aspects of the question by means of a single decision.

Finally, two cases relating to the exercise of Court's jurisdiction to give preliminary rulings are worthy of note.

In Case C-196/09 *Miles and Others* (judgment of 14 June 2011), the Court examined the concept of a 'court or tribunal of a Member State' under Article 267 TFEU.

The Court held that it has no jurisdiction to rule on a reference for a preliminary ruling from the Complaints Board of the European Schools. In order to determine whether a body making a reference is a court or tribunal for the purposes of Article 267 TFEU, which is a question governed by European Union law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent. Although the Complaints Board meets all those criteria and must, therefore, be deemed to be a 'court or tribunal' within the meaning of Article 267 TFEU, it falls within the remit not of a Member State, as stated in that article, but of the European Schools, which constitute, as the first and second recitals of the European Schools' Convention state, a '*sui generis*' system, which achieves, by means of an international agreement, a form of cooperation between the Member States and between those States and the European Union. The Complaints Board is thus a body of an international organisation which, despite the functional links which it has with the European Union, remains formally distinct from it and from its Member States. In those circumstances, the mere fact that the Complaints Board is required to apply the general principles of European Union law when it has a dispute before it is not sufficient to make it fall within the definition of a court or tribunal of a Member State and thus within the scope of Article 267 TFEU.

Case C-240/09 *Lesochranárske zoskupenie* (judgment of 8 March 2011) enabled the Court to rule on its jurisdiction to interpret an international agreement (the Aarhus Convention ⁽⁵⁾) concluded by the Community and the Member States on the basis of shared competence.

The Court stated that, having been duly seised in accordance with the provisions of the Treaty, including Article 267 TFEU, it had jurisdiction to define the obligations which the European Union has assumed and those which remain the sole responsibility of the Member States in order to interpret the Aarhus Convention. Next, it had to be determined whether, in the field covered by Article 9(3) of that convention, the European Union has exercised its powers and adopted provisions to implement the obligations which derive from it. If that were not the case, the obligations deriving from Article 9(3) of the Aarhus Convention would continue to be covered by the national law of the Member States. In those circumstances, it would be for the courts of those Member States to determine, on the basis of national law, whether individuals could rely directly on the rules of that international agreement relevant to that field or whether the courts must apply those rules of their own motion. In that case, European Union law does not require or forbid the legal order of a Member State to accord to individuals the right to rely directly on a rule laid down in the Aarhus Convention or to oblige the courts to apply that rule of their own motion. However, if it were to be held that the European Union has exercised its powers and adopted provisions in the field covered by Article 9(3) of the Aarhus Convention, European Union law would apply and it would be for the Court of Justice to determine whether the provision of the international agreement in question has direct effect. Furthermore, a specific issue which has not yet been the subject of European Union legislation may nevertheless be part of European Union law where that issue is regulated in agreements concluded by the European Union and the Member States and it concerns a field in large measure covered by European Union law.

The Court found that it has jurisdiction to interpret the provisions of Article 9(3) of the Aarhus Convention and, in particular, to give a ruling on whether or not they have direct effect. Where a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of European Union law, there is a clear interest that, in order to forestall future differences of interpretation, that provision should be interpreted uniformly, whatever the circumstances in which it is to apply.

The case-law's contribution to the clarification of issues of a constitutional and institutional nature during 2011 extends far beyond these cases, however.

In Case C-163/10 *Patriciello* (judgment of 6 September 2011), the Court interpreted Article 8 of the Protocol on the Privileges and Immunities of the European Union, annexed to the EU, FEU and EAEC Treaties. It defined the scope of the immunity conferred by European Union law on Members of the European Parliament in respect of opinions expressed and votes cast by them in the performance of their duties.

The Court held that Article 8 of the Protocol on the Privileges and Immunities of the European Union must be interpreted to the effect that a statement made by a Member of the European Parliament beyond the precincts of that institution and giving rise to prosecution in his Member State of origin for the offence of making false accusations does not constitute an opinion expressed in the performance of his parliamentary duties covered by the immunity afforded by that provision

⁽⁵⁾ Convention on access to information, public participation in decision-making and access to justice in environmental matters, approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1).

unless that statement amounts to a subjective appraisal having a direct, obvious connection with the performance of those duties. It is for the national court to determine whether those conditions have been satisfied in a given case.

In the context of the accession of new Member States to the European Union on 1 May 2004, the Court considered, in Joined Cases C-307/09 to C-309/09 *Vicoplus and Others* (judgment of 10 February 2011), the interpretation of Articles 56 TFEU and 57 TFEU and of Article 1(3)(c) of Directive 96/71 ⁽⁶⁾ concerning the posting of workers in the framework of the provision of services.

The Court held that Articles 56 TFEU and 57 TFEU do not preclude a Member State from making, during the transitional period provided for in Chapter 2, paragraph 2, of Annex XII to the 2003 Act of Accession, ⁽⁷⁾ the hiring-out, within the meaning of Article 1(3)(c) of Directive 96/71, on its territory, of workers who are Polish nationals subject to the obtaining of a work permit. Such a national measure, though it amounts to a restriction on the freedom to provide services, must be considered to be a measure regulating access of Polish nationals to the labour market of that State within the meaning of Chapter 2, paragraph 2, of Annex XII to the 2003 Act of Accession. Such a finding also necessarily follows from the purpose of that paragraph, which is intended to prevent, following the accession to the European Union of new Member States, disturbances on the labour market of the existing Member States due to the immediate arrival of a large number of workers who are nationals of those new States.

In the area of the public's right of access to documents, the Court was seised, in Case C-506/08 *P Sweden v My Travel and Commission* (judgment of 21 July 2011), of an appeal brought against a judgment of the Court of First Instance (now the General Court) ⁽⁸⁾ dismissing the action brought by My Travel in respect of two decisions ⁽⁹⁾ of the Commission refusing access to certain documents internal to the institution relating to merger proceedings which had already been closed.

Article 4 of Regulation No 1049/2001 ⁽¹⁰⁾ regarding public access to European Parliament, Council and Commission documents provides for exceptions which derogate from the principle of the widest possible public access to documents and which must, accordingly, be interpreted and applied strictly. The Court held that where an institution decides to refuse access to a document which it has been asked to disclose, it must, in principle, explain how disclosure of that document could specifically and effectively undermine the protected interest — namely, inter alia, protection of the institution's decision-making process and protection of legal advice — upon which it is relying.

The Court analysed all the documents at issue and concluded, inter alia, that the General Court should have required the Commission to indicate the specific reasons why it considered that its

⁽⁶⁾ 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).

⁽⁷⁾ Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 33).

⁽⁸⁾ Case T-403/05 *My Travel v Commission* [2008] ECR II-2027.

⁽⁹⁾ Commission Decision D(2005) 8461 of 5 September 2005, and Commission Decision D(2005) 9763 of 12 October 2005.

⁽¹⁰⁾ 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).

decision-making process would have been seriously undermined by disclosure of certain documents at issue, despite the fact that the procedure to which those documents referred had been closed.

Accordingly, the Court concluded that the Commission, in its decisions, had not correctly applied the exception for protecting its decision-making process or the exception for protecting legal advice. It therefore decided to set aside the judgment of the General Court and to annul the two Commission decisions in so far as those two points were concerned.

Given that some of the arguments put forward by the Commission to justify refusing disclosure of certain other internal documents — in particular, those relating to the other exceptions for protecting the purpose of inspections, investigations and audits — had not been examined by the General Court, the Court found that it was not in a position to rule on those pleas and decided to refer the case back to the General Court.

Regarding the application of European Union law in the internal legal orders of the Member States, two judgments call for particular attention.

In Joined Cases C-201/10 and C-202/10 *Ze Fu Fleischhandel and Vion Trading* (judgment of 5 May 2011), the Court held that the principle of legal certainty did not preclude in principle, in the context of the protection of the European Union's financial interests as defined by Regulation No 2988/95 ⁽¹⁾ and pursuant to Article 3(3) of that regulation, the national authorities and courts of a Member State from applying 'by analogy' to proceedings relating to repayment of a wrongly granted export refund a limitation period derived from a general provision of national law, provided, however, that such application resulting from a judicially determined practice was sufficiently foreseeable, a matter which it was for the referring court to establish. However, according to the Court, the principle of proportionality precludes, in the context of exercise by the Member States of the power which they are given by Article 3(3) of Regulation No 2988/95, application of a 30-year limitation period to proceedings relating to repayment of wrongly received refunds. In light of the objective of protecting the European Union's financial interests, an objective for which the European Union legislature considered that a limitation period of four, or indeed even three, years is already in itself sufficient to enable the national authorities to bring proceedings in respect of an irregularity detrimental to those financial interests and capable of leading to the adoption of a measure such as recovery of a wrongly received advantage, to grant those authorities a period of 30 years goes beyond what is necessary for a diligent public service. Finally, the Court found that, in a situation falling within the scope of Regulation No 2988/95, the principle of legal certainty precludes a 'longer' limitation period within the meaning of Article 3(3) of that regulation from resulting from a limitation period under the general law that is reduced by case-law so that, when applied, it complies with the principle of proportionality, since, in any event, the four-year limitation period provided for in the first subparagraph of Article 3(1) of the regulation could be applied in such circumstances.

In Case C-398/09 *Lady & Kid and Others* (judgment of 6 September 2011), the Court held that the rules of European Union law on recovery of sums wrongly paid must be interpreted to the effect that recovery of sums wrongly paid can give rise to unjust enrichment only when the amounts wrongly paid by a taxpayer under a tax levied in a Member State in breach of European Union law have been passed on direct to the purchaser. The Court inferred from this that European Union

⁽¹⁾ Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests (OJ 1995 L 312, p. 1).

law precludes a Member State from refusing reimbursement of a tax wrongfully levied on the ground that the amounts wrongly paid by the taxpayer have been set off by a saving made as a result of the concomitant abolition of other levies, since such a set-off cannot be regarded, from the point of view of European Union law, as an unjust enrichment as regards that tax.

As regards the Court's contribution to the definition of the effects of agreements concluded by the European Union with third countries, reference will be made to Case C-187/10 *Unal* (judgment of 29 September 2011) and Case C-484/07 *Pehlivan* (judgment of 16 June 2011), which raised important questions concerning the interpretation of international agreements, in particular the EEC–Turkey association agreement. ⁽¹²⁾

Still in the area of international agreements, Case C-240/09 *Lesoochranárske zoskupenie* (judgment of 8 March 2011), concerning the interpretation of the Aarhus Convention, ⁽¹³⁾ will be noted.

First of all, in *Unal*, the Court held that the first indent of Article 6(1) of Decision No 1/80 of the EEC–Turkey Association Council ('Decision No 1/80') must be interpreted as precluding the competent national authorities from withdrawing the residence permit of a Turkish worker with retroactive effect from the point in time at which there was no longer compliance with the condition on the basis of which his residence permit had been issued under national law if there is no question of fraudulent conduct on the part of that worker and that withdrawal occurs after the expiry of the one-year period of legal employment provided for in the first indent of Article 6(1) of Decision No 1/80. The Court found that that provision cannot be construed as permitting a Member State to modify unilaterally the scope of the system of gradual integration of Turkish workers into the host Member State's labour force. Also, not to accept that such a worker has been legally employed in the host Member State for more than one year would be contrary to the general principle of respect for acquired rights, according to which, in the case where a Turkish national may legitimately rely on rights pursuant to a provision of Decision No 1/80, those rights are no longer dependent on the continuing existence of the circumstances which gave rise to them, as no condition of that nature is laid down by that decision.

Next, in *Pehlivan*, the Court concluded that it follows both from the primacy of European Union law and from the direct effect of a provision such as the first paragraph of Article 7 of Decision No 1/80 that Member States are not permitted to modify unilaterally the scope of the system of gradually integrating Turkish nationals in the host Member State and do not have the power to adopt measures which may undermine the legal status expressly conferred on those nationals by the law governing the EEC–Turkey Association. Thus, members of a Turkish worker's family who fulfil the conditions laid down in the first paragraph of Article 7 can lose the rights conferred on them by that provision only in two cases, that is to say, either where the presence of the Turkish migrant in the host Member State constitutes, by reason of his personal conduct, a genuine and serious threat to public policy, public security or public health, within the terms of Article 14(1) of Decision No 1/80, or where the person concerned has left the territory of that State for a significant length of time without legitimate reason.

⁽¹²⁾ Council Decision 64/732/EEC of 23 December 1963 on the conclusion of the Agreement establishing an Association between the European Economic Community and Turkey (OJ 1973 C 113, p. 1).

⁽¹³⁾ See footnote 5.

Finally, in *Lesoochranárske zoskupenie*, the Court held that Article 9(3) ⁽¹⁴⁾ of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) does not have direct effect in European Union law. It is, however, for the national courts to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by European Union law, in order to enable an environmental protection organisation to challenge before a court a decision taken following administrative proceedings liable to be contrary to European Union environmental law. In the absence of European Union rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from European Union law, since the Member States are responsible for ensuring that those rights are effectively protected in each case. On that basis, the detailed procedural rules governing actions for safeguarding an individual's rights under European Union law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by European Union law (principle of effectiveness).

Citizenship of the Union, and the rights attaching to it, have not by any means exhausted their potential.

In Case C-34/09 *Ruiz Zambrano* (judgment of 8 March 2011), the Court gave a ruling on the sensitive question of whether the Treaty provisions on citizenship of the Union confer on a parent who is a third country national and upon whom his minor children, who are Union citizens, are dependent a right to reside and work in the Member State of which the children are nationals, in which they reside and which they have never left since birth. The Court held that Article 20 TFEU precludes a Member State from refusing a third country national upon whom his minor children, who are Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of Union citizen. Citizenship of the Union is intended to be the fundamental status of nationals of the Member States. Such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the European Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the European Union. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.

In Case C-434/09 *McCarthy* (judgment of 5 May 2011), the Court was given the opportunity to determine whether the provisions concerning citizenship of the Union are applicable to the situation of a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State. The Court first concluded that Article 3(1) of Directive 2004/38 on the right to move and reside

⁽¹⁴⁾ 'In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.'

freely⁽¹⁵⁾ is not applicable to such a Union citizen. That finding cannot be influenced by the fact that the citizen concerned is also a national of a Member State other than that where he resides. The fact that a Union citizen is a national of more than one Member State does not mean that he has made use of his right of freedom of movement. Secondly, the Court held that Article 21 TFEU is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State, provided that the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving him of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member States. The fact that a citizen, in addition to being a national of the Member State in which he resides, is also a national of another Member State is not sufficient, in itself, for a finding that the situation of the person concerned is covered by Article 21 TFEU, as that situation exhibits no factor linking it with any of the situations governed by European Union law and is confined in all relevant respects within a single Member State.

The question arising in Case C-256/11 *Dereci and Others* (judgment of 15 November 2011) was whether the provisions concerning citizenship of the Union enable a third country national to reside on the territory of a Member State in the case where that third country national wishes to reside with a family member who is a Union citizen, is resident in that Member State and a national of that Member State, has never exercised his right to free movement and is not maintained by the third country national. The Court held that European Union law, in particular, its provisions on citizenship of the Union, does not preclude a Member State from refusing to allow a third country national to reside on its territory, where that third country national wishes to reside with a member of his family who is a citizen of the Union residing in the Member State of which he has nationality, who has never exercised his right to freedom of movement, provided that such refusal does not lead, for the Union citizen concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union, which is a matter for the national courts to verify. In that regard, the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of Union citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the European Union as a whole. Consequently, the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the European Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the European Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave European Union territory if such a right is not granted.

In Case C-434/10 *Aladzhov* (judgment of 17 November 2011), the Court interpreted Article 27(1) and (2) of Directive 2004/38.⁽¹⁶⁾ The Court held that European Union law does not preclude a legislative provision of a Member State which permits an administrative authority to prohibit a national of that State from leaving it on the ground that a tax liability of a company of which he is one of the managers has not been settled, subject, however, to the twofold condition that the measure at issue is intended to respond, in certain exceptional circumstances which might arise from, inter

⁽¹⁵⁾ 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).

⁽¹⁶⁾ See footnote 15.

alia, the nature or amount of the debt, to a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society and that the objective thus pursued does not solely serve economic ends. It is for the national court to determine whether that twofold condition is satisfied. First, the possibility cannot be ruled out as a matter of principle that non-recovery of tax liabilities may fall within the scope of the requirements of public policy. Second, since the purpose of recovery of debts owed to a public authority, in particular the recovery of taxes, is to ensure the funding of actions of the Member State concerned on the basis of the choices which are the expression of, *inter alia*, its general policy in economic and social matters, the measures adopted by the public authorities in order to ensure such recovery also cannot be considered, as a matter of principle, to have been adopted exclusively to serve economic ends, within the meaning of Article 27(1) of Directive 2004/38. The Court further stated that, even if a measure imposing a prohibition on leaving the territory has been adopted under the conditions laid down in Article 27(1) of Directive 2004/38, the conditions laid down in Article 27(2) thereof preclude such a measure if it is founded solely on the existence of the tax liability of the company of which the party concerned is one of the joint managers, and on the basis of that status alone, without any specific assessment of the personal conduct of the person concerned and with no reference to any threat of any kind which he represents to public policy, and if the prohibition on leaving the territory is not appropriate to ensure the achievement of the objective it pursues and goes beyond what is necessary to attain it. Again, it is for the national court to determine whether that is the position in the case before it.

