

A — The Court of Justice in 2006: changes and proceedings

By Mr Vassilios Skouris, President of the Court of Justice

This part of the Annual Report gives an overview of the activity of the Court of Justice of the European Communities in 2006. It describes, first, how the institution evolved during that year, with the emphasis on the institutional changes affecting the Court and developments relating to its internal organisation and working methods (Section 1). It includes, second, an analysis of the statistics in relation to developments in the Court's workload and the average duration of proceedings (Section 2). It presents, third, as each year, the main developments in the case-law, arranged by subject-matter (Section 3).

1. The main development in 2006 for the Court as an institution was constituted by the adoption of preparatory measures for the accession of the Republic of Bulgaria and of Romania on 1 January 2007 (Section 1.1). The past year was also the first in which the Civil Service Tribunal operated (Section 1.2), and a legislative process was embarked upon to establish a procedure for the expeditious and appropriate handling of references for preliminary rulings concerning the area of freedom, security and justice (Section 1.3).

1.1. A year and a half after the enlargement in 2004 when 20 new judges were welcomed to the institution, the Court of Justice had to commence preparations for the accession of the Republic of Bulgaria and of Romania on 1 January 2007. In January 2006 an ad hoc working group was set up in order to identify the needs of the various departments and to ensure coordination of all the preparatory work at administrative level. In addition, from 1 July 2006, members of staff were recruited to work in the two new language units in the Translation Directorate.

As regards the organisation of judicial work, the Court decided, in view of the forthcoming accession of the Republic of Bulgaria and of Romania, to create an additional chamber of five judges and an additional chamber of three judges. The Court now has four five-judge chambers (the First, Second, Third and Fourth Chambers) and four three-judge chambers (the Fifth, Sixth, Seventh and Eighth Chambers). Each five-judge chamber is composed of six judges, and each three-judge chamber of five judges, who sit in rotation in accordance with the relevant provisions of the Rules of Procedure ¹.

1.2. By decision of 2 December 2005, published in the Official Journal on 12 December 2005, it was declared that the European Union Civil Service Tribunal was duly constituted. Thus, 2006 was the first full calendar year in which this new body has operated, and it delivered its first judgment on 26 April 2006.

Chapter III of this Report contains a detailed account of the Civil Service Tribunal's work, while Part C of that chapter sets out all the statistics concerning its first year of judicial activity.

¹ Once the Bulgarian and Romanian Judges arrive, the Second and Third Chambers will comprise seven judges, while the Sixth and Seventh Chambers will each be composed of six judges.

1.3. In response to the Presidency Conclusions of the Brussels European Council of 4 and 5 November 2004, the Court of Justice and the political organs of the European Union began consideration of the measures which could be adopted in order to ensure the expeditious handling of references for a preliminary ruling concerning the area of freedom, security and justice.

On 25 September 2006, the Court of Justice submitted an initial discussion paper on the treatment of questions referred for a preliminary ruling concerning the area of freedom, security and justice². In this document, the Court noted in particular that existing procedures, including the accelerated procedure under Article 104a of the Rules of Procedure, are not capable of ensuring that this category of cases is dealt with sufficiently expeditiously and states that it would be wise to contemplate a new type of procedure, which might be called 'the emergency preliminary ruling procedure'. The Court put forward two options for this type of procedure.

On 14 December 2006, the Court submitted to the Council of the European Union a supplement to that discussion paper, which contains a more detailed analysis of the two procedural options³. This legislative process which is now under way will lead to the adoption of the necessary amendments to the Statute of the Court of Justice and its Rules of Procedure, so that the Court may deal with this type of case with maximum efficiency.

2. The statistics concerning the Court's judicial activity in 2006 reveal a considerable improvement, for the third year in a row. The reduction in the duration of proceedings before the Court should be noted, as should the decrease in the number of cases pending despite a significant increase in new cases.

In particular, the Court completed 503 cases in 2006 (net figure, that is to say, taking account of the joinder of cases). Of those cases, 351 were dealt with by judgments and 151 gave rise to orders. The number of judgments delivered and orders made in 2006 is not far from the number in 2005 (362 judgments and 150 orders), despite the constant decrease in pending cases over the preceding three years (974 cases on 31 December 2003, 840 on 31 December 2004, 740 on 31 December 2005).

The Court had 537 new cases brought before it, representing an increase of 13.3 % compared with the number of new cases in 2005 (474 cases, gross figure). The number of cases pending on 31 December 2006 was 731 (gross figure).