Case C-391/09 *Runevič-Vardyn and Vardyn* (judgment of 12 May 2011) gave the Court the opportunity to express a view on rules governing the transcription of forenames and surnames of citizens of the Union on the certificates of civil status of a Member State. First of all, the Court held that Article 21 TFEU does not preclude the competent authorities of a Member State from refusing, pursuant to national rules which provide that a person's surnames and forenames may be entered on the certificates of civil status of that State only in a form which complies with the rules governing the spelling of the official national language, to amend, on the birth certificate and marriage certificate of one of its nationals, the surname and forename of that person in accordance with the spelling rules of another Member State. The fact that the person's surname and forename cannot be changed and entered in civil status documents of his Member State of origin except using the characters of the language of that latter Member State cannot constitute treatment that is less favourable than that which he enjoyed before he availed himself of the opportunities offered by the Treaty in relation to free movement of persons and, hence, is not liable to deter a citizen of the Union from exercising the rights of movement recognised in Article 21 TFEU. Next, according to the Court, Article 21 TFEU does not preclude the competent authorities of a Member State from refusing, pursuant to the abovementioned national rules, to amend the joint surname of a married couple who are citizens of the Union, as it appears on the certificates of civil status issued by the Member State of origin of one of those citizens, in a form which complies with the spelling rules of that latter State, on condition that that refusal does not give rise, for those Union citizens, to serious inconvenience at administrative, professional and private levels, this being a matter which it is for the national court to decide. If that proves to be the case, it is also for the national court to determine whether the refusal to make the amendment is necessary for the protection of the interests which the national rules are designed to secure and is proportionate to the legitimate aim pursued. The Court finally held that Article 21 TFEU does not preclude those same authorities from refusing, pursuant to those national rules, to amend the marriage certificate of a citizen of the Union who is a national of another Member State in such a way that the forenames of that citizen are entered on that certificate with diacritical marks as they were entered on the certificates of civil status issued by his Member State of origin and in a form which complies with the rules governing the spelling of the official national language of that latter State.

Following the judgment in *Lassal*,⁽¹⁷⁾ the Court again interpreted Article 16 of Directive 2004/38⁽¹⁸⁾ in Case C-325/09 *Dias* (judgment of 21 July 2011), in response to a reference from the same court. The Court held that Article 16(1) and (4) of Directive 2004/38 must be interpreted as meaning (i) that periods of residence completed before the date of transposition of that directive, namely 30 April 2006, on the basis solely of a residence permit validly issued pursuant to Council Directive 68/360,⁽¹⁹⁾ without the conditions governing entitlement to any right of residence having been satisfied, cannot be regarded as having been completed legally for the purposes of the acquisition of the right of permanent residence under Article 16(1) of Directive 2004/38 and (ii) that periods of residence of less than two consecutive years, completed on the basis solely of a residence permit validly issued pursuant to Directive 68/360, without the conditions governing entitlement to a right of residence having been satisfied, which occurred before 30 April 2006 and after a continuous period of five years' legal residence completed prior to that date, are not such as to affect the acquisition of the right of permanent residence under Article 16(1) of Directive 2004/38. Even though Article 16(4) of Directive 2004/38 refers only to absences from the host Member State, the integration link between the person concerned and that Member State is also called into question in the case of a citizen who, while having resided legally for a continuous period of five years, then decides to remain in that Member State without having a right of residence. In that regard, the integration objective which lies behind the acquisition of the right of permanent residence laid down in Article 16(1) of Directive 2004/38 is based not only on territorial and time factors but also on qualitative elements, relating to the level of integration in the host Member State.

Finally, in Case C-503/09 *Stewart* (judgment of 21 July 2011) concerning the nature of a short-term incapacity benefit in youth, the Court gave a ruling on the conditions for the award of the benefit, which consisted not only in the presence of the claimant on the territory of the Member State on the date on which the claim was made, but also in his past presence on the territory of that State. The Court found that Article 21(1) TFEU precluded a Member State from making the award of a short-term incapacity benefit in youth subject to a condition of past presence of the claimant in that State to the exclusion of any other element enabling the existence of a genuine link between the claimant and that Member State to be established, or to a condition of presence of the claimant in that State on the date on which the claim was made.

Free movement of goods

In this area, the case-law is now significantly less abundant than it was for several decades. However, the number of cases lodged remains high.

One such case was Case C-291/09 *Francesco Guarnieri & Cie* (judgment of 7 April 2011), which concerned a commercial dispute between a Monegasque company and a Belgian company. The Court first observed that goods originating in Monaco are covered by the rules of the Treaty on the free movement of goods. That is because, pursuant to Article 3(2)(b) of Regulation No 2913/92⁽²⁰⁾ establishing the Community Customs Code, the territory of the Principality of Monaco is to be considered to be part of the customs territory of the European Union. As no customs duty or

⁽¹⁷⁾ Judgment of 7 October 2010 in Case C-162/09 *Lassal*. See *Annual Report 2010*, p. 17.

⁽¹⁸⁾ See footnote 15.

⁽¹⁹⁾ Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ, English Special Edition 1968 (II), p. 485).

⁽²⁰⁾ Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1).

charge having equivalent effect can, consequently, be applied to trade between Monaco and the Member States, goods originating in Monaco, exported directly to a Member State, must be treated as if they originated in those Member States. Secondly, the Court ruled on the question whether a provision of a Member State that requires any foreign national, such as Monegasque nationals, to provide security pending judgment when he seeks to bring proceedings against a national of that Member State, although such a requirement is not imposed on nationals of that State, constitutes a hindrance to the free movement of goods under Article 34 TFEU. The Court answered that question in the negative. In the Court's view, a measure of that sort does admittedly have the effect of making traders wishing to bring proceedings subject to different procedural rules according to whether or not they have the nationality of the Member State concerned. Nevertheless, the possibility that nationals of other Member States would therefore hesitate to sell goods to purchasers established in that Member State who have the nationality of that State is too uncertain and indirect for that national measure to be regarded as liable to hinder intra-Community trade; the causal link between the possible distortion of intra-Community trade and the difference in treatment at issue is therefore not established.

Another judgment relating to the free movement of goods calls for attention. At issue in Case C-28/09 *Commission v Austria* (judgment of 21 December 2011) was a national rule prohibiting lorries of over 7.5 tonnes carrying certain goods from using a section of motorway which is one of the principal land transport routes between certain Member States. In the Court's view, a Member State which adopts such a rule with the aim of ensuring ambient air quality in the zone concerned, in accordance with Article 8(3) of Directive 96/62 on ambient air quality assessment and management ⁽²¹⁾ in conjunction with Directive 1999/30 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, ⁽²²⁾ fails to fulfil its obligations under Articles 28 EC and 29 EC. The Court observes that, in so far as it forces the undertakings concerned to seek viable alternative solutions for the transport of the relevant goods, such a prohibition impedes the free movement of goods and must be regarded as constituting a measure having equivalent effect to quantitative restrictions which is incompatible with the obligations under Articles 28 EC and 29 EC, unless it can be objectively justified. In the Court's assessment, although overriding requirements relating to protection of the environment — which, in principle, also incorporates protection of health — can justify national measures that are liable to obstruct intra-Community trade, provided that those measures are suitable for securing the attainment of that objective and do not go beyond what is necessary for attaining it, the prohibition in question cannot be justified on that ground as it has not been established that the objective pursued could not be attained by other measures less restrictive of freedom of movement, including extending the traffic prohibition for lorries in certain classes to lorries in other classes, or replacing the variable speed limit by a permanent 100 km/h speed limit.

Free movement of persons, services and capital

In 2010, the Court again delivered many judgments concerning freedom of establishment, freedom to provide services, freedom of movement of workers and the free movement of capital. In the interests of clarity, the judgments selected will be presented in groups on the basis of the freedom with which they deal and then, as the case may be, of the fields of activity in question.

⁽²¹⁾ Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management (OJ 1996 L 296, p. 55).

⁽²²⁾ Council Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air (OJ 1999 L 163, p. 41).

In the area of freedom of establishment, the Court gave rulings in several related cases on the concept of activities connected with the exercise of official authority and the exclusion of the profession of notary from the application of Article 49 TFEU (ex Article 43 EC). In actions for failure to fulfil obligations brought against six Member States whose national laws restricted access to the profession of notary to nationals of the Member State concerned, the Court held, in Case C-47/08 *Commission v Belgium* (judgment of 24 May 2011), Case C-50/08 *Commission v France* (judgment of 24 May 2011), Case C-51/08 *Commission v Luxembourg* (judgment of 24 May 2011), Case C-53/08 *Commission v Austria* (judgment of 24 May 2011), Case C-54/08 *Commission v Germany* (judgment of 24 May 2011) and Case C-61/08 *Commission v Greece* (judgment of 24 May 2011), that the first paragraph of Article 45 EC is an exception to the fundamental rule of freedom of establishment and must be interpreted in a manner which limits its scope to what is strictly necessary to safeguard the interests it allows the Member States to protect. Further, that exception must be restricted to activities which in themselves are directly and specifically connected with the exercise of official authority. Regarding the activities entrusted to notaries, the Court then explained that, in order to ascertain whether those activities involve a direct and specific connection of that kind with the exercise of official authority, account must be taken of the nature of the activities carried out by notaries. In that regard, the Court found that a direct and specific connection with the exercise of official authority within the meaning of the first paragraph of Article 45 EC (now the first paragraph of Article 51 TFEU) was lacking in the various activities carried out by notaries in the Member States concerned, despite the significant legal effects with which notarial acts are endowed, inasmuch as either the intention of the parties or the supervision or decision of the court are of particular importance. The Court also noted that, within the geographical limits of their office, notaries practise their profession in conditions of competition, which is not characteristic of the exercise of official authority. Likewise, they are directly and personally liable to their clients for loss arising from any default in the exercise of their activities, whereas the State is liable for the wrongful acts or omissions of public authorities. Accordingly, the Court concluded that each of the States under scrutiny had failed to fulfil its obligations under Article 43 EC (now Article 49 TFEU), since the activities entrusted to notaries in the legal order of each of those States were not connected to the exercise of official authority within the meaning of the first paragraph of Article 45 EC (now the first paragraph of Article 51 TFEU).

Still in the area of freedom of establishment, the Court also clarified its case-law regarding restrictions imposed in the case of a transfer of a company's place of management to a Member State other than that in which it is incorporated.

In Case C-371/10 *National Grid Indus* (judgment of 29 November 2011), the Court held that Article 49 TFEU does not preclude legislation of a Member State under which the amount of tax on unrealised capital gains relating to a company's assets is fixed definitively, without taking account of decreases or increases in value which may occur subsequently, at the time when the company, because of the transfer of its place of effective management to another Member State, ceases to obtain profits taxable in the former Member State. It makes no difference that the unrealised capital gains that are taxed relate to exchange rate gains which cannot be reflected in the host Member State under the tax system in force there. In the Court's view, such legislation complies with the principle of proportionality, having regard to the objective of subjecting to tax in the Member State of origin the capital gains which arose within the ambit of that State's power of taxation. It is proportionate for a Member State of origin, for the purpose of safeguarding the exercise of its powers of taxation, to determine the tax due on the unrealised capital gains that have arisen in its territory at the time when its power of taxation in respect of the company in question ceases to exist, here the time of the transfer of the company's place of effective management to another Member State. By contrast, the Court held that Article 49 TFEU does preclude legislation of a Member State which prescribes the immediate recovery of tax on unrealised capital gains relating to

assets of a company transferring its place of effective management to another Member State at the very time of that transfer. In the Court's assessment, national legislation offering a company transferring its place of effective management to another Member State the choice between, first, immediate payment of the amount of tax, which creates a disadvantage for that company in terms of cash flow but frees it from subsequent administrative burdens, and, second, deferred payment of the amount of tax, possibly together with interest in accordance with the applicable national legislation, which necessarily involves an administrative burden for the company in connection with tracing the transferred assets, would constitute a measure which, while being appropriate for ensuring the balanced allocation of powers of taxation between the Member States, would be less harmful to freedom of establishment than the immediate recovery of the tax.

The Court also interpreted the Treaty rules on freedom of establishment and the freedom to provide services with regard to determination of the level of lawyers' fees.

In Case C-565/08 *Commission v Italy* (judgment of 29 March 2011), the Commission complained that the Italian Republic had maintained, in breach of Articles 43 EC and 49 EC (now Articles 49 TFEU and 56 TFEU), provisions which oblige lawyers to comply with maximum fee tariffs. The Court rejected the Commission's arguments and decided that the Italian State had not failed to fulfil its obligations under Article 43 EC (now Article 49 TFEU) and 49 EC (now Article 56 TFEU), since the national legislation in question was not established in a manner which adversely affected access to the market for lawyers' services under conditions of normal and effective competition. According to the Court, that was so in the case of a system characterised by a flexibility allowing proper remuneration for all types of services provided by lawyers given that, in certain cases, the fees could be increased by two or four times the maximum tariffs or even more, and given that it was also open to lawyers, in numerous situations, to conclude a special agreement with their clients to fix the amount of the fees. The Court explained that the existence of a restriction within the meaning of the Treaty cannot be inferred from the mere fact that lawyers established in Member States other than the host Member State must become accustomed to the rules applicable in that latter Member State for the calculation of their fees for services provided there, but must be based upon the fact that such a system impedes the access of lawyers from other Member States to the market of the host Member State.

Regarding the freedom to provide services, the Court delivered a number of important judgments in very diverse areas such as, inter alia, broadcasting services, games of chance, the activities of court experts, public health and commercial communication. In these judgments, the Court was called on either to apply the principle of the freedom to provide services as enshrined by the Treaty, or to interpret a directive intended to implement that principle in a particular field.

First to be noted among the case-law relating to Article 56 TFEU are Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* (judgment of 4 October 2011), concerning the exclusive right, granted to certain broadcasters on a territorial basis, to broadcast live football matches, and the practice of certain proprietors of public houses of using foreign decoder cards to circumvent that exclusivity. According to the Court, Article 56 TFEU precludes legislation which makes it unlawful to import into and sell and use in the State concerned foreign decoding devices which give access to an encrypted satellite broadcasting service from another Member State that includes subject-matter protected by the legislation of that first State. In particular, such a restriction cannot be justified in light of the objective of protecting intellectual property rights. The Court recognised that sporting events, as such, have a unique and, to that extent, original character which can transform them into subject-matter that is worthy of protection comparable to the protection of works. However, since safeguarding of the rights which constitute the specific subject-matter of the intellectual property guarantees the right holders concerned only

appropriate remuneration and not the highest possible remuneration for the commercial exploitation of the protected subject-matter, such safeguarding is ensured where reception of a satellite broadcast requires possession of a decoding device and where, consequently, it is possible to determine with a very high degree of precision the total number of viewers who form part of the actual and potential audience of the broadcast concerned, hence of the viewers residing within and outside the Member State of broadcast. Moreover, the premium paid by broadcasters in order to be granted territorial exclusivity is such as to result in artificial price differences between the partitioned national markets. Such partitioning and such an artificial price difference are irreconcilable with the fundamental aim of the Treaty, which is completion of the internal market.

Next, reference should be made to Case C-347/09 *Dickinger and Ömer* (judgment of 15 September 2011), which confirms and clarifies the Court's case-law concerning monopolies in respect of the operation of games of chance. The Court recalled that, although a monopoly over games of chance constitutes a restriction on the freedom to provide services, such a restriction can, however, be justified by overriding reasons in the public interest such as the objective of ensuring a particularly high level of consumer protection, this being a question for the national court. Regarding, in particular, the possibility for the holder of the monopoly to pursue an expansionist commercial policy, the Court stated that, to be consistent with the objective of fighting crime and reducing opportunities for gambling, national legislation establishing a monopoly over games of chance must, first, be based on a finding that the crime and fraud linked to gaming and addiction to gambling are a problem in the Member State concerned which could be remedied by expanding authorised regulated activities, and second, allow only moderate advertising limited strictly to what is necessary for channelling consumers towards monitored gaming networks. In order for that objective of channelling into controlled circuits to be achieved, the authorised operators must provide a reliable, but at the same time attractive, alternative to non-regulated activities, which may as such necessitate the offer of an extensive range of games, advertising on a certain scale, and the use of new distribution techniques. In that regard, the Court however stated that the advertising must remain measured and strictly limited to what is necessary and cannot aim to encourage consumers' natural propensity to gamble by stimulating their active participation in it, such as by trivialising gambling or giving it a positive image because revenues derived from it are used for activities in the public interest, or by increasing the attractiveness of gambling by means of enticing advertising messages holding out the prospect of major winnings.

The Court also had the opportunity, in Joined Cases C-372/09 and C-373/09 *Peñarroja Fa* (judgment of 17 March 2011), to devote attention to the conditions as to qualifications which can be imposed upon court experts wishing to pursue activities in the field of translation. In response to several questions referred for a preliminary ruling by the French Cour de cassation (Court of Cassation), the Court noted, first of all, that the activities of court experts in the field of translation do not constitute activities which are connected with the exercise of official authority for the purposes of the first paragraph of Article 45 EC (now the first paragraph of Article 51 TFEU), since the translations carried out by such an expert are merely ancillary steps and leave the discretion of judicial authority and the free exercise of judicial power intact. The Court then held that Article 49 EC (now Article 56 TFEU) precludes national legislation under which enrolment in a register of court expert translators is subject to conditions concerning qualifications, but the interested parties cannot obtain knowledge of the reasons for the decision taken in their regard and that decision is not open to effective judicial scrutiny enabling its legality to be reviewed, inter alia, as regards its compliance with the requirement under European Union law that the qualifications obtained and recognised in other Member States must have been properly taken into account. Likewise, according to the Court, Article 49 EC (now Article 56 TFEU) precludes a requirement to the effect that no person may be enrolled in a national register of court experts as a translator unless he can prove that he has been enrolled for three consecutive years in a register of court

experts maintained by a cour d'appel (appeal court), where it is found that such a requirement prevents, in the consideration of an application by a person established in another Member State who cannot prove that he has been so enrolled, the qualification obtained by that person and recognised in that other Member State from being duly taken into account for the purposes of determining whether — and, if so, to what extent — that qualification may attest to skills equivalent to those normally expected of a person who has been enrolled for three consecutive years in a register of court experts maintained by a cour d'appel. In that regard, the Court recalled that national authorities must ensure that qualifications obtained in another Member State are accorded their proper value and duly taken into account.

Finally, mention should be made of Case C-490/09 *Commission v Luxembourg* (judgment of 27 January 2011). At issue in that case were Luxembourg rules preventing reimbursement of costs relating to laboratory analyses and tests carried out in other Member States. In its judgment, the Court held that by failing to provide, under its social security rules, for the possibility of acceptance of liability by means of reimbursement of the costs paid for those analyses and tests, but by providing solely for a system of direct billing to sickness insurance funds, Luxembourg had failed to fulfil its obligations under Article 49 EC (now Article 56 TFEU). According to the Court, in so far as the application of such a system effectively precludes, in practice, the possibility of acceptance of liability for laboratory analyses and tests carried out by almost all, or even all, medical service providers established in other Member States, it deters or even prevents persons insured by the social security scheme of the Member State in question from using such providers and constitutes, both for such persons and for providers, an obstacle to the freedom to provide services.

Among the cases concerning the interpretation of a particular directive, the first to be mentioned is Case C-119/09 *Société fiduciaire nationale d'expertise comptable* (judgment of 5 April 2011), relating to the interpretation of Directive 2006/123.⁽²³⁾ In that case, the French Conseil d'État (Council of State) raised the question of the possibility for Member States to maintain a general prohibition on canvassing by members of a regulated profession, namely accountants. First of all, the Court held that the concept of commercial communication as defined in Article 4(12) of Directive 2006/123 covers not only traditional advertising but also other forms of advertising and communications of information intended to obtain new clients and that, accordingly, canvassing does come within the concept of commercial communication. The Court then pointed out that a ban on any canvassing, whatever its form, its content or the means employed, and which includes a prohibition of all means of communication enabling the carrying out of that form of commercial communication, must be regarded as a total prohibition of commercial communications prohibited by Article 24(1) of Directive 2006/123. The Court concluded that, since it totally prohibits a form of commercial communication and, therefore, comes within the scope of Article 24(1) of Directive 2006/123, such legislation is incompatible with that directive and cannot be justified under Article 24(2) of the directive, even if it is non-discriminatory, based on an overriding reason relating to the public interest and proportionate.

Next, in the field of television broadcasting, Joined Cases C-244/10 and C-245/10 *Mesopotamia Broadcast and Roj TV* (judgment of 22 September 2011) should be mentioned. In that judgment, the Court held that Article 22a of Directive 89/552, as amended by Directive 97/36,⁽²⁴⁾ which

⁽²³⁾ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

⁽²⁴⁾ Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23), as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 (OJ 1997 L 202, p. 60).

provides that Member States are to ensure that broadcasts do not contain any 'incitement to hatred on grounds of race, sex, religion or nationality', was to be interpreted as meaning that facts covered by a rule of national law prohibiting infringement of the principles of international understanding had to be regarded as being included in the concept mentioned above. According to the Court, that article does not preclude a Member State from adopting measures against a television broadcaster established in another Member State, pursuant to a general law such as a law on associations, on the ground that the activities and objectives of that broadcaster run counter to the prohibition of the infringement of the principles of international understanding, provided that those measures do not prevent retransmission per se on the territory of the receiving Member State of television broadcasts made by that broadcaster from another Member State, this being a matter to be determined by the national court.

In the area of the freedom of movement for workers, two cases are worthy of note. First, reference should be made to Case C-424/09 *Toki* (judgment of 5 April 2011), which concerns the interpretation of Directive 89/48.⁽²⁵⁾ In that case, a Greek national, who had obtained her qualification in the United Kingdom in the field of environmental engineering, was refused admission to the regulated profession of engineer in Greece, on the ground that she was not a full member of the Engineering Council, a private United Kingdom organisation expressly named in Directive 89/48 but of which membership is not obligatory in order to pursue the regulated profession of engineer in the United Kingdom. The Court stated first that the mechanism of recognition provided for in point (b) of the first subparagraph of Article 3 of Directive 89/48 is applicable irrespective of whether the person concerned is or is not a full member of the association or organisation concerned. The Court held next that professional experience relied on by a person seeking to obtain authorisation to pursue a regulated profession in the host Member State must satisfy the following three conditions: (i) the experience relied on must consist of full-time work for at least two years during the previous 10 years; (ii) that work must have consisted of the continuous and regular pursuit of a range of professional activities which characterise the profession concerned in the Member State of origin, but that work need not have encompassed all those activities; and (iii) the profession, as it is normally pursued in the Member State of origin, must be equivalent, in respect of the activities which it covers, to the profession which the person has sought authorisation to pursue in the host Member State.

The second case to be mentioned is Case C-379/09 *Casteels* (judgment of 10 March 2011), which concerns the safeguarding of the supplementary pension rights of a migrant worker. In that judgment the Court held that Article 45 TFEU precludes, in the context of the mandatory application of a collective labour agreement, in order to determine the period for the acquisition of definitive entitlements to supplementary pension benefits in a Member State, the non-inclusion of the years of service completed by a worker for the same employer in establishments of that employer situated in different Member States and pursuant to the same coordinating contract of employment. That provision also precludes a worker who has been transferred from an establishment of his employer in one Member State to an establishment of the same employer in another Member State from being regarded as having left the employer of his own free will. The Court also stated that Article 48 TFEU does not have any direct effect capable of being relied on by an individual against his private-sector employer in a dispute before national courts.

⁽²⁵⁾ Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration (OJ 1989, L 19, p. 16), as amended by Directive 2001/19/EC of the European Parliament and of the Council of 14 May 2001 (OJ 2001 L 206, p. 1).

The principle of the free movement of capital was the subject of a number of tax judgments. Among those, the first that should be mentioned is Case C-10/10 *Commission v Austria* (judgment of 16 June 2011), in which the Court held that a Member State which authorises the deduction from tax of gifts to research and teaching institutions exclusively where those institutions are established in its territory fails to fulfil its obligations under Article 56 EC (now Article 63 TFEU) and Article 40 of the Agreement on the European Economic Area. According to the Court, a distinction between taxpayers according to the sole criterion of the place of establishment of the recipient of the gift cannot, by definition, be a valid criterion for assessing the objective comparability of the situations or, consequently, for establishing an objective difference between them. Further, while the promotion of research and development may constitute an overriding reason in the public interest, national legislation reserving the benefit of a tax credit solely to research carried out in the Member State concerned is directly contrary to the objective of European Union policy in the field of research and technical development. In accordance with Article 163(2) EC, that policy aims in particular to remove the fiscal obstacles to cooperation in the field of research, and cannot therefore be implemented by the promotion of research and development at national level.

Secondly, Case C-450/09 *Schröder* (judgment of 31 March 2011) is to be noted. In that case, the Court held that Article 63 TFEU precludes legislation of a Member State which, while allowing a resident taxpayer to deduct the annuities paid to a relative who transferred to him immovable property situated in the territory of that State from the rental income derived from that property, does not grant such a deduction to a non-resident taxpayer, in so far as the undertaking to pay those annuities results from the transfer of that property. The Court pointed out that, to the extent that the undertaking of a non-resident taxpayer to pay the annuity to his relative results from the transfer to that taxpayer of immovable property situated in the Member State concerned, that annuity constitutes an expense directly linked to the use of that property, with the result that the non-resident taxpayer is in that regard in a situation comparable to that of a resident taxpayer. In those circumstances, national provisions which, in matters of income tax, deny non-residents the right to deduct such an expense, while that right is, by contrast, granted to residents, is, in the absence of valid justification, contrary to Article 63 TFEU.

One final judgment should be noted, namely Case C-503/09 *Stewart* (judgment of 21 July 2011), which gave the Court the opportunity to give a ruling, in the area of social security for migrant workers, on the nature of a short-term incapacity benefit in youth and to examine the condition of ordinary residence on the territory of the Member State to which the grant of that benefit was subject. The Court's judgment establishes that a short-term incapacity benefit in youth is an invalidity benefit within the meaning of Article 4(1)(b) of Regulation No 1408/71 ⁽²⁶⁾ if it is clear that, on the date on which the claim is made, the claimant has a permanent or long-term disability, since, in that case, the benefit relates directly to the risk of invalidity referred to in that provision. The judgment also establishes that the first subparagraph of Article 10(1) of Regulation No 1408/71 precludes a Member State from making the award of short-term incapacity benefit in youth, when it is considered to be an invalidity benefit, subject to a condition of ordinary residence by the claimant in that State.

⁽²⁶⁾ Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ, English Special Edition, 1971 (II), p. 416), in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005 (OJ 2005 L 117, p. 1).

Approximation of laws

The case-law on the approximation of laws — abundant once again — displays great variety, much like the legislative action giving rise to it.

In the area of consumer protection, the Court gave a ruling in Joined Cases C-65/09 and C-87/09 *Gebr. Weber and Putz* (judgment of 16 June 2011) on the interpretation of Article 3(2) and (3) of Directive 1999/44 on certain aspects of the sale of consumer goods and associated guarantees,⁽²⁷⁾ which provides that, in the case of a lack of conformity of the goods delivered, the consumer is entitled to require of the seller that the goods be repaired or replaced free of charge. More specifically, the Court had to provide answers to two questions, namely, first, whether replacement free of charge encompasses removal of the defective goods and installation of the replacement goods, and second, whether the seller may refuse to bear the costs of replacement if they are disproportionate, in the case where that is the only remedy available.

In answering the first question, the Court recalled that the ‘free of charge’ aspect of the seller’s obligation to bring goods into conformity is an essential element of the protection afforded to consumers by Directive 1999/44. Accordingly, the Court decided, relying on the purpose of that directive which is to ensure a high level of consumer protection, that Article 3(2) and (3) of the directive must be interpreted as meaning that, where consumer goods not in conformity with the contract which were installed in good faith by the consumer in a manner consistent with their nature and purpose, before the defect became apparent, are restored to conformity by way of replacement, the seller is obliged either to remove the goods from where they were installed and to install the replacement goods there or else to bear the cost of that removal and installation of the replacement goods. The Court further specified that that obligation on the seller exists regardless of whether he was obliged under the contract of sale to install the consumer goods originally purchased.

With regard to the second question, the Court held that Article 3(3) of Directive 1999/44 precludes national legislation from granting the seller the right to refuse to replace goods not in conformity, as the only remedy possible, on the ground that, because of the obligation to remove the goods from where they were installed and to install the replacement goods there, replacement imposes costs on him which are disproportionate with regard to the value that the goods would have if there were no lack of conformity and the significance of the lack of conformity. However, the Court also recognised that that provision, in order to establish a fair balance between the interests of the consumer and the seller, does not preclude the consumer’s right to reimbursement of the cost of removing the defective goods and of installing the replacement goods from being limited, in such a case, to the payment by the seller of a proportionate amount, fixed in accordance with the criteria defined in the judgment.

Regarding liability for defective products, note should be taken of Case C-495/10 *Dutruieux* (judgment of 21 December 2011), in which the Court, to which a reference for a preliminary ruling had been made on a point of interpretation, had to define once again⁽²⁸⁾ the extent of the

⁽²⁷⁾ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ 1999 L 171, p. 12).

⁽²⁸⁾ See Case C-285/08 *Moteurs Leroy Somer* [2009] ECR I-4733.

harmonisation brought about by Directive 85/374. ⁽²⁹⁾ The question referred in the case was, essentially, whether that directive precludes the French system of no-fault liability of public healthcare establishments for harm sustained by a patient as a result of the failure of equipment or products used in the course of treatment.

The Court first recalled its case-law on the extent and the degree of fullness of the harmonisation effected by Directive 85/374, stating that the latter seeks to achieve, in the matters regulated by it, complete ⁽³⁰⁾ and exhaustive ⁽³¹⁾ harmonisation. That said, in order to establish whether, pursuant to that case-law, the directive precludes a given national liability system, it should first be established whether that system falls within the scope of the directive. Accordingly, having recalled the case-law, the Court proceeded to examine the limits of the ambit of the directive in terms of the class of persons who can be liable under the liability system it establishes. According to the Court, that class, which covers, as provided by Article 3 of the directive, the producer, the importer of the product into the European Union and the supplier where the producer cannot be identified, is defined exhaustively. Accordingly, the Court held that the liability of a service provider which, in the course of providing services such as treatment given in a hospital, uses defective equipment or products of which it is not the producer within the meaning of Article 3 of Directive 85/374 and thereby causes damage to the recipient of the service does not fall within the scope of the directive. On that basis the Court concluded that the directive does not prevent a Member State from applying rules, such as those which were at issue in the main proceedings, under which such a provider is liable for damage thus caused, even in the absence of any fault on its part, provided, however, that the injured person and/or the service provider retain the right to put in issue the producer's liability on the basis of the directive when the conditions laid down by the latter are fulfilled.

In the area of medicinal products for human use, reference should be made to two decisions delivered on the same day — Case C-249/09 *Novo Nordisk* (judgment of 5 May 2011) and Case C-316/09 *MSD Sharp & Dohme* (judgment of 5 May 2011) — in which the Court provided important clarification of the meaning of certain provisions which are contained in Directive 2001/83 on the Community code relating to medicinal products for human use ⁽³²⁾ and regulate the advertising of such products.

In the first case, *Novo Nordisk*, the dispute in the main proceedings concerned a company specialising in the treatment of diabetes, which had been banned by decision of the Medicines Office of the Republic of Estonia from publishing in a medical journal an advertisement, aimed at persons entitled to prescribe medicines, for an insulin-based medicine, on the basis that it contravened the provisions of national law providing that advertising for a medicinal product may not contain information which is not in the summary of the product's characteristics. The national court, before which an action for annulment of that decision had been brought, referred two questions to the Court for a preliminary ruling, concerning the interpretation of Article 87(2) of Directive

⁽²⁹⁾ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ 1985 L 210, p. 29), as amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 (OJ 1999 L 141, p. 20).

⁽³⁰⁾ See, *inter alia*, Case C-52/00 *Commission v France* [2002] ECR I-3827, paragraph 24; Case C-154/00 *Commission v Greece* [2002] ECR I-3879, paragraph 20; and Case C-402/03 *Skov and Bilka* [2006] ECR I-199, paragraph 23.

⁽³¹⁾ See *Moteurs Leroy Somer*, paragraphs 24 and 25.

⁽³²⁾ 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).

2001/83, under which ‘all parts of the advertising of a medicinal product must comply with the particulars listed in the summary of product characteristics’.

By the first question, the referring court wished to know whether Article 87(2) of Directive 2001/83 was to be interpreted as extending also to quotations taken from medical journals or other scientific works which are included in advertisements for medicinal products directed at persons qualified to prescribe medicines. The Court answered in the affirmative, holding that it follows from the position of Article 87 of Directive 2001/83 in the structure of that directive, and from the wording and content of that provision, that Article 87(2) is a general rule applicable to all advertising for medicinal products, including that directed at persons qualified to prescribe or supply medicinal products.

By the second question, the national court asked the Court about the extent of the prohibition laid down by Article 87(2) of Directive 2001/83. The Court’s response was that that provision must be interpreted as prohibiting the publication, in advertising of medicinal products directed at persons qualified to prescribe or supply them, of claims which conflict with the summary of product characteristics, but it does not require that all the claims in such advertisements are included in that summary or can be derived from it. The Court further stated that such advertisements may include claims supplementing the information referred to in Article 11 of that directive, provided that those claims confirm or clarify — and are compatible with — that information and do not distort it, and are consistent with the requirements of Articles 87(3) and 92(2) and (3) of the directive.

In the second case, *MSD Sharp & Dohme*, the Court had to give a ruling on the interpretation of Article 88(1)(a) of Directive 2001/83, which prohibits the advertising to the general public of medicinal products which are available on medical prescription only. In the main proceedings, a pharmaceutical company alleged that one of its competitors had breached the national law which transposed that rule by publishing on its website freely accessible information concerning three medicinal products manufactured by it which were available only on prescription. The claimant persuaded the national courts to order the banning of the publication in question. The referring court, to which the defendant appealed on a point of law, asked the Court, essentially, if the publication at issue really constituted advertising within the meaning of Article 88(1)(a) of Directive 2001/83. The Court answered that that provision is to be interpreted as meaning that it does not prohibit the dissemination on a website, by a pharmaceutical undertaking, of information relating to medicinal products available on medical prescription only, where that information is accessible on the website only to someone who seeks to obtain it and that dissemination consists solely in the faithful reproduction of the packaging of the medicinal product, in accordance with Article 62 of the Directive 2001/83, and in the literal and complete reproduction of the package leaflet or the summary of the product’s characteristics, which have been approved by the authorities with competence in relation to medicinal products. On the other hand, the dissemination, on such a website, of information relating to a medicinal product which has been selected or rewritten by the manufacturer is prohibited since such manipulation of information can be explained only by an advertising purpose.

Staying with medicinal products for human use, but focusing now on Regulation No 469/2009 concerning the supplementary protection certificate for medicinal products, ⁽³³⁾ Case C-322/10 *Medeva* (judgment of 24 November 2011) should be mentioned. In that case, the Court responded

⁽³³⁾ Regulation (EC) No 469/2009 of the European Parliament and of the Council of 6 May 2009 concerning the supplementary protection certificate for medicinal products (OJ 2009 L 152, p. 1).

to a reference for a preliminary ruling seeking clarification of the conditions for obtaining a supplementary protection certificate ('SPC').

In order to make up for the insufficiency of the protection afforded by a patent, Article 3 of Regulation No 469/2009 provides the possibility for the holder of a national patent to obtain an SPC, on condition, *inter alia*, that the product is already protected by a basic patent in force and that a valid authorisation to place the product on the market as a medicinal product has been granted. The Court stated first, regarding the criteria for deciding whether 'the product is protected by a basic patent in force', that Article 3(a) of the regulation is to be interpreted as precluding the competent industrial property office of a Member State from granting a supplementary protection certificate relating to active ingredients which are not specified in the wording of the claims of the basic patent relied on in support of the application for such a certificate. Next, with regard to the second condition, laid down in Article 3(b) of Regulation No 469/2009, that the product must be covered by an authorisation to place it on the market as a medicinal product, the Court held, as regards the product's composition, that, provided the other requirements laid down in Article 3 are also met, Article 3(b) of the regulation does not preclude the competent industrial property office of a Member State from granting an SPC for a combination of two active ingredients, corresponding to that specified in the wording of the claims of the basic patent relied on, where the medicinal product for which the marketing authorisation is submitted in support of the application for an SPC contains not only that combination of the two active ingredients but also other active ingredients.

In the area of the protection of biotechnological inventions, the Court gave an important preliminary ruling in Case C-34/10 *Brüstle* (judgment of 18 October 2011), in which it devoted attention to defining the concept of 'human embryo'. The reference for a preliminary ruling was made in the context of an action brought by Greenpeace seeking annulment of a patent relating to neural precursor cells produced from human embryonic stem cells and used to treat neurological diseases. The Court was asked about the interpretation of the concept of 'human embryo', which is not defined by Directive 98/44 on the legal protection of biotechnological inventions,⁽³⁴⁾ and about the scope of the exclusion from patentability of inventions relating to the use of human embryos for industrial and commercial purposes laid down in Article 6(2)(b) of that directive.