The reversal, already observed in 2004 and 2005, of the trend of increasingly lengthy proceedings was consolidated in 2006. As concerns references for a preliminary ruling, the average duration of proceedings was 19.8 months as against 23.5 months in 2004 and 20.4 months in 2005. A comparative analysis from 1995 onwards reveals that the average time taken to deal with references for a preliminary ruling reached its shortest in 2006. The

² This document is available on the Court's website (http://curia.europa.eu/fr/instit/txtdocfr/index_projet.htm).

³ This document is available on the Court's website (http://curia.europa.eu/fr/instit/txtdocfr/index_projet.htm).

average time taken to deal with direct actions and appeals was 20 and 17.8 months respectively (21.3 months and 20.9 months in 2005).

In the course of the past year the Court has made use to differing degrees of the various instruments at its disposal to expedite the handling of certain cases (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 expedited or accelerated procedure was requested in five cases, but the requirement of exceptional urgency laid down by the Rules of Procedure was not satisfied. Following a practice established in 2004, requests for the use of the expedited or accelerated procedure are granted or refused by reasoned order of the President of the Court.

The Court continued to use the simplified procedure laid down in Article 104(3) of the Rules of Procedure to answer certain questions referred to it for a preliminary ruling. It made 16 orders on the basis of that provision, bringing a total of 21 cases to a close.

In addition, the Court made fairly frequent use of the possibility offered by Article 20 of the Statute of determining cases without an Opinion of the Advocate General where they do not raise any new point of law. About 33 % of the judgments delivered in 2006 were delivered without an Opinion (compared with 35 % in 2005).

As regards the distribution of judgments between the various formations of the Court, it may be noted that the Grand Chamber and the full Court dealt with nearly 13 %, chambers of five judges with 63 %, and chambers of three judges with 24 %, of the cases brought to a close in 2006. Compared with the previous year, the number of cases dealt with by five-judge chambers increased significantly (54 % in 2005), the number decided by the Grand Chamber remained stable (13 % in 2005), and the number disposed of by three-judge chambers decreased markedly (33 % in 2005).

For further information regarding the statistics for the 2006 judicial year, reference should be made to Part C of this chapter.

3. This section presents the main developments in the case-law, arranged by subject as follows: constitutional or institutional issues; European citizenship; free movement of goods; agriculture; free movement of persons, services and capital; visas, asylum and immigration; competition rules; approximation and harmonisation of laws; trade marks; taxation; social policy; cooperation in civil and judicial matters; police and judicial cooperation in criminal matters. Quite frequently, however, a judgment which, on the basis of the main issue addressed by it, comes under a given subject, also broaches questions of great interest concerning another subject.

Constitutional or institutional issues

In Opinion 1/03 [2006] ECR I-1145, the Court ruled, at the Council's request, on whether the European Community has exclusive competence, or only shared competence with the Member States, to conclude the new Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters intended to replace the Lugano Convention.

Summarising the principles which may be derived from its case-law on the conclusion of international agreements by the Community, the Court observed first of all that in order to find, in the absence of express Treaty provisions, that the Community — which enjoys only conferred powers — has exclusive competence, it is necessary to have shown, on the basis of a specific analysis of the relationship between the agreement envisaged and the Community law in force, that the conclusion of such an agreement is capable of affecting the Community rules. The Court then conducted an examination of that kind as regards both the rules governing the jurisdiction of courts and the rules concerning the recognition and enforcement of judgments in civil and commercial matters. After the Court had (i) established that, by virtue of the very existence of Regulation (EC) No 44/2001, which provides for a unified and coherent system of rules on jurisdiction, any international agreement also establishing a unified system of rules on conflict of jurisdiction such as that established by that regulation is capable of affecting those rules of jurisdiction, (ii) specifically verified that that is indeed the case with the agreement envisaged despite the inclusion in it of a disconnection clause providing that the agreement does not affect the application by the Member States of the relevant provisions of Community law and (iii) stated that the same finding may be made with regard to the provisions envisaged regarding the recognition and enforcement of judgments, it reached the conclusion that the new Lugano Convention falls entirely within the sphere of exclusive competence of the Community.

In Case C-177/04 *Commission v France* [2006] ECR I-2461, the Court had to decide an action for failure to fulfil obligations under Article 228 EC.

In response to the French Republic's submissions that the reformulation by the Commission of the European Communities during the procedure of the complaints against it amounted to a new claim, so as to render the action inadmissible, the Court held that the requirement that the subject-matter of the proceedings is circumscribed by the pre-litigation procedure cannot go so far as to mean that in every case the operative part of the reasoned opinion and the form of order sought in the application must be exactly the same, provided that the subject-matter of the proceedings has not been extended or altered but simply limited. It is accordingly permissible for the Commission to limit the extent of the failure to fulfil obligations which it asks the Court to find, so as to take account of partial measures to comply adopted in the course of the proceedings.