First, the Court stated that the term 'human embryo' in Article 6(2) of Directive 98/44 must be regarded as designating an autonomous concept of European Union law, which must be interpreted in a uniform manner throughout the territory of the European Union. Noting, next, that the context and aim of the directive show that the European Union legislature intended to exclude any possibility of patentability where respect for human dignity could thereby be affected, the Court took the view that the concept of 'human embryo' was to be understood in a wide sense and that, in that framework, any non-fertilised human ovum into which the cell nucleus from a mature human cell has been transplanted and any non-fertilised human ovum whose division and further development have been stimulated by parthenogenesis constitute a 'human embryo' within the meaning of that provision. On the other hand, the Court held that it is for the national court to ascertain, in the light of scientific developments, whether a stem cell obtained from a human embryo at blastocyst stage constitutes a 'human embryo' within the meaning of that provision.

⁽³⁴⁾ 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).

Second, the Court held that the exclusion from patentability relating to the concept of ‘uses of human embryos for industrial or commercial purposes’ also covers the use of human embryos for purposes of scientific research. In the Court’s view, the grant of a patent for an invention implies, in principle, its industrial or commercial application, and although the aim of scientific research must be distinguished from industrial or commercial purposes, the use of human embryos for the purposes of research which constitutes the subject-matter of a patent application cannot be separated from the patent itself and the rights attaching to it.

Finally, the Court gave its ruling on the patentability of an invention involving the production of neural precursor cells. It held that an invention must be regarded as unpatentable where (as in the case at hand) the implementation of the invention requires the prior destruction of human embryos or their use as base material, whatever the stage at which that takes place and even if the description of the technical teaching claimed does not refer to the use of human embryos.

In Joined Cases C-58/10 to C-68/10 *Monsanto and Others* (judgment of 8 September 2011), the Court ruled on the circumstances in which national authorities may adopt emergency measures designed to suspend or provisionally to prohibit the use or sale of genetically modified organisms (‘GMOs’) the placing on the market of which has already been authorised under Directive 90/220 on GMOs ⁽³⁵⁾ (repealed by Directive 2001/18 ⁽³⁶⁾).

The Court observed that, in the case in point, MON 810 maize, which was authorised as, *inter alia*, a seed for the purpose of planting pursuant to Directive 90/220, was notified as an ‘existing product’ under Regulation No 1829/2003 on genetically modified food, ⁽³⁷⁾ and was subsequently the subject of a pending application for renewal of authorisation pursuant to that regulation. The Court held that, in such circumstances, Member States cannot have recourse to the safeguard clause provided by Directive 2001/18 to adopt measures suspending and then prohibiting provisionally the use or sale of a GMO such as MON 810 maize. The Court stated that such emergency measures may, however, be adopted pursuant to Regulation No 1829/2003.

In that regard, the Court emphasised that, where a Member State intends to adopt emergency measures pursuant to Regulation No 1829/2003, it must comply not only with the substantive conditions laid down by that regulation, but also with the procedural conditions provided for in Regulation No 178/2002, ⁽³⁸⁾ to which the former regulation refers on that point. Accordingly, the Member State must inform the Commission ‘officially’ of the need to take emergency measures. If the Commission takes no measure, the Member State must inform ‘immediately’ the Commission and the other Member States of the content of the interim protective measures adopted.

The Court held, moreover, regarding the substantive conditions for emergency measures adopted pursuant to Regulation No 1829/2003, that the latter requires the Member States to establish, in

⁽³⁵⁾ Council Directive 90/220/EEC of 23 April 1990 on the deliberate release into the environment of genetically modified organisms (OJ 1990 L 117, p. 15).

⁽³⁶⁾ Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC (OJ 2001 L 106, p. 1).

⁽³⁷⁾ Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed (OJ 2003 L 268, p. 1).

⁽³⁸⁾ Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (OJ 2002 L 31, p. 1).

addition to urgency, the existence of a situation which is likely to constitute a clear and serious risk to human health, animal health or the environment. Notwithstanding their temporary and preventive character, protective measures may be adopted only if they are based on a risk assessment which is as complete as possible in the particular circumstances of an individual case, which indicate that those measures are necessary.

Finally, the Court observed that, in the light of the overall scheme provided for by Regulation No 1829/2003 and its objective of avoiding artificial disparities, the assessment and management of a serious and evident risk ultimately come under the sole responsibility of the Commission and the Council, subject to review by the European Union judicature.

Case C-442/09 *Bablok and Others* (judgment of 6 September 2011), which likewise concerns the interpretation of Regulation No 1829/2003 on genetically modified food, ⁽³⁹⁾ is also worthy of note. The dispute in the main proceedings was between a beekeeper and Freistaat Bayern (Germany), the owner of plots of land on which MON 810 (GMO) maize had been cultivated. The beekeeper maintained that the presence of MON 810 maize DNA in maize pollen and a number of samples of his honey was liable to make his apicultural products not marketable or fit for consumption. The referring court, pointing out that the pollen in question loses its capacity to fertilise as soon as it is incorporated in honey or in pollen-based food supplements, made a reference to the Court for a preliminary ruling in order to ascertain principally whether the mere presence, in the apicultural products in question, of the pollen of genetically modified maize which has lost its reproductive capacity means that authorisation for placing those products on the market is required.

Thus it fell to the Court to clarify the concept of a genetically modified organism within the meaning of Article 2(5) of Regulation No 1829/2003. The Court took the view that a substance such as pollen derived from a variety of genetically modified maize, which has lost its ability to reproduce and is totally incapable of transferring the genetic material which it contains, no longer comes within the scope of that concept. Nevertheless, the Court held that products such as honey and food supplements containing such pollen constitute food containing ingredients produced from GMOs within the meaning of Regulation No 1829/2003. In that regard, the Court found that the pollen at issue was 'produced from GMOs' and constituted an 'ingredient' of honey and pollen-based food supplements. Concerning honey, the Court observed that pollen is not a foreign substance or impurity, but rather a normal component of it, so that it in fact must be classified as an 'ingredient'. Accordingly, the pollen at issue fell within the scope of Regulation No 1829/2003 and had to be subjected to the authorisation scheme provided for by that regulation before being placed on the market. The Court added that that authorisation scheme applies to the foodstuff containing ingredients produced from GMOs irrespective of whether such pollen is introduced into honey intentionally or adventitiously. The Court stated, finally, that the obligation to authorise and supervise a foodstuff imposed by Articles 3(1) and 4(2) of Regulation No 1829/2003 subsists whatever the amount of genetically modified material contained in the product in question, and that a tolerance threshold such as that provided for in respect of labelling in Article 12(2) of that regulation may not be applied to that obligation by analogy.

In the area of copyright protection in the information society, two decisions are particularly noteworthy.

The first concerns national measures designed to combat illegal downloading from the Internet (Case C-70/10 *Scarlet Extended* (judgment of 24 November 2011)). The case arose from a dispute

⁽³⁹⁾ See footnote 37.

between Scarlet Extended SA, an Internet service provider ('ISP'), and SABAM, a Belgian management company entrusted with authorising the use, by third parties, of musical works of authors, composers and editors. SABAM had established that Internet users using Scarlet's services were downloading works in SABAM's catalogue from the Internet, without authorisation and without paying royalties, by means of 'peer-to-peer' networks. SABAM brought proceedings before the national court and obtained, at first instance, an order requiring the ISP to bring those copyright infringements to an end by making it impossible for its customers to send or receive in any way files containing a musical work in the SABAM catalogue using 'peer-to-peer' software. Following an appeal by the ISP, the referring court stayed proceedings in order to ask the Court, essentially, whether such an injunction was compatible with European Union law.

The Court answered that Directives 2000/31,⁽⁴⁰⁾ 2001/29,⁽⁴¹⁾ 2004/48,⁽⁴²⁾ 95/46⁽⁴³⁾ and 2002/58,⁽⁴⁴⁾ read together and construed in the light of the requirements stemming from the protection of the applicable fundamental rights, must be interpreted as precluding an injunction made against an ISP which requires it to install — as a preventive measure, exclusively at its expense, and for an unlimited period — a system, which applies indiscriminately to all its customers, for filtering all electronic communications passing via its services, in particular those involving the use of peer-to-peer software, and which is capable of identifying on that provider's network the movement of electronic files containing a musical, cinematographic or audiovisual work in respect of which the applicant claims to hold intellectual property rights, with a view to blocking the transfer of files the sharing of which infringes copyright.

As grounds for its decision, the Court stated that such an injunction both infringes the prohibition on imposing a general monitoring obligation on such a provider laid down by Article 15(1) of Directive 2000/31, and fails to comply with the requirement that a fair balance be struck between the right to intellectual property, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other.

In the second case (Case C-462/09 *Stichting de Thuis kopie* (judgment of 16 June 2011)), the Court ruled on the method of implementation and the extent of the obligation, owed by Member States which apply the private copying exception, to ensure payment of fair compensation to rightholders under Article 5(2)(b) of Directive 2001/29 on copyright and related rights in the information society.⁽⁴⁵⁾ The case concerned the particular situation where a commercial seller of reproduction media is established in a Member State other than that owing that obligation and focuses its operations on that State.

⁽⁴⁰⁾ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (OJ 2000 L 178, p. 1).

⁽⁴¹⁾ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

⁽⁴²⁾ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45).

⁽⁴³⁾ 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).

⁽⁴⁴⁾ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (OJ 2002 L 201, p. 37).

⁽⁴⁵⁾ See footnote 41.

The Court first recognised that although, in principle, it is the final user who carries out, on a private basis, the reproduction of a protected work who must be regarded as the person responsible for paying the fair compensation, it is open to the Member States, given the practical difficulties in identifying private users and obliging them to compensate rightholders for the harm caused to them, to establish a private copying levy chargeable to the persons who make reproduction equipment, devices and media available to the final user, since they are able to pass on the amount of that levy in the price paid by the final user for that service. Second, the Court interpreted the provisions of Directive 2001/29 as imposing on a Member State which has introduced the private copying exception into its national law an obligation to achieve a certain result, meaning that it must guarantee, within the framework of its competences, the effective recovery of the fair compensation intended to compensate the authors harmed for the prejudice sustained, in particular if that harm arose on the territory of that Member State. In that regard, the mere fact that the commercial seller of reproduction equipment, devices and media is established in a Member State other than that in which the purchasers reside has no bearing on that obligation to achieve a certain result. It is for the national court, where it is impossible to ensure recovery of the fair compensation from the purchasers, to interpret national law in order to allow recovery of that compensation from the person responsible for payment who is acting on a commercial basis.

Concerning the protection of intellectual property rights more generally, the Court gave a ruling in Case C-406/09 *Realchemie Nederland* (judgment of 18 October 2011) on the scope of the rule laid down by Article 14 of Directive 2004/48 on the enforcement of intellectual property rights,⁽⁴⁶⁾ under which Member States are to ensure that legal costs incurred by the successful party in a dispute concerning infringement of an intellectual property right are, as a general rule, borne by the unsuccessful party.

In that case, the Court held that the costs relating to an exequatur procedure brought in a Member State, in the course of which the recognition and enforcement are sought of a judgment given in another Member State in proceedings seeking to enforce an intellectual property right, fall within Article 14 of Directive 2004/48. According to the Court, that interpretation is consistent both with the general objective of Directive 2004/48, which aims to approximate the legislative systems of the Member States in order to ensure a high, equivalent and homogeneous level of intellectual property protection, and with the specific aim of Article 14, which attempts to prevent the injured party from being deterred from bringing legal proceedings in order to protect his intellectual property rights. In accordance with those objectives, the author of the infringement of the intellectual property rights must generally bear all the financial consequences of his conduct.

In Case C-236/09 *Association Belge des Consommateurs Test-Achats and Others* (judgment of 1 March 2011), the Cour constitutionnelle du Royaume de Belgique (Constitutional Court of the Kingdom of Belgium) sought a ruling from the Court on the validity of Article 5(2) of Directive 2004/113⁽⁴⁷⁾ which provides that ‘notwithstanding paragraph 1, Member States may decide before 21 December 2007 to permit proportionate differences in individuals’ premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data’. The Court recalled that it is established that the purpose of Directive 2004/113 in the insurance services sector is, as is reflected in Article 5(1) of that directive, the application of unisex rules on premiums and benefits. Recital 18 in the preamble to Directive 2004/113 expressly states that, in order to guarantee equal treatment between men and women, the use of sex as an

⁽⁴⁶⁾ See footnote 42.

⁽⁴⁷⁾ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ 2004 L 373, p. 37).

actuarial factor must not result in differences in premiums and benefits for insured individuals. Recital 19 in the preamble to that directive describes the option granted to Member States not to apply the rule of unisex premiums and benefits as an option to permit 'exemptions'. Accordingly, Directive 2004/113 is based on the premiss that, for the purposes of applying the principle of equal treatment for men and women, enshrined in Articles 21 and 23 of the Charter of Fundamental Rights of the European Union, the respective situations of men and women with regard to insurance premiums and benefits contracted by them are comparable. The Court then held that Article 5(2) of Directive 2004/113, which enables the Member States in question to maintain without temporal limitation an exemption from the rule of unisex premiums and benefits, works against the achievement of the objective of equal treatment between men and women, which is the purpose of Directive 2004/113, and is incompatible with Articles 21 and 23 of the Charter of Fundamental Rights of the European Union. Accordingly, the Court concluded that Article 5(2) of that directive must be regarded as invalid with effect from 21 December 2012.

In Case C-442/10 *Churchill Insurance Company and Evans* (judgment of 1 December 2011), concerning the first, second and third directives on civil liability in respect of the use of motor vehicles (respectively, Directives 72/166, ⁽⁴⁸⁾ 84/5 ⁽⁴⁹⁾ and 90/232 ⁽⁵⁰⁾, now codified by Directive 2009/103, ⁽⁵¹⁾ the Court had to give a preliminary ruling on the scope of compulsory insurance cover in respect of third parties who have been victims of an accident.

In its judgment, the Court held that the first paragraph of Article 1 of Third Directive 90/232 and Article 2(1) of Second Directive 84/5 preclude national rules the effect of which is to omit automatically the requirement that the insurer compensate a passenger who is a victim of a road traffic accident when that accident was caused by a driver who was not insured under the insurance policy and the victim, who was a passenger in the vehicle at the time of the accident, was insured to drive the vehicle himself but had given permission to the driver to drive it. The Court further stated that that interpretation does not differ depending on whether the insured victim was aware that the person to whom he gave permission to drive the vehicle was not insured to do so, whether he believed that the driver was insured or whether or not he had turned his mind to that question. The Court did, however, recognise that that does not mean that the Member States may not take account of that factor within the ambit of their rules relating to civil liability provided, none the less, that they exercise their powers in that field in compliance with European Union law and, in particular, with Article 3(1) of the First Directive, Article 2(1) of the Second Directive and Article 1 of the Third Directive, and that those national rules do not deprive those directives of their effectiveness. Accordingly, national rules, formulated in terms of general and abstract criteria, may not refuse or restrict to a disproportionate extent the compensation to be made available to a passenger by compulsory insurance against civil liability in respect of the use of motor vehicles solely on the basis of his contribution to the occurrence of the loss which arises. It is only in exceptional circumstances that the amount of compensation may be limited on the basis of an assessment of that particular case.

⁽⁴⁸⁾ Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability (OJ, English Special Edition 1972 (II), p. 360).

⁽⁴⁹⁾ Second Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (OJ 1984 L 8, p. 17).

⁽⁵⁰⁾ Third Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (OJ 1990 L 129, p. 33).

⁽⁵¹⁾ Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability (OJ 2009 L 263, p. 11). This directive had not yet entered into force at the material time.

Transport

In Case C-176/09 *Luxembourg v Parliament and Council* (judgment of 12 May 2011), the Court gave a ruling on the validity of Directive 2009/12 on airport charges.⁽⁵²⁾ The Grand Duchy of Luxembourg's only airport, though it does not meet the quantitative criterion laid down by that directive (5 million passenger movements per year), and though it is close to other airports situated in neighbouring Member States, is subject to the administrative and financial obligations under the directive, since it is regarded, in accordance with the directive, as enjoying a privileged position as the point of entry to that State. The Grand Duchy of Luxembourg relied, in challenging the validity of Directive 2009/12, on an infringement of the principle of equal treatment on the basis, first, that there were other regional airports registering higher passenger movements and, second, that its only airport was treated like an airport registering annual passenger traffic in excess of 5 million.

The Court first recalled that the European Union legislature had drawn a distinction between two categories of airports, and that the airport recording the highest passenger movements per year in a Member State where no airport reaches the threshold of 5 million passenger movements is regarded as the point of entry into the Member State because it enjoys a privileged position. The Court then held that the European Union legislature had neither erred nor exceeded its powers in establishing a distinction between secondary airports and principal airports, irrespective of the number of passenger movements per year: secondary airports cannot be regarded as the point of entry into the Member State within the meaning of the directive. Finally, the Court held that the mere fact that an airport enjoys a privileged position suffices to justify the application of the directive. The Court also pointed out that the charges stemming from the system introduced by the directive do not appear disproportionate to the advantages it brings, and that the European Union legislature had rightly considered that it was not necessary to include in the scope of the directive airports recording traffic under 5 million passenger movements per year when they are not the main airport of their Member State.

Competition

Whether it be through the examination of appeals against judgments of the General Court or following references for preliminary rulings, the Court has had the chance to clarify various aspects of competition law, both at the level of substantive Treaty rules and at the level of procedures for applying them, particularly in relation to the division of powers between the European Union authorities and those of the Member States.

In Joined Cases C-78/08 to C-80/08 *Paint Graphos and Others* (judgment of 8 September 2011), several questions relating to tax advantages granted by Italian law to cooperative societies were submitted to the Court for a preliminary ruling. The Court had to rule on the application of the provisions relating to State aid⁽⁵³⁾ to the various exemptions from taxes to which cooperative societies are entitled under Italian legislation. The referring court had held that it was necessary to ascertain first whether and, if so, under what conditions, the fact that the cooperative societies in question made tax savings, which were often considerable, constituted aid incompatible with the common market within the meaning of Article 87(1) EC. Owing to the direct effect of Article 88(3) EC, if those benefits were found to be incompatible, the national authorities, including the judicial authorities, would be obliged to disapply the Italian decree providing for the tax advantages.

⁽⁵²⁾ Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges (OJ 2009 L 70, p. 11).

⁽⁵³⁾ Articles 87 and 88 of the EC Treaty (OJ 2002 C 325, p. 67).

The Court therefore explained how it is necessary to interpret the conditions for categorising a national measure as State aid under Article 87(1) EC, namely: (i) the financing of that measure by the State or through State resources; (ii) the selectivity of that measure; and (iii) the effect of that measure on trade between Member States and the distortion of competition resulting from the measure. The Court stated that tax exemptions constitute State aid and that aid which favours certain undertakings or the production of certain goods is prohibited. The Court also pointed out that a measure which constitutes an exception to the application of the general tax system may nevertheless be justified if the Member State concerned can show that that measure results directly from the basic or guiding principles of its tax system, while observing that the objective pursued by State measures is not sufficient to exclude those measures outright from classification as State aid. In any event, in order for tax exemptions such as those of the Italian cooperatives to be justified by the nature or general scheme of the tax system of the Member State concerned, it is also necessary to ensure that those exemptions are consistent with the principle of proportionality and do not go beyond what is necessary, in that the legitimate objective being pursued could not be attained by less far-reaching measures. Finally, the Court examined the issue of the effect on trade between Member States and that of the distortion of competition, in accordance with the provisions of Article 87(1) EC. The Court observed that, when aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid. In that regard, the Court stated that it is not necessary that the beneficiary undertaking itself be involved in intra-Community trade. Where a Member State grants aid to an undertaking, internal activity may be maintained or increased as a result, so that the opportunities for undertakings established in other Member States to penetrate the market in that Member State are thereby reduced. Furthermore, the strengthening of an undertaking which, until then, was not involved in intra-Community trade may place that undertaking in a position which enables it to penetrate the market of another Member State. That is why the Court concluded that the tax benefit granted to Italian cooperative societies was capable of affecting trade between Member States and distorting competition, and constituted State aid, provided, however, that all the requirements for the application of Article 87(1) EC were met. The Court stated that it was for the referring court to determine whether the tax exemptions granted to cooperative societies are selective and whether they may be justified by the nature or general scheme of the national tax system of which they form part. In order to do this, the Court recommended the Italian court to establish in particular whether the cooperative societies are in fact in a comparable situation to that of other operators in the form of profit-making legal entities and, if that is indeed the case, whether the more advantageous tax treatment enjoyed by those cooperative societies, first, forms an inherent part of the essential principles of the tax system applicable in the Member State concerned and, second, complies with the principles of consistency and proportionality.

In Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and the United Kingdom* (judgment of 15 November), the Court set aside the judgment of the General Court of 18 December 2008 by which the General Court annulled a decision of the Commission relating to an aid regime which the United Kingdom of Great Britain and Northern Ireland was planning to implement through the reform of corporate tax in Gibraltar. The Court held that the General Court had made an error of law by holding that the proposed tax reform did not confer selective advantages on offshore companies. The Court held that, while a different tax burden resulting from the application of a 'general' tax regime is not sufficient on its own to establish the selectivity of taxation, that selectivity nevertheless exists when, as in the case in point, the taxation criteria adopted by a tax system are such as to characterise the recipient undertakings, by virtue of the properties which are specific to them, as a privileged category of undertakings. The Court stated in particular that the classification of a tax system as 'selective' is not conditional upon that system being designed in such a way that all undertakings are liable to the same tax

burden and that some of them benefit from derogating provisions giving them a selective advantage. Such a view of the selectivity criterion would require that, in order for a tax system to be classifiable as selective, it must be designed in accordance with a certain regulatory technique. However, the consequence of such an approach would be that national tax rules would from the outset fall outside the scope of control of State aid merely because they were adopted under a different regulatory technique although they produce the same effects.

In Case C-52/09 *TeliaSonera Sverige* (judgment of 17 February 2011), the Court dealt with an anti-competitive practice in the telecommunications sector, on the wholesale market in asymmetric digital subscriber line input services used for broadband connections. A Swedish court raised before the Court the question of the criteria on the basis of which a pricing practice causing margin squeeze should be held to constitute an abuse of a dominant position. The practice called 'margin squeeze' consists of an operator, which is generally vertically integrated, setting both the retail tariffs in a market and the tariff of an intermediary service which is necessary for entry onto the retail market, without leaving a margin between the two sufficient to cover the other costs incurred in supplying the retail service. Such a practice may constitute an abuse, within the meaning of Article 102 TFEU, by the vertically integrated telecommunications undertaking of its dominant position.

The Court recalled that subparagraph (a) of the second paragraph of Article 102 TFEU expressly prohibits a dominant undertaking from directly or indirectly imposing unfair prices. The Court then stated that the list of abusive practices contained in Article 102 TFEU is not exhaustive, so that the list of abusive practices contained in that provision does not exhaust the methods of abusing a dominant position prohibited by European Union law. The concept of abuse of a dominant position prohibited by that provision is an objective concept relating to the conduct of a dominant undertaking which, on a market where the degree of competition is already weakened precisely because of the presence of the undertaking concerned, through recourse to methods different from those governing normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition. Thus, according to the Court, in order to determine whether the dominant undertaking has abused its position by the pricing practices it applies, it is necessary to consider all the circumstances and to investigate whether the practice tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition.

The Court therefore held that, in the absence of any objective justification, the fact that a vertically integrated undertaking, holding a dominant position on the wholesale market in asymmetric digital subscriber line input services, applies a pricing practice under which the spread between the prices applied on that market and those applied in the retail market for broadband connection services to end users is not sufficient to cover the specific costs which that undertaking must incur in order to gain access to that retail market may constitute an abuse within the meaning of Article 102 TFEU.

The Court specified the circumstances of the case which, when assessing whether such a practice is abusive, are not relevant to the determination of the existence of the abuse of a dominant position. They include the following circumstances: the absence of any regulatory obligation on the undertaking concerned to supply asymmetric digital subscriber line input services on the wholesale market in which it holds a dominant position; the degree of dominance held by that undertaking in that market; the fact that that undertaking does not also hold at the same time a dominant position in the retail market for broadband connection services to end users; whether

the customers to whom such a pricing practice is applied are new or existing customers of the undertaking concerned; the fact that the dominant undertaking is unable to recoup any losses which the establishment of such a pricing practice might cause, or the extent to which the markets concerned are mature markets and whether they involve new technology requiring high levels of investment.

The Court held that, as a general rule, primarily the prices and costs of the undertaking concerned on the retail services market should be taken into consideration. Only where it is not possible, in particular circumstances, to refer to those prices and costs should those of its competitors on the same market be examined. The Court also held that it is necessary to demonstrate that, taking particular account of whether the wholesale product is indispensable, that practice produces an anti-competitive effect, at least potentially, on the retail market, and that the practice is not in any way economically justified.

In Case C-90/09 *General Química and Others v Commission* (judgment of 20 January 2011), the Court ruled on the regime providing for a presumption of actual exercise by a parent company of decisive influence over the conduct of its subsidiary, in connection with a cartel in the rubber chemicals sector. That case concerned a holding company that held 100% of the capital of an interposed company which, in turn, held the entire capital of a subsidiary. According to the Court, it cannot be excluded that a holding company may be held jointly and severally liable for the infringements of European Union competition law committed by a subsidiary of its group whose capital it does not hold directly, in so far as that holding company exercises decisive influence over that subsidiary, even indirectly via an interposed company. That is the case, in particular, where the subsidiary does not determine its conduct independently on the market in relation to that interposed company, which does not operate autonomously on the market either, but essentially acts in accordance with the instructions given to it by the holding company. In such a situation, the holding company, the interposed company and the last subsidiary in the group form part of the same economic unit and, therefore, constitute a single undertaking for the purposes of European Union competition law. The Court therefore confirmed that the Commission is entitled to require the holding company to pay the fine imposed on the last subsidiary of the group jointly and severally, without it being necessary to establish direct involvement in that infringement, unless the holding company can rebut the presumption by demonstrating that either the interposed company or the subsidiary operate independently on the market. The Court however set aside the judgment of the General Court, which confirmed the decision of the Commission, on the ground that the General Court was required to take account of and to conduct a concrete examination of the factors which were raised by the parent company to show that the subsidiary implemented its commercial policy independently, in order to ascertain whether the Commission had made an error of assessment in regarding that evidence as insufficient to demonstrate that that subsidiary did not constitute a single economic entity with the parent company. The General Court committed an error of law by affirming that the arguments raised in order to establish such independence could not succeed without carrying out a concrete examination of the factors raised by the parent company, but by referring only to case-law.

In a case relating to a cartel in the chemical products sector, the Court again ruled on the regime providing for a presumption of actual exercise by a parent company of decisive influence over the conduct of its subsidiary (Case C-521/09 P *Elf Aquitaine v Commission*, judgment of 29 September 2011).

By a decision of 2005, the Commission had imposed fines on several companies, including Elf Aquitaine S.A. and its subsidiary Arkema S.A., which it considered to be creators of a cartel on the market for a substance used as a chemical intermediate.

Those two companies brought two separate appeals before the General Court, seeking the setting aside of the decision of the Commission or reduction of the fines which had been imposed upon them.

The General Court rejected all of the arguments put forward by the two companies. It held in the classical manner that, when all or virtually all of the capital of a subsidiary is held by the parent company, the Commission can presume that that parent company exercises a decisive influence over the subsidiary's commercial policy.

The Court of Justice started by recalling that, where a decision on competition law relates to several addressees and concerns the imputability of the infringement, it must include an adequate statement of reasons with respect to each addressee. Thus, in regard to a parent company held liable for the infringement committed by its subsidiary, such a decision must in principle contain a detailed statement of reasons for imputing the infringement to that company.

The Court stated that, given that the Commission decision relied exclusively on the presumption that Elf Aquitaine S.A. actually exercised decisive influence over the conduct of its subsidiary, the Commission was required to explain adequately the reasons why the matters of fact and of law put forward by Elf Aquitaine S.A. did not suffice to rebut that presumption, as otherwise the presumption would be rendered irrebuttable. The rebuttable nature of the presumption requires that those concerned produce evidence relating to the economic, organisational and legal links between the undertakings concerned, in order for that presumption to be rebutted.

According to the Court, the General Court therefore had to pay particular attention to the question of whether the Commission decision contained a detailed statement of the reasons for which the evidence put forward by Elf Aquitaine S.A. was not sufficient to rebut the presumption of liability applied in that decision.

The Court then stated that the grounds of the Commission decision concerning the arguments put forward by Elf Aquitaine S.A. consisted only of a series of mere repetitive, and by no means detailed, assertions and denials, and, in the absence of further information, that set of assertions and denials was therefore incapable of enabling Elf Aquitaine S.A. to ascertain the reasons for the measure or the competent court to exercise its power of review.

As a consequence, the Court set aside the judgment of the General Court and annulled the Commission decision in so far as it imputed the infringement to Elf Aquitaine S.A. and imposed a fine upon it.

In a case relating to a set of agreements and practices in the copper industrial tubes sector concerning three companies in the same group, the Commission adopted a decision relating to a proceeding under Article 81 EC and Article 53 of the Agreement on the European Economic Area.⁽⁵⁴⁾ The three companies brought an action before the General Court, relying on pleas relating to the amount of the fine imposed by the Commission. The General Court rejected each of the pleas and the companies appealed to the Court of Justice (Case C-272/09 P *KME Germany and Others v Commission*, judgment of 8 December 2011).

In addition to review of application of the criteria — forming the subject of settled and well-established case-law of the European Union judicature — applicable to the fixing of the amount of

⁽⁵⁴⁾ Agreement on the European Economic Area (OJ 1994 L 1, pp. 181 to 185).

finer in the event of anti-competitive practices, that is to say, the duration of the infringement, its seriousness and any cooperation of the companies concerned, the Court ruled on the plea alleging breach of the right to an effective judicial remedy. The companies submitted that the General Court had infringed European Union law and their fundamental right to a full and effective judicial review by failing to examine their arguments closely and thoroughly and had deferred, to an excessive and unreasonable extent, to the Commission's discretion. They relied on Article 6 of the European Convention on Human Rights and on the Charter of Fundamental Rights of the European Union. ⁽⁵⁵⁾

The Court of Justice observed that the principle of effective judicial protection is a general principle of European Union law to which expression is now given by Article 47 of the Charter. The judicial review of the decisions of the institutions was arranged by the founding Treaties; in addition to the review of legality, provided for under Article 263 TFEU, a review with unlimited jurisdiction was envisaged with regard to the penalties laid down.

As to the review of legality, the Court held in line with its previous case-law that, whilst the Commission has a margin of discretion in areas giving rise to complex economic assessments, that does not however mean that the European Union judicature must refrain from reviewing the Commission's interpretation of information of an economic nature. It is for the European Union judicature to carry out that review on the basis of the matters adduced by the applicant.

The Court therefore held that the European Union judicature cannot use the Commission's margin of discretion — either as regards the choice of factors taken into account in the assessment by the Commission of the criteria which are taken into consideration in order to determine the amount of fines or as regards the assessment of those factors — as a basis for dispensing with the conduct of an in-depth review of the law and of the facts.

As to the unlimited jurisdiction relating to the amount of fines, the Court held that that jurisdiction empowers the European Union judicature, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute its own appraisal for the Commission's and, consequently, to cancel, reduce or increase the pecuniary sanction imposed. However, the exercise of unlimited jurisdiction does not mean that the European Union judicature is required to carry out a review of its own motion of the whole of the contested decision; that would involve a new complete investigation of the documents in the case.

The Court therefore firstly concluded that the European Union judicature must review both the law and the facts, and that it has the power to assess the evidence, to annul the decision of the Commission and to alter the amount of a fine. The Court pointed out that the review of legality as provided for by European Union law is therefore not contrary to the requirements of the principle of effective judicial protection set out in the Charter of Fundamental Rights. The Court then held that the General Court had carried out the full and unrestricted review, in law and in fact, required of it in the case which was brought before it.

Case C-109/10 P *Solvay v Commission* and Case C-110/10 P *Solvay v Commission* (judgments of 25 October 2011) provided the Court with the opportunity to define the outline of the obligation to respect the rights of the defence. The Commission had sanctioned Solvay for the first time in 1990 for abuse of a dominant position on the soda ash market and a pricing agreement with a competitor. The decisions by means of which the Commission had sanctioned this Belgian

⁽⁵⁵⁾ Charter of Fundamental Rights of the European Union (OJ 2010 C 83, p. 401).

undertaking were annulled. The Commission therefore adopted new decisions in 2000 imposing new fines on Solvay for the same conduct. Solvay brought an action before the General Court, alleging that the Commission had infringed the right of access to documents held by the Commission, in particular due to the fact that some of those documents had been lost. Solvay also claimed that, before taking new decisions, the Commission ought to have heard it. After the General Court dismissed Solvay's actions, that company appealed to the Court, which had to examine the same complaints.

The Court firstly pointed out that the right of access to the file means that the Commission provides the undertaking concerned with the opportunity to examine all the documents in the investigation that might be relevant for its defence. A breach of the right of access to the file during the procedure prior to the adoption of a decision is, in principle, capable of giving rise to the annulment of that decision when it has adversely affected the rights of the defence.

The Court stated that, in the case in point, it was not a question of some missing documents, whose contents could have been reconstructed from other sources, but of whole sub-files which could have contained essential documents in the procedure followed before the Commission and which could have also been relevant for Solvay's defence.

As a consequence, the Court stated that the General Court had committed an error of law by holding that the fact that Solvay had not had access to all of the documents in the case did not amount to an infringement of the rights of the defence.

As regards hearing of an undertaking before the adoption of a Commission decision, the Court stated that it forms part of the rights of the defence and that it must therefore be examined in the light of the specific circumstances of each case. Where, following the annulment of a decision on account of a procedural defect concerning exclusively the procedures governing its final adoption by the College of Commissioners, the Commission adopts a new decision, having substantially the same content and based on the same objections, the Commission is not required to conduct a new hearing of the undertaking concerned. However, the Court held that the question of the hearing of Solvay could not be separated from access to the documents in the case, since, during the administrative procedure which preceded the adoption of the first decisions of 1990, the Commission had not provided Solvay with all the documents in the case. Despite that factor and the importance which the case-law of the Court and the General Court gives to access to the documents in the case, the Commission adopted the same decisions as those which were annulled for lack of proper authentication without initiating a new administrative procedure in the course of which it would have had to hear Solvay, after having given it access to the file.

The Court therefore concluded that the General Court had committed an error of law in holding that the hearing of Solvay was not necessary in order to adopt the new decisions. It set aside the judgments of the General Court and, ruling on the substance of the case, annulled the Commission decisions.

In cases relating to agreements and concerted practices involving European producers of beams, the European Commission adopted, in 1994, a decision against ARBED (now Arcelor Mittal) and, in 1998, a decision against Thyssen Stahl (now ThyssenKrupp), imposing fines on both of those undertakings. Those two decisions were set aside by the Court of Justice for infringement of the rights of the defence. The Commission nevertheless adopted two new decisions in 2006 in respect of the same facts, which dated from 1988 to 1991, relying on, *inter alia*, the provisions of the ECSC Treaty, which expired on 23 July 2002. Those last two decisions were initially placed before the General Court (which confirmed them), and then before the Court of Justice. In Joined Cases

C-201/09 P and C-216/09 P *ArcelorMittal Luxembourg v Commission and Commission v ArcelorMittal Luxembourg and Others* (judgment of 29 March 2011) and in Case C-352/09 P *ThyssenKrupp Nirosta v Commission* (judgment of 29 March 2011), the Court of Justice upheld the judgments of the General Court, ruling, *inter alia*, on the issue of the possibility of applying procedural rules adopted on the basis of the EC Treaty to breaches of the ECSC Treaty after the ECSC Treaty had expired. The Court held that, unless the legislature expresses a contrary intention, when legislation is amended there is a need to ensure continuity of the legal system. In the absence of any indication that the European Union legislature wished it to be possible for concerted practices prohibited under the ECSC Treaty to escape the application of all penalties after that treaty expired, the Court held that it would be contrary to the objectives and the coherence of the Treaties and irreconcilable with the continuity of the legal order of the European Union if the Commission did not have jurisdiction to ensure the uniform application of the rules deriving from the ECSC Treaty which continue to produce effects even after the expiry of that Treaty. The Court then stated that the principles of legal certainty and the protection of legitimate expectations required the application in the case of the substantive provisions provided for by the ECSC Treaty, whilst observing that a diligent undertaking could not be unaware of the consequences of its conduct or expect to escape a penalty through the succession of the legal framework of the EC Treaty in place of that of the ECSC Treaty. The Court thus held, first, that the Commission's power to impose fines on the companies concerned derived from the rules adopted on the basis of the EC Treaty and that the procedure had to be carried out in accordance with those rules and, second, that the substantive law providing for the applicable sanction was that of the ECSC Treaty.

In Case C-375/09 *Tele2 Polska* (judgment of 3 May 2011), relating to a decision of a national competition authority in which that authority decided that, pursuant to national law, the undertaking had not abused its dominant position and ruled that there were no grounds for a decision in respect of infringement of the EC Treaty, questions on the extent of the powers of national competition authorities were submitted to the Court for a preliminary ruling.

The Court firstly stated that, in order to ensure a coherent application of the competition rules in the Member States, a cooperation mechanism between the Commission and the national competition authorities was set up by Regulation No 1/2003, ⁽⁵⁶⁾ as part of the general principle of sincere cooperation.

The Court then observed that where, on the basis of the information in its possession, a national competition authority decides that the conditions for prohibition are not met, the regulation clearly states that the power of that authority is limited to the adoption of a decision stating that there are no grounds for action.

According to the Court, empowerment of national competition authorities to take decisions stating that there has been no breach of the provisions of the Treaty concerning the abuse of a dominant position would call into question the system of cooperation established by Regulation No 1/2003 and would undermine the power of the Commission. The Court held that such a negative decision on the merits would risk undermining the uniform application of the competition rules established by the Treaty, ⁽⁵⁷⁾ which is one of the objectives of that regulation, since such a decision might prevent the Commission from finding subsequently that the practice in question amounts to a breach of those rules.

⁽⁵⁶⁾ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).

⁽⁵⁷⁾ Articles 101 and 102 of the Treaty on the Functioning of the European Union (OJ 2010 C 83, p. 47).

The Court therefore held that only the Commission is empowered to make a finding that there has been no breach of the prohibition of abuse of a dominant position provided for by Article 102 TFEU, even if that article is applied in a procedure undertaken by a national competition authority. The Court concluded that a national competition authority cannot take a decision stating that the prohibition of abuse of a dominant position has not been breached where it examines whether the conditions for applying Article 102 TFEU are satisfied and it forms the view that there has been no abuse.

The Court also held that European Union law precludes a rule of national law which would require a procedure relating to the application of Article 102 TFEU to be brought to an end by a decision stating that there has been no breach of that article. The Court pointed out that it is only where European Union law does not lay down a specific rule that a national competition authority may apply its national rules.

In Case C-360/09 *Pfleiderer* (judgment of 14 June 2011), following a reference for a preliminary ruling by a German court, the Court found it necessary to give a ruling on the possibility for third parties in the context of proceedings where fines are imposed for cartels, including parties adversely affected by a cartel, to have access to leniency applications and to information and documents voluntarily submitted by applicants for leniency to a national competition authority.

The Court firstly pointed out that neither the provisions of the EC Treaty on competition nor Regulation No 1/2003⁽⁵⁸⁾ lay down common rules on leniency or common rules on the right of access to documents relating to a leniency procedure which have been voluntarily submitted to a national competition authority pursuant to a national leniency programme. The Court then stated that the Commission notice on cooperation within the Network of Competition Authorities⁽⁵⁹⁾ and that on immunity from fines and reduction of fines in cartel cases⁽⁶⁰⁾ are not binding on Member States, nor is the model leniency programme drawn up in connection with the European Competition Network.

The Court then held that the provisions of European Union law on cartels, and in particular Regulation No 1/2003, do not preclude a person who has been adversely affected by an infringement of European Union competition law and is seeking to obtain damages from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement. However, the Court stated that it is for the courts and tribunals of the Member States, on the basis of their national law, to determine the conditions under which such access must be permitted or refused by weighing the interests protected by European Union law.

Fiscal provisions

As regards value added tax, Case C-539/09 *Commission v Germany* (judgment of 15 November 2011) is particularly noteworthy. In that case, the Commission complained that the Federal Republic of Germany had objected to the conduct by the Court of Auditors of the European Union of

⁽⁵⁸⁾ See footnote 56.

⁽⁵⁹⁾ Commission Notice 2004/C 101/04 on cooperation within the Network of Competition Authorities (OJ 2004 C 101, p. 43).

⁽⁶⁰⁾ Commission Notice 2006/C 298/11 on immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17).

audits in Germany concerning administrative cooperation under Regulation No 1798/2003. ⁽⁶¹⁾ The Court held that, by acting in that way, the Federal Republic of Germany had failed to fulfil its obligations under Article 248(1) to (3) EC, which provides that the Court of Auditors is to examine the accounts of all revenue and expenditure of the Community, the legality and regularity of that revenue and expenditure as well as the soundness of financial management, and which empowers the Court of Auditors to carry out audits based on records and, if necessary, on the spot, including in the Member States.

According to the Court, the system of own resources established pursuant to the Treaty is designed, as regards VAT resources, to create an obligation on the part of the Member States to make available to the Community as own resources a proportion of the amounts which they collect as VAT. In so far as they are intended to combat VAT fraud and avoidance, the mechanisms of cooperation to which the Member States are subject by virtue of Regulation No 1798/2003 are themselves capable of having a direct and fundamental impact on the effective collection of VAT revenue and, therefore, on the availability to the Community budget of VAT resources. Thus, the effective application by a Member State of the rules on cooperation established by Regulation No 1798/2003 is likely to determine not only that Member State's ability to take effective measures to prevent tax evasion and tax avoidance in its own territory but also the ability of the other Member States to take such measures in their own territories, especially where the correct application of VAT in those other Member States depends on the information which that Member State holds. An audit by the Court of Auditors relating to administrative cooperation under Regulation No 1798/2003 therefore deals with Community revenue from the aspect of its legality and its sound financial management, and thus has a direct link with the powers conferred on the Court of Auditors by Article 248 EC.

Trade marks

Trade mark law, whether it be envisaged through the Community trade mark ⁽⁶²⁾ or through the approximation of the laws of the Member States in that field, ⁽⁶³⁾ required the attention of the Court on various occasions.

In Case C-263/09 P *Edwin v OHIM* (judgment of 5 July 2011), which related to the validity of a trade mark formed from the family name of the Italian fashion designer Elio Fiorucci, the Court ruled on the instances of invalidity of a Community trade mark following an appeal brought against the judgment of the General Court in Case T-165/06 *Fiorucci v OHIM — Edwin (ELIO FIORUCCI)* (judgment of 14 May 2009). The Court of Justice held that, under Article 52(2) of Regulation No 40/94, ⁽⁶⁴⁾ a Community trade mark may be declared invalid on application by a person concerned claiming another earlier right. The list of rights contained in that article does not amount to an exhaustive list of rights intended to protect interests of different types, such as the right to a name, the right of personal portrayal, a copyright and an industrial property right. Therefore, the Court held that the wording and structure of the article interpreted by it do not, where a right to a name is asserted, allow application of that provision to be restricted merely to situations where the registration of a Community trade mark conflicts with a right intended exclusively to pro-

⁽⁶¹⁾ Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax (OJ 2003 L 264, p. 1).

⁽⁶²⁾ Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1).

⁽⁶³⁾ Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45).

⁽⁶⁴⁾ See footnote 62.

tect a name as an attribute of personality; like other rights, the right to a name is therefore also protected in its economic aspects. Furthermore, the Court affirmed the jurisdiction of the General Court to review the legality of the assessment by the Office for Harmonization in the Internal Market of the national law relied upon. The Court then approved of the decision of the General Court in so far as the latter inferred from the findings made on the content of the national law concerned by the case that the proprietor of a well-known name is entitled to prevent the use of his name as a trade mark where he has not given his consent to registration of that mark.

In Case C-235/09 *DHL Express France* (judgment of 12 April 2011), the Court held following a reference for a preliminary ruling that, as a rule, a prohibition against further infringement or threatened infringement issued by a Community trade mark court extends to the entire area of the European Union. Both the objective of uniform protection of the Community trade mark pursued by Regulation No 40/94 ⁽⁶⁵⁾ and the unitary character of that mark justify such a scope. However, the Court stated that the territorial scope of the prohibition can be limited, in particular where detriment or a threat of a detriment to the functions of the trade mark do not exist on part of the territory of the European Union. The territorial scope of the exclusive right of a Community trade mark proprietor cannot extend beyond what that right allows its proprietor to do in order to protect his trade mark. The Court added that the other Member States are, as a rule, required to recognise and enforce the judgment, thereby conferring on it a cross-border effect. Referring to the principle of sincere cooperation laid down in the second subparagraph of Article 4(3) of the Treaty on European Union, the Court then held that Member States are to provide for the measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights covered by Directive 2004/48. ⁽⁶⁶⁾ As a consequence, the Court held that a coercive measure, such as a periodic penalty payment, ordered by a Community trade mark court by application of its national law also has effect in Member States other than the Member State of that court. Such measures can be effective only if they have effect in the same territory as that in which the judgment itself has effect. However, if coercive measures similar to those ordered by the Community trade mark court do not exist in the law of the Member State where enforcement is sought, the court seised of the case must attain the coercive objective by having recourse to the relevant provisions of its national law so as to ensure that the coercive measure originally issued is complied with in an equivalent manner.

In Case C-324/09 *L'Oréal and Others* (judgment of 12 July 2011) between, on the one hand, L'Oréal and several of its subsidiaries and, on the other, eBay International and several of its subsidiaries as well as individual sellers, the Court gave a ruling on several points concerning Community trade mark law after a United Kingdom court had referred for a preliminary ruling several questions concerning referencing services for keywords corresponding to registered trade marks. The Court held that, where offers for sale or advertisements in respect of products bearing Community trade marks whose use has not been authorised by their proprietors are targeted at consumers within the territory of the European Union, the rules of European Union law can apply. In order to assess whether such offers or advertisements are actually targeted at consumers within the European Union, the Court invited national courts to check the existence of relevant factors, particularly the geographic areas to which the seller is willing to dispatch the product in question. The Court also stated that items bearing a trade mark intended to be offered as free samples, given by the proprietor of the trade mark to his authorised distributors, are not put on the market within the

⁽⁶⁵⁾ See preceding footnote.

⁽⁶⁶⁾ See footnote 63.

meaning of Directive 89/104 ⁽⁶⁷⁾ or Regulation No 40/94. ⁽⁶⁸⁾ The Court provided clarification relating to the liability of the operator of an online marketplace, who, whilst not being the person who uses the trade marks when he merely allows his customers to reproduce signs corresponding to trade marks, is none the less liable where he plays an active role of such a kind as to give him knowledge of, or control over, the data relating to those offers. The operator cannot therefore exonerate himself from all liability when he assists his customers to enhance the presentation of the offers or their promotion. He also cannot exonerate himself if he was aware of facts or circumstances such that a diligent economic operator should have identified the illegality of the online offers for sale and he did not act expeditiously to remove, or disable access to, the information. The Court held that, in that last case, injunctions can be issued against the operator concerned, including a requirement to transmit information enabling the identification of customer-sellers, subject to compliance with the rules relating to the protection of personal data. Thus, according to the Court, European Union law requires the Member States to ensure that the national courts with jurisdiction in relation to the protection of intellectual property rights are able to order the operator of an online marketplace to take measures which contribute not only to bringing to an end infringements of those rights but also to preventing further infringements of that kind. The injunctions thereby authorised must, however, be effective, proportionate and dissuasive and must not create barriers to legitimate trade.

When an appeal was brought against the judgment of the General Court in Joined Cases T-225/06, T-255/06, T-257/06 and T-309/06 *Budějovický Budvar v OHIM — Anheuser-Busch (BUD)* (judgment of 16 December), the Court had to decide a dispute between Anheuser-Busch and Budějovický Budvar in relation to the use of the trade mark BUD to designate certain products, including beer. The first ground of appeal concerned the scope of earlier rights (a national trade mark and appellations of origin protected in certain Member States) invoked in support of the oppositions filed against the registration of the trade marks in question: ⁽⁶⁹⁾ in Case C-96/09 P *Anheuser-Busch v Budějovický Budvar* (judgment of 29 March 2011), the Court held that it was not sufficient that the earlier rights were protected in several Member States in order to infer that those rights did not have a merely local significance. Even if the geographical extent of the protection is more than local, the rights must have been used in a sufficiently significant manner in the course of trade in a substantial part of the territory where they are the subject of protection. Furthermore, the Court stated that the use in the course of trade must be assessed separately for each of the territories concerned. The Court also held that it is only in the whole or part of the territory in which the earlier rights are protected that the exclusive rights relating to the sign can enter into conflict with a Community trade mark. The Court finally held that the General Court had committed an error of law by stating that it has to be shown only that a sign was used in the course of trade before publication of the trade mark application and not, at the latest, as at the date of that application. In view, in particular, of the considerable period of time which may elapse between the filing of an application for registration and its publication, applying the temporal condition used for acquiring the right to a mark, namely the date of application for registration of the Community trade mark, provides a better guarantee that the use claimed for the sign concerned is real and not an exercise whose sole aim is to prevent registration of a new trade mark. The judgment was therefore partially set aside and the case was referred back to the General Court.

⁽⁶⁷⁾ 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).

⁽⁶⁸⁾ See footnote 62.

⁽⁶⁹⁾ *Idem*.

The Court looked again into the respective rights of Anheuser-Busch and Budějovický Budvar in Case C-482/09 *Budějovický Budvar* (judgment of 22 September 2011). The questions referred for a preliminary ruling by the United Kingdom court had their origin in the specific facts which the Court took into account in order to give its judgment. For nearly 30 years, the two companies had used the word 'Budweiser' in good faith by way of a trade mark in order to identify beer, before registering that sign as a trade mark. In response to the first two questions posed by the United Kingdom court, the Court firstly held that the notion of acquiescence, within the meaning of Article 9(1) of Directive 89/104, ⁽⁷⁰⁾ is a concept of European Union law and the proprietor of an earlier trade mark cannot be held to have acquiesced in the long and well-established honest use, of which he has long been aware, by a third party of a later trade mark which is identical to his if that proprietor was not in any position to oppose that use. The Court then pointed out that the period of limitation in consequence of acquiescence cannot start to run from the date of mere use of a later trade mark, even if the proprietor of that mark subsequently has it registered because, according to the Court, the registration of the earlier trade mark in the Member State concerned does not constitute a prerequisite for the period of limitation in consequence of acquiescence to begin to run. The prerequisites for the running of that period of limitation, which it is for the national court to determine, are the registration of the later trade mark in the Member State concerned, the application for registration of that mark being made in good faith, the use of the later trade mark by its proprietor in the Member State where it has been registered and, finally, knowledge by the proprietor of the earlier trade mark that the later trade mark has been registered and used after its registration. In response to the third question referred for a preliminary ruling, the Court stated that a later registered trade mark can be declared invalid only when it has an adverse effect or is liable to have an adverse effect on the essential function of the earlier trade mark in accordance with Article 4(1) of Directive 89/104, that function being to guarantee to consumers the origin of the goods or services designated by it. Referring expressly to good faith, the Court then held that the long period of honest concurrent use of the two identical trade marks designating identical goods neither had nor was liable to have an adverse effect on the essential function of the earlier trade mark and that, as a consequence, the later trade mark did not have to be annulled. The Court itself, however, limited the scope of its judgment by pointing out on several occasions the particular circumstances of the case, going as far as to state that the circumstances which gave rise to the dispute were 'exceptional'.

Social policy

Whilst, in this area, questions of equal treatment recur, they are not the only ones to have been addressed by the Court.

Two cases gave the Court the opportunity to interpret the principle of non-discrimination on grounds of age.

In Joined Cases C-297/10 and C-298/10 *Hennigs and Mai* (judgment of 8 September 2011), the Court firstly held that the principle of non-discrimination on grounds of age proclaimed in Article 21 of the Charter of Fundamental Rights of the European Union and given specific expression in Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, ⁽⁷¹⁾ and more particularly Articles 2 and 6(1) of that directive, preclude a measure laid down by a collective agreement which provides that, within each salary group, the basic pay

⁽⁷⁰⁾ See footnote 67.

⁽⁷¹⁾ 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).

step of a public sector contractual employee is determined on appointment by reference to the employee's age. The fact that European Union law precludes that measure and that it appears in a collective agreement does not interfere with the right to negotiate and conclude collective agreements recognised in Article 28 of the Charter. Whilst the criterion of length of service is, as a general rule, appropriate to achieve the legitimate aim of taking into account the professional experience acquired by the employee before his appointment, the determination according to age of the basic pay step on appointment of a public sector contractual employee goes beyond what is necessary and appropriate for that purpose. A criterion also based on length of service or professional experience but without resorting to age would, from the point of view of Directive 2000/78, appear better adapted to achieving the legitimate aim mentioned above. Secondly, the Court was of the opinion that Articles 2 and 6(1) of Directive 2000/78 and Article 28 of the Charter do not preclude a measure in a collective agreement which replaces a system of pay of public sector contractual employees leading to discrimination on grounds of age by a system of pay based on objective criteria while maintaining, for a transitional period limited in time, some of the discriminatory effects of the earlier system in order to ensure that employees in post are transferred to the new system without suffering a loss of income. Transitional arrangements intended to protect established advantages must be regarded as pursuing a legitimate aim within the meaning of Article 6(1) of Directive 2000/78. Moreover, having regard to the broad discretion enjoyed by the social partners in the field of determining pay, it is not unreasonable for the social partners to adopt appropriate and necessary transitional measures to avoid a loss of income on the part of the contractual employees in question.

In Case C-447/09 *Prigge and Others* (judgment of 13 September 2011), the Court firstly held that Article 2(5) of Directive 2000/78 ⁽⁷²⁾ must be interpreted as meaning that the Member States may authorise, through rules to that effect, the social partners to adopt measures within the meaning of that provision in the areas referred to in the provision that fall within collective agreements on condition that those rules of authorisation are sufficiently precise so as to ensure that those measures fulfil the requirements set out in Article 2(5) of the directive. A measure which fixes the age limit from which pilots may no longer carry out their professional activities at 60, whereas national and international legislation fixes that age at 65, is not a measure that is necessary for public security and protection of health, within the meaning of Article 2(5) of Directive 2000/78. The Court then held that Article 4(1) of Directive 2000/78 precludes a clause in a collective agreement that fixes at 60 the age limit from which pilots are considered as no longer possessing the physical capabilities to carry out their professional activity while national and international legislation fix that age at 65. In so far as it allows a derogation from the principle of non-discrimination, Article 4(1) of the directive must be interpreted strictly. Whilst possessing particular physical capabilities may be considered a genuine and determining occupational requirement, within the meaning of that provision, for acting as an airline pilot and whilst the aim of guaranteeing air traffic safety pursued by that measure constitutes a legitimate aim within the meaning of Article 4(1) of the directive, the fixing at 60 of the age limit from which airline pilots are regarded as no longer possessing the physical capabilities to carry out their occupational activity amounts in such circumstances, and having regard to the national and international legislation, to a disproportionate requirement within the meaning of that article. Finally, the Court held that the first subparagraph of Article 6(1) of Directive 2000/78 must be interpreted to the effect that air traffic safety does not constitute a legitimate aim within the meaning of that provision. Although the list of legitimate aims set out in the first subparagraph of Article 6(1) of the directive is not exhaustive, the aims that may be considered legitimate within the meaning of that provision and, consequently, appropriate for the purposes of justifying derogation from the principle prohibiting discrimination on grounds of

⁽⁷²⁾ See preceding footnote.

age, are social policy objectives, such as those related to employment policy, the labour market or vocational training.

It was again Directive 2000/78, ⁽⁷³⁾ but in relation to a different type of discrimination, that the Court had to interpret in Case C-147/08 *Römer* (judgment of 10 May 2011). That case concerned discrimination on grounds of sexual orientation, relating to the amount of a supplementary retirement pension. As regards the scope of the directive, the Court firstly held that Directive 2000/78 is to be interpreted as meaning that supplementary retirement pensions such as those paid by a public employer to former employees and their survivors on the basis of national law, which constitute pay within the meaning of Article 157 TFEU, do not fall outside the material scope of the directive either on account of Article 3(3) thereof or on account of recital 22 in the preamble thereto. The Court then held that Article 1 in conjunction with Articles 2 and 3(1)(c) of Directive 2000/78 preclude a provision of national law under which a person who has entered into a registered life partnership receives a supplementary retirement pension lower than that granted to a married, not permanently separated, person, if, first, in the Member State concerned, marriage is reserved to persons of different gender and exists alongside a life partnership, which is reserved to persons of the same gender, and, second, there is direct discrimination on the ground of sexual orientation because, under national law, that life partner is in a legal and factual situation comparable to that of a married person as regards that pension. It is for national courts to assess comparability, focusing on the respective rights and obligations of spouses and persons in a registered life partnership, as governed within the corresponding institutions, which are relevant taking account of the purpose of and the conditions for the grant of the benefit in question. The Court finally held that, should such a national provision constitute discrimination within the meaning of Article 2 of Directive 2000/78, the right to equal treatment could be claimed by an individual affected by that provision at the earliest after the expiry of the period for transposing the directive, and it would not be necessary to wait for that provision to be made consistent with European Union law by the national legislature.

In Case C-214/10 *KHS* (judgment of 22 November 2011), the Court held that Article 7(1) of Directive 2003/88 ⁽⁷⁴⁾ does not preclude national provisions or practices, such as collective agreements, which limit, by a carry-over period of 15 months on the expiry of which the right to paid annual leave lapses, the accumulation of entitlement to such leave of a worker who is unfit for work for several consecutive reference periods. Unlimited accumulation would no longer reflect the actual purpose of the right to paid annual leave. That purpose has two aspects, in that it enables the worker both to rest from his work and to enjoy a period of relaxation and leisure. While the positive effect of paid annual leave for the safety and health of the worker is deployed fully where that leave is taken in the year prescribed for that purpose, namely the current year, the significance of that rest period remains if it is taken during a later period. However, in so far as the carry-over exceeds a certain temporal limit, annual leave ceases to have its positive effect for the worker with regard to its purpose of rest time, leaving only its purpose of a period of relaxation and leisure. In consequence, in light of the actual purpose of the right to paid annual leave, a worker who is unfit for work for several consecutive years cannot have the right to accumulate, without any limit, entitlements to paid annual leave acquired during that period. In that context, in order to uphold the right to paid annual leave, the objective of which is the protection of workers, the Court held that any carry-over period must take into account the specific circumstances of a worker who is unfit for work for several consecutive reference periods. Thus, that carry-over period must inter

⁽⁷³⁾ See footnote 71.

⁽⁷⁴⁾ Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9).

alia be substantially longer than the reference period in respect of which it is granted. Accordingly, the Court held that it may reasonably be considered that a carry-over period of 15 months is not contrary to the purpose of the right to paid annual leave, in that it ensures that the latter retains its positive effect for the worker as a rest period.

In Case C-108/10 *Scattolon* (judgment of 6 September 2011), the Court defined the scope of the protection of the rights of workers taken over by a new employer. The Court firstly held that the takeover by a public authority of a Member State of staff employed by another public authority and entrusted with the supply to schools of auxiliary services including, in particular, tasks of maintenance and administrative assistance constitutes a transfer of an undertaking falling within Directive 77/187, ⁽⁷⁵⁾ where that staff consists of a structured group of employees who are protected as workers by virtue of the domestic law of that Member State. The Court then held that, where a transfer within the meaning of Directive 77/187 leads to the immediate application to the transferred workers of the collective agreement in force with the transferee, and where the conditions for remuneration laid down by that agreement are linked in particular to length of service, Article 3 of that directive precludes the transferred workers from suffering, in comparison with their situation immediately before the transfer, a substantial loss of salary by reason of the fact that their length of service with the transferor, equivalent to that completed by workers in the service of the transferee, is not taken into account when determining their starting salary position with the transferee. It is for national courts to examine whether, at the time of such a transfer, there is such a loss of salary.

In Case C-435/10 *van Ardennen* (judgment of 17 November 2011), the Court defined the scope of the protection of employees in the event of the insolvency of their employer. The Court held that Articles 3 and 4 of Directive 80/987 ⁽⁷⁶⁾ preclude national legislation which obliges employees to register as job-seekers in the event of the insolvency of their employer, in order to fully assert their right to payment of wage claims which are outstanding, non-contested and recognised by the national legislation. It is purely by way of exception that Member States have the option, under Article 4 of Directive 80/987, to limit the payment obligation referred to in Article 3 of that directive. Article 4 must be interpreted strictly and in conformity with its social objective, which is to guarantee a minimum of protection to all employees. To that effect, the cases in which it is permitted to limit the payment obligation of the guarantee institutions are listed exhaustively by Directive 80/987 and the provisions concerned must be interpreted strictly, having regard to their derogatory character and the social objective of the directive. In that respect, it would be contrary to the objective of the directive to interpret it, and in particular Articles 3 and 4, in such a way that an employee is subject — owing to failure to comply with the obligation to register as a job-seeker within a given period — to an automatic and flat-rate reduction of the reimbursement of his salary claims, which are non-contested and recognised by the national legislation, and is not, therefore, entitled to the guarantee in respect of the salary which he has in fact lost during the reference period.

⁽⁷⁵⁾ Council Directive 77/187/EEC of 14 February 1977 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 businesses (OJ 1977 L 61, p. 26).

⁽⁷⁶⁾ Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (OJ 1980 L 283, p. 23), as amended by Directive 2002/74/EC of the European Parliament and of the Council of 23 September 2002 (OJ 2002 L 270, p. 10).

Environment

Implementation of the environmental protection policy which is resolutely pursued by the European Union gave rise to a number of issues to which it fell to the Court to respond.

In Joined Cases C-165/09 to C-167/09 *Stichting Natuur en Milieu and Others* (judgment of 26 May 2011), the Court looked into the question of the interpretation of Directive 2008/1, ⁽⁷⁷⁾ which establishes the principles that govern the procedures and conditions for granting permits for the construction and operation of large industrial installations, and of Directive 2001/81, ⁽⁷⁸⁾ which introduces a system of national emission ceilings for certain pollutants. The Court held that, when granting an environmental permit for the construction and operation of an industrial installation, the Member States are not obliged to include among the conditions for grant of that permit the national emission ceilings for SO₂ and NO_x laid down by Directive 2001/81. They are nevertheless required to comply with the obligation arising from that directive of reducing emissions of inter alia those pollutants, to amounts not exceeding the ceilings laid down in Annex I to that directive by the end of 2010 at the latest. During the transitional period from 27 November 2002 to 31 December 2010, the Member States had to refrain from adopting measures liable seriously to compromise the attainment of the prescribed result. ⁽⁷⁹⁾ However, the Court allowed Member States the possibility of adopting a specific measure relating to a single source of SO₂ and NO_x during that period, stating that such a measure did not appear liable seriously to compromise the attainment of the result in question. The Court was of the view that, during that period, Directive 2001/81 did not itself require the Member States to refuse or to attach restrictions to the grant of an environmental permit for the construction and operation of an industrial installation, or to adopt specific compensatory measures for each permit granted of that kind, even where the national emission ceilings for SO₂ and NO_x were exceeded or risked being exceeded. Finally, the Court held that Article 4 of Directive 2001/81 is neither unconditional nor sufficiently precise for individuals to be able to rely upon it before the national courts before 31 December 2010. By contrast, Article 6 grants rights to individuals directly concerned which can be relied upon before the national courts in order to claim that, during the transitional period, the Member States should adopt or envisage appropriate and coherent policies and measures capable of reducing emissions of the pollutants covered so as to comply with the national ceilings laid down in Annex I to that directive. Individuals can also claim that the States should make the programmes drawn up for those purposes available to the public and appropriate organisations by means of clear, comprehensible and easily accessible information.

In Case C-366/10 *The Air Transport Association of America and Others* (judgment of 21 December 2011), the Court stated that Directive 2008/101 ⁽⁸⁰⁾ must be interpreted in the light of the relevant rules of the international law of the sea and international law of the air. European Union legislation may be applied to an aircraft operator when its aircraft is in the territory of one of the Member States and, more specifically, on an aerodrome situated in such territory. In laying down a criterion for Directive 2008/101 to be applicable to operators of aircraft registered in a Member State or in

⁽⁷⁷⁾ Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (OJ 2008 L 24, p. 8).

⁽⁷⁸⁾ Directive 2001/81/EC of the European Parliament and of the Council of 23 October 2001 on national emission ceilings for certain atmospheric pollutants (OJ 2001 L 309, p. 22).

⁽⁷⁹⁾ Article 4(3) TFEU and Article 288(3) TFEU. Directive 2001/81/EC, see footnote 78.

⁽⁸⁰⁾ Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community (OJ 2009 L 8, p. 3).

a third State that is founded on the fact that those aircraft perform a flight which departs from or arrives at an aerodrome situated in the territory of one of the Member States, Directive 2008/101 does not infringe the principle of territoriality or the sovereignty of the third States from or to which such flights are performed, since those aircraft are physically in the territory of one of the Member States of the European Union and are thus subject on that basis to the unlimited jurisdiction of the European Union. The Court then stated that the European Union legislature may in principle choose to permit a commercial activity, in this instance air transport, to be carried out in the territory of the European Union only on condition that operators comply with the criteria that have been established by the European Union and are designed to fulfil the environmental protection objectives which it has set for itself, in particular where those objectives follow on from an international agreement to which the European Union is a signatory, such as the Framework Convention ⁽⁸¹⁾ and the Kyoto Protocol. According to the reasoning of the Court, the fact that, in the context of applying European Union environmental legislation, certain matters contributing to the pollution of the air, sea or land territory of the Member States originate in an event which occurs partly outside that territory is not such as to call into question, in the light of the principles of customary international law, the full applicability of European Union law in that territory.

In Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen* (judgment of 12 May 2011), the Court held that Article 10a of Directive 85/337 ⁽⁸²⁾ precludes legislation which does not permit non-governmental organisations promoting environmental protection, as referred to in Article 1(2) of that directive, to rely before the courts, in an action contesting a decision authorising projects likely to have significant effects on the environment for the purposes of Article 1(1) of that directive, on the infringement of a rule flowing from the law of the European Union and intended to protect the environment, on the ground that that rule protects only the interests of the general public and not the interests of individuals.

In Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09 *Boxus and Others* (judgment of 12 May 2011), the Court held that Article 1(5) of Directive 85/337 ⁽⁸³⁾ must be interpreted as meaning that only projects the details of which have been adopted by a specific legislative act, in such a way that the objectives of that directive have been achieved by the legislative process, are excluded from the directive's scope. It is for the national court to verify that those two conditions are satisfied, taking account both of the content of the legislative act adopted and of the entire legislative process which led to its adoption. In that regard, a legislative act which does no more than simply ratify a pre-existing administrative act, by merely referring to overriding reasons in the general interest without a substantive legislative process enabling those conditions to be fulfilled having first been commenced, cannot be regarded as a specific legislative act for the purposes of that provision and would therefore not be sufficient to exclude a project from the scope of Directive 85/337. Interpreting Article 9(2) of the Aarhus Convention ⁽⁸⁴⁾ and Article 10a of Directive 85/337, the Court held that, when a project falling within their scope is adopted by a legislative act, the question whether the conditions laid down in Article 1(5) of that directive are complied with must be capable of being submitted to a court of law or an independent and impartial body

⁽⁸¹⁾ United Nations Framework Convention on Climate Change, signed on 9 May 1992 in New York.

⁽⁸²⁾ Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ 2003 L 156, p. 17).

⁽⁸³⁾ See preceding footnote.

⁽⁸⁴⁾ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1).

established by law. The Court also held that, if no review procedure is available in respect of such an act, any national court before which an action falling within its jurisdiction is brought has the task of carrying out that review and, as the case may be, disapplying that legislative act.

Visas, asylum and immigration

Responsible for reviewing the actions of Member States in this particularly sensitive area, national courts found it necessary on various occasions to use the preliminary ruling procedure in order for the Court to explain the requirements resulting from European Union law on the treatment of third-country nationals who want to stay in the European Union.

In Case C-61/11 PPU *El Dridi* (judgment of 28 April 2011), the Court was asked whether Directive 2008/115, ⁽⁸⁵⁾ in particular Articles 15 and 16 thereof, had to be interpreted as precluding national legislation which provides for a sentence of imprisonment to be imposed on an illegally staying foreign national on the sole ground that he remains, without valid grounds, on national territory, contrary to an order to leave that territory within a given period. The Court, which dealt with the case under the urgent preliminary ruling procedure upon application of the referring court, answered in the affirmative, since such a penalty, due inter alia to its conditions and methods of application, risks jeopardising the attainment of the objective pursued by that directive, namely, the establishment of an effective policy of removal and repatriation of illegally staying third-country nationals.

Case C-329/11 *Achughbabian* (judgment of 6 December 2011) also concerns the interpretation of Directive 2008/115 ⁽⁸⁶⁾ in relation to national legislation imposing penal sanctions. More precisely, the Court was asked whether, taking into account its scope, Directive 2008/115 precludes national legislation which provides for the imposition of a sentence of imprisonment on a third-country national on the sole ground of his illegal entry and residence in national territory. The Court firstly stated that Directive 2008/115 only concerns the adoption of decisions to return third-country nationals illegally staying in a Member State and the implementation of those decisions. It is thus not designed to harmonise in their entirety the national rules on the stay of foreign nationals. According to the Court, it follows that that directive does not preclude the law of a Member State from classifying an illegal stay as an offence and laying down penal sanctions to deter and prevent such an infringement of the national rules on residence. It also does not preclude a third-country national being placed in detention with a view to determining whether or not his stay is lawful.

Secondly, the Court held that Directive 2008/115 must be interpreted as precluding legislation of a Member State repressing illegal stays by criminal sanctions, in so far as that legislation permits the imprisonment of a third-country national who, though staying illegally in the territory of that Member State and not being willing to leave that territory voluntarily, has not been subject to coercive measures within the meaning of Article 8 of that directive and has not, in the event of placing in detention with a view to the preparation and implementation of his removal, reached the expiry of the maximum duration of that detention. The Court then stated that, by contrast, that directive does not preclude such legislation in so far as the latter permits the imprisonment of a third-country national to whom the return procedure established by the directive has been applied and who is staying illegally in the territory of that Member State with no justified ground

⁽⁸⁵⁾ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98).

⁽⁸⁶⁾ See preceding footnote.

for non-return. Whilst the Member States bound by Directive 2008/115 cannot provide for a term of imprisonment for illegally staying third-country nationals in situations in which the latter must, by virtue of the common standards and procedures established by that directive, be removed and may, with a view to preparation and implementation of that removal, at the very most be subject to detention, that does not exclude the possibility of Member States adopting or maintaining provisions, which may be of a criminal nature, governing, in compliance with the principles of the directive and its objective, the situation in which coercive measures have not enabled the removal of an illegally staying third-country national to take place.

Case C-69/10 *Samba Diouf* (judgment of 28 July 2011) concerned a third-country national whose application for international protection made to the authorities of a Member State was refused under an accelerated procedure. He then brought an action seeking, in particular, annulment of the decision refusing his application in so far as the national authorities had thereby decided to rule on the merits of his application under the accelerated procedure, and reversal or annulment of that decision in so far as it refused him international protection. During its consideration of the admissibility of the action for annulment of the decision of the national authorities to rule under an accelerated procedure, the national court concluded that the application of domestic law, which provided that such a decision was not open to any appeal, gave rise to questions concerning the interpretation of Article 39 of Directive 2005/85 on minimum standards on procedures in Member States for granting and withdrawing refugee status, ⁽⁸⁷⁾ with respect to the application of the general principle of the right to an effective remedy. Following a reference for a preliminary ruling, the Court held that, on a proper construction, Article 39 of that directive and the principle of effective judicial protection do not preclude national rules under which no separate action may be brought against the decision of the competent national authority to deal with an application for asylum under such an accelerated procedure, provided that the reasons which led that authority to examine the merits of the application under that procedure can in fact be subject to judicial review in the action which may be brought against the final decision rejecting the application — a matter which falls to be determined by the national courts. According to the Court, the decision relating to the procedure to be applied for the examination of the application for asylum, viewed separately and independently from the final decision which grants or rejects the application, is a measure preparatory to the final decision on the application. Accordingly, the absence of a remedy at that stage of the procedure does not constitute an infringement of the right to an effective remedy, provided, however, that the legality of the final decision adopted in an accelerated procedure and, in particular, the reasons which led the competent authority to reject the application for asylum as unfounded may be the subject of a thorough review by the national court, within the framework of an action against the decision rejecting the application. By contrast, the Court stated that the effectiveness of such an action would not be guaranteed if, because of the impossibility of bringing an appeal against the decision of the competent authority to examine an application for asylum under an accelerated procedure, the reasons which led that authority to examine the merits of the application under such a procedure could not be the subject of judicial review, in so far as those reasons are the same as those which led to the application being rejected. Such a situation would render review of the legality of the decision impossible, as regards both the facts and the law. What is important, therefore, is that such reasons may be effectively challenged at a later stage before the national court and reviewed by it within the framework of the action that may be brought against the final decision closing the procedure relating to the application for asylum.

⁽⁸⁷⁾ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13).

Still in relation to the right of asylum, in Joined Cases C-411/10 and C-493/10 *NS* (judgment of 21 December 2011), the Court was asked whether Member States can transfer asylum seekers to other Member States where there is a risk of a serious infringement of the rights which the Charter of Fundamental Rights of the European Union grants to those asylum seekers. For that purpose, the Court gave a ruling on the interpretation to be given to Articles 1, 4, 18 and 47 of the Charter of Fundamental Rights and Article 3 of Regulation No 343/2003. ⁽⁸⁸⁾

The Court firstly interpreted Article 4 of the Charter of Fundamental Rights of the European Union as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the Member State responsible within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman and degrading treatment within the meaning of that provision. According to the Court, it follows that European Union law precludes the operation of a conclusive presumption that the Member State to which responsibility is allocated by Article 3(1) of Regulation 343/2003 complies with the fundamental rights of the European Union, a solution which is not rebutted by Articles 1, 18 and 47 of the Charter of Fundamental Rights.

The Court then held that, subject to the right itself to examine the application referred to in Article 3(2) of Regulation No 343/2003, the finding that it is impossible to transfer an applicant to another Member State, where that State is identified as the Member State responsible in accordance with the criteria set out in Chapter III of that regulation, entails that the Member State which should carry out that transfer must continue to examine the criteria set out in that chapter in order to establish whether one of the following criteria enables another Member State to be identified as responsible for the examination of the asylum application. According to the Court, the Member State in which the asylum seeker is present must ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, the first mentioned Member State must itself examine the application in accordance with the procedure laid down in Article 3(2) of Regulation No 343/2003. Articles 1, 18 and 47 of the Charter of Fundamental Rights of the European Union do not lead to a different analysis.

Judicial cooperation in civil matters and private international law

During 2011, the Court delivered several judgments concerning Regulation No 44/2001, ⁽⁸⁹⁾ of which two in particular are noteworthy.

The first, in Case C-144/10 *BVG* (judgment of 12 May 2011), concerned the scope of Article 22(2) of Regulation No 44/2001, according to which, in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat are to have exclusive jurisdiction, regardless of domicile. According to the Court, that rule of exclusive jurisdiction

⁽⁸⁸⁾ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1).

⁽⁸⁹⁾ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

does not apply to proceedings in which a company pleads that a contract cannot be relied upon against it because a decision of its organs which led to the conclusion of the contract is supposedly invalid on account of infringement of its statutes. Any question concerning the validity of a decision to enter into a contract taken by organs of one of the parties thereto must be considered ancillary in the context of a contractual dispute. The subject-matter of such a contractual dispute does not necessarily display a particularly close link with the courts where the party which pleads that a decision of its own organs is invalid has its seat. It would therefore be contrary to the sound administration of justice to confer exclusive jurisdiction for such disputes upon the courts of the Member State in which one of the contracting companies has its seat.

The second judgment, in Joined Cases C-509/09 and C-161/10 *eDate Advertising and Others* (judgment of 25 October 2011), gave the Court the opportunity to set out how the expression 'place where the harmful event occurred or may occur', used in Article 5(3) of Regulation No 44/2001, is to be interpreted in the case of an alleged infringement of personality rights by means of content placed online on an Internet website. The Court firstly pointed out that that expression is intended to cover both the place where the damage occurred and the place of the event giving rise to it. It then stated that the placing online of content on a website is to be distinguished from the regional distribution of printed matter in that that content may be consulted instantly by an unlimited number of Internet users throughout the world. Thus, the universal distribution is liable, first, to increase the seriousness of the infringements of the personality rights and, second, to make the locating of the places where the damage resulting from those infringements occurred extremely difficult. The Court therefore inferred from this that the difficulties in giving effect to the criterion relating to the occurrence of damage arising from the distribution of information make it obligatory to adapt that connecting criterion. Given that the impact which material placed online is liable to have on an individual's personality rights might best be assessed by the court of the place where the alleged victim has his centre of interests, the Court attributed jurisdiction to that court in respect of all the damage caused on the territory of the European Union. In that context, the Court observed that the place where a person has the centre of his interests corresponds in general to his habitual residence. The Court added that that person also has the option of bringing an action for liability, in respect of all the damage caused, before the courts of the Member State in which the publisher of that content placed online is established. That person may also, instead of an action for liability in respect of all the damage caused, bring his action before the courts of each Member State in the territory of which content placed online is or has been accessible, those courts having jurisdiction only in respect of the damage caused in the territory of the Member State of the court seised.

Furthermore, in the same judgment, the Court gave a ruling on the methodological implication of Article 3 of Directive 2000/31.⁽⁹⁰⁾ According to the Court, whilst that article does not require transposition in the form of a specific conflict-of-laws rule, Member States must ensure that, in the coordinated field and subject to the derogations authorised in accordance with the conditions set out in Article 3(4) of that directive, the provider of an electronic commerce service is not made subject to stricter requirements than those provided for by the substantive law applicable in the Member State in which that service provider is established.

⁽⁹⁰⁾ 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).

In addition, a reference seeking interpretation of Article 6 of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations, ⁽⁹¹⁾ a provision which relates to individual contracts of employment, was made to the Court for the first time in Case C-29/10 *Koelzsch* (judgment of 15 March 2011), in connection with an international dispute arising out of the termination of the contract of employment of a heavy goods vehicle driver. According to Article 6(1) of that convention, ‘a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 in the absence of choice’. In the case in point, the Court had to interpret the connecting criterion laid down in Article 6(2)(a) of the Rome Convention. It held that that provision must be interpreted as meaning that, in a situation in which an employee carries out his activities in more than one Contracting State, the country in which the employee habitually carries out his work in performance of the contract, within the meaning of that provision, is that in which or from which, in the light of all the factors which characterise that activity, the employee performs the greater part of his obligations towards his employer. The Court explained that the criterion laid down by that provision can apply also in a situation where the employee carries out his activities in more than one Contracting State, if it is possible, for the court seised, to determine the State with which the work has a significant connection. The Court also stated that, bearing in mind the objective of Article 6 of the Rome Convention, which is to guarantee adequate protection for the employee, the criterion of the country in which the work is habitually carried out, set out in Article 6(2)(a) of that convention, must be given a broad interpretation. Following the example of the interpretation given by the Court, within the context of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, ⁽⁹²⁾ in respect of Article 5(1) of that convention, the criterion of the country in which the work is habitually carried out must be understood as referring to the place in which or from which the employee actually carries out his working activities and, in the absence of a centre of activities, to the place where he carries out the majority of his activities. Such an interpretation is consistent also with the wording of the new provision on the conflict-of-law rules relating to individual contracts of employment, introduced by Regulation No 593/2008 on the law applicable to contractual obligations (Rome I), ⁽⁹³⁾ and in particular with Article 8 of that regulation.

The Court finally added that, as regards work carried out in the international transport sector, the referring court was required, in order to determine the State in which the employee habitually carried out his work, to take account of all the factors specific to that activity. For that purpose, it had, in particular, to determine in which State the place from which the employee carried out his transport tasks, received instructions concerning his tasks and organised his work was situated, and the place where his work tools were situated. It had to also determine the places where the transport was principally carried out, where the goods were unloaded and the place to which the employee returned after completion of his tasks.

Police and judicial cooperation in criminal matters

In this area, attention will be drawn only to Joined Cases C-483/09 and C-1/10 *Gueye and Salmerón Sánchez* (judgment of 15 September 2011), in which the Court interpreted Articles 2, 3, 8 and 10 of

⁽⁹¹⁾ 1980 Rome Convention on the law applicable to contractual obligations (consolidated version) (OJ 1998 C 27, p. 34).

⁽⁹²⁾ 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1978 L 304, p. 36).

⁽⁹³⁾ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6).

Framework Decision 2001/220⁽⁹⁴⁾ on the standing of victims in criminal proceedings. It defined in particular the scope of the right, recognised by the framework decision, for victims to be heard, and the effects of that right on the penalties to be imposed on offenders.

The Court firstly held that Articles 2, 3 and 8 of that framework decision do not preclude the mandatory imposition of an injunction to stay away for a minimum period, provided for as an ancillary penalty by the criminal law of a Member State, on persons who commit crimes of violence within the family, even when the victims of those crimes oppose the application of such a penalty.

The Court stated that the obligations laid down in Article 2(1) of that framework decision are intended to ensure that a victim can effectively and adequately take part in the criminal proceedings, which does not imply that a mandatory injunction to stay away cannot be imposed contrary to the wishes of the victim. Also, the procedural right to be heard under the first paragraph of Article 3 of the framework decision does not confer on victims any rights in respect of the choice of form of penalties nor in respect of the level of those penalties. The Court then explained that the protection offered by criminal law against acts of domestic violence is intended to protect not only the interests of the victim but also other more general interests of society. Finally, the protection under Article 8 of the framework decision, which is intended in particular to offer protection which is suitable to the victim from the offender during the criminal proceedings, cannot be understood as meaning that Member States are also obliged to protect victims from indirect consequences which may, at a later stage, arise as a result of the penalties imposed by the national courts.

In addition, the Court stated that the obligation to impose an injunction to stay away in accordance with the substantive law at issue did not fall within the scope of the framework decision.

Secondly, the Court held that Article 10(1) of the framework decision must be interpreted as permitting Member States, having regard to the particular category of offences committed within the family, to exclude recourse to mediation in all criminal proceedings relating to such offences.

Common and foreign and security policy

Within the limited framework of powers which it has in this area, the Court delivered three judgments which are particularly worth mentioning.

In the context of the common foreign and security policy, in Case C-27/09 P *France v People's Mojahedin Organization of Iran* (judgment of 21 December 2011), the Court, before which an appeal was brought by the French Republic against a judgment of the General Court⁽⁹⁵⁾ which had annulled Decision 2008/583⁽⁹⁶⁾ ('the contested decision') in so far as it concerned the People's Mojahedin Organization of Iran, noted that in the case of an initial decision to freeze funds, the institution is not obliged to inform the person or entity concerned beforehand of the grounds on which that institution intends to rely in order to include that person or entity's name in the

⁽⁹⁴⁾ Council Framework Decision 2001/200/JHA of 15 March 2001 on the standing of victims in criminal proceedings (OJ 2001 L 82, p. 1).

⁽⁹⁵⁾ Case T-284/08 *People's Mojahedin Organization of Iran v Council* [2008] ECR II-3487.

⁽⁹⁶⁾ Council Decision 2008/583/EC of 15 July 2008 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2007/868/EC (OJ 2008 L 188, p. 21).

list referred to in Article 2(3) of Regulation No 2580/2001.⁽⁹⁷⁾ So that its effectiveness may not be jeopardised, such a measure must be able to take advantage of a surprise effect and to be applicable immediately. By contrast, in the case of a subsequent decision to freeze funds by which the inclusion of the name of a person or entity already appearing in the list referred to in Article 2(3) of that regulation is maintained, that surprise effect is no longer necessary in order to ensure that the measure is effective, with the result that the adoption of such a decision must, in principle, be preceded by notification of the incriminating evidence and by allowing the person or entity concerned an opportunity of being heard. The Court therefore held that General Court had rightly concluded that, given that the name of the People's Mojahedin Organization of Iran ('the PMOI') had been maintained by the contested decision in the list referred to in Article 2(3) of Regulation No 2580/2001, the Council could not communicate the new incriminating evidence against the PMOI at the same time as it adopted the contested decision. The Council was bound, imperatively, to ensure that the PMOI's rights of defence were observed, that is to say, notification of the incriminating evidence against it and the right to be heard, before that decision was adopted. In that respect, the Court held that the element of protection afforded by the requirement of notification of incriminating evidence and the right to make representations before the adoption of a measure, such as the contested decision, that sets in motion the application of restrictive measures is fundamental and essential to the rights of defence. This is all the more the case because such measures have a considerable effect on the rights and freedoms of the persons and groups concerned.

Finally, bearing in mind the fundamental importance which must attach to observance of the rights of the defence, expressly affirmed in Article 41(2)(a) of the Charter of Fundamental Rights of the European Union, in the procedure preceding the adoption of a decision such as the contested decision, the General Court did not err in law in holding that the Council had not established that the contested decision had so urgently to be adopted that it was impossible for that institution to notify the PMOI of the new evidence adduced against it and to allow the PMOI to be heard before the contested decision was adopted.

As regards, this time, the restrictive measures taken against the Islamic Republic of Iran with the aim of stopping nuclear proliferation, in Case C-548/09 P *Bank Melli Iran v Council* (judgment of 16 November 2011), an appeal was brought before the Court by Bank Melli Iran, an Iranian bank owned by the Iranian State, seeking the setting aside of the judgment of the General Court⁽⁹⁸⁾ by which that court had dismissed the action⁽⁹⁹⁾ of the bank for annulment of measures relating to it. The Court of Justice held that the principle of effective judicial protection means that the European Union authority which adopts an act imposing restrictive measures against a person or entity is bound to communicate the grounds on which it is based, so far as possible, either when that measure is adopted or, at the very least, as swiftly as possible after it has been adopted in order to enable those persons or entities to exercise their right to bring an action. It is with a view to ensuring observance of that principle that Article 15(3) of Regulation No 423/2007⁽¹⁰⁰⁾ requires the Council to state individual and specific reasons for decisions taken pursuant to Article 7(2) of

⁽⁹⁷⁾ 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).

⁽⁹⁸⁾ Case T-390/08 *Bank Melli Iran v Council* [2009] ECR II-3967.

⁽⁹⁹⁾ Action seeking the annulment of paragraph 4 of Table B in the annex to Council Decision 2008/475/EC of 23 June 2008 implementing Article 7(2) of Regulation (EC) No 423/2007 concerning restrictive measures against Iran (OJ 2008 L 163, p. 29).

⁽¹⁰⁰⁾ Council Regulation (EC) No 423/2007 of 19 April 2007 concerning restrictive measures against Iran (OJ 2007 L 103, p. 1).

the regulation and make them known to the persons, entities and bodies concerned. The freezing of funds has considerable consequences for the entities concerned, for it may restrict the exercise of their fundamental rights. It follows that the Council is required to communicate a decision individually to satisfy the obligation imposed on it by that provision. In addition, although an individual communication is necessary in principle, Article 15(3) of that regulation does not require communications to take a specific form, and refers only to the obligation to 'make [the reasons] known'. What matters is that useful effect should have been given to that provision, namely, effective judicial protection of the persons and entities concerned by the restrictive measures adopted pursuant to Article 7(2) of the regulation.

The Court also held that the choice of legal basis for a Community measure must rest on objective factors that are amenable to judicial review, including, in particular, the aim and the content of the measure. According to its title, Regulation No 423/2007 concerns restrictive measures against the Islamic Republic of Iran. It is apparent from the recitals in the preamble thereto and from its provisions taken as a whole that the regulation is intended to prevent or slow down the nuclear policy of that State, in the light of the threat it poses, by means of restrictive economic measures. It is not nuclear proliferation in general which is being combated, but the risks inherent in the Iranian nuclear proliferation programme. The aim and content of the measure in question clearly being the adoption of economic measures against the Islamic Republic of Iran, it was not necessary to have recourse to Article 308 EC, since Article 301 EC constitutes a sufficient legal basis in that it provides for an action by the European Union to interrupt or to reduce, in part or completely, economic relations with one or more third countries; that action may cover the freezing of funds of entities, such as Bank Melli Iran, which are associated with the regime of the third country concerned. As regards the need to include Common Position 2007/140 ⁽¹⁰¹⁾ among the legal bases, Article 301 EC indicates that the common position or joint action must exist in order for Community measures to be adopted, but not that those measures must be based on that common position or joint action. In any event, a common position cannot constitute the legal basis for a Community measure. Council common positions in the sphere of the common foreign and security policy (CFSP), such as Common Positions 2007/140 and 2008/479, ⁽¹⁰²⁾ are adopted within the framework of the Treaty on European Union, in accordance with Article 15 thereof, whereas Council regulations, such as Regulation No 423/2007, are adopted within the framework of the EC Treaty. As a consequence, the Council could adopt a Community measure only on the basis of the powers conferred on it by the EC Treaty, in this case Articles 60 EC and 301 EC.

Still in relation to Regulation No 423/2007 ⁽¹⁰³⁾ concerning restrictive measures against the Islamic Republic of Iran, the Court, to which a reference was made by the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf), interpreted Article 7(3) and (4) of that regulation in Case C-72/11 *Afrasiabi and Others* (judgment of 21 December 2011).

The Court held that Article 7(3) of that regulation must be interpreted as meaning that the prohibition on indirectly making available an economic resource, within the meaning of Article 1(i) of the regulation, encompasses acts relating to the supply and installation in Iran of a sintering furnace in working condition but not yet ready to use for the benefit of a third party which, acting on behalf, under the control or on the instructions of a person, an entity or a body listed in Annexes IV and

⁽¹⁰¹⁾ Council Common Position 2007/140/CFSP of 27 February 2007 concerning restrictive measures against Iran (OJ 2007 L 61, p. 49).

⁽¹⁰²⁾ Council Common Position 2008/479/CFSP of 23 June 2008 amending Common Position 2007/140 (OJ 2008 L 163, p. 43).

⁽¹⁰³⁾ See footnote 100.

V to that regulation, intends to use that furnace to manufacture, for the benefit of such a person, entity or body, goods capable of contributing to nuclear proliferation in that State. The Court also held that Article 7(4) of the regulation must be interpreted as meaning that: (a) it covers activities which, under cover of a formal appearance which enables them to avoid the constituent elements of an infringement of Article 7(3) of the regulation, none the less have the object or effect, direct or indirect, of frustrating the prohibition laid down in that provision; (b) the terms 'knowingly' and 'intentionally' imply cumulative requirements of knowledge and intent, which are met where the person participating in an activity having such an object or such an effect deliberately seeks that object or effect or is at least aware that his participation may have that object or that effect and he accepts such a possibility.