After establishing that the failure on the part of the French Republic to fulfil obligations still subsisted at the date of the Court's examination of the facts, the Court examined the Commission's proposal of a periodical penalty payment. It recalled first of all that Article 228 EC has the objective of inducing a Member State to comply with a judgment establishing a failure to fulfil obligations, and thereby of ensuring that Community law is in fact applied; such a penalty payment and a lump sum are both intended to place the Member State concerned under economic pressure inducing it to put an end to the infringement and are decided upon according to the degree of persuasion needed for the Member State to alter its conduct. It is for the Court, in the exercise of its discretion, to set a penalty payment in the light of the basic criteria which are, in principle, the duration of the infringement, the seriousness of the infringement and the ability of the Member State to pay. Regard is also to be had to the effects of failure to comply on private and public interests and to the urgency of inducing the Member State concerned to fulfil its obligations.

In this connection, the Court observed that, while guidelines such as those in the notices published by the Commission may indeed contribute to ensuring the transparency, predictability and legal certainty of that institution's actions, it nevertheless remains the fact that exercise of the power conferred on the Court by Article 228(2) EC is not subject to the condition that the Commission adopts such rules, which in any event cannot bind the Court. In the case in point, while the Court accepted the coefficients relating to the seriousness of the infringement, to the gross domestic product of the Member State concerned and to its number of votes, it did not, on the other hand, uphold the coefficient relating to the duration of the infringement. Holding that, for the purposes of calculating that coefficient, regard is to be had to the period between the Court's first judgment and the time at which it assesses the facts, not the time at which the case is brought before it, the Court ordered the Member State to pay a penalty payment higher than that proposed by the Commission.

In Case C-459/03 *Commission v Ireland* [2006] ECR I-4635, which was an action for failure to fulfil obligations brought by the Commission, the Court declared that, by instituting dispute-settlement proceedings against the United Kingdom of Great Britain and Northern Ireland under the United Nations Convention on the Law of the Sea concerning the MOX plant located at Sellafield (United Kingdom), Ireland had failed to fulfil its obligations under various provisions of the EC and EA Treaties. The reasoning followed by the Court in reaching that conclusion comprised several stages. First, given the fact that the Commission alleged that Ireland had infringed Article 292 EC, by virtue of which Member States undertake not to submit a dispute concerning the interpretation or application of the Treaty to any method of settlement other than those provided for in the Treaty, the Court considered whether the provisions of the Convention on the Law of the Sea alleged by Ireland before the arbitral tribunal to have been infringed by the United Kingdom were to be regarded as provisions of Community law, the infringement of which by a Member State falls within the procedure for failure to fulfil obligations set up by Article 226 *et seq.* EC. After reasoning involving the rules governing the conclusion of international agreements by the Community, the relevant Community legislation and a specific examination of the provisions alleged by Ireland to have been infringed, the Court reached the conclusion that the provisions of the Convention relied on by Ireland in the dispute relating to the MOX plant which was submitted to the arbitral tribunal are rules which form part of the Community legal order. Therefore the Court has jurisdiction to deal with disputes relating to the interpretation and application of those provisions and to assess a Member State's compliance with them, and it is the Court which, by virtue of Article 292 EC, has exclusive jurisdiction to deal with a dispute such as that brought by Ireland before the arbitral tribunal. However, Ireland's failure to fulfil obligations did not end there. It also failed to fulfil its Community obligations by submitting Community measures for examination by the arbitral tribunal, in particular various directives adopted on the basis of the EC Treaty or the EA Treaty; this constituted a further breach of the obligation resulting from Articles 292 EC and 193 EA to respect the exclusive jurisdiction of the Court to interpret and apply provisions of Community law. Furthermore, Ireland failed to comply with its duty to cooperate in good faith under Articles 10 EC and 193 EA by bringing proceedings under the dispute-settlement procedure laid down in the Convention on the Law of the Sea without having first informed or consulted the competent Community institutions.

In Case C-173/03 *Traghetti del Mediterraneo* (judgment of 13 June 2006, not yet published in the ECR), the Court explained the rules applicable to liability of the Member States for

infringement of Community law in the specific case where the infringement is committed in the exercise of judicial functions. In particular, it was called upon to assess the compatibility with Community law of national legislation which, first, excludes all State liability for damage caused to individuals by an infringement of Community law committed by a national court adjudicating at last instance, where that infringement is the result of an interpretation of provisions of law or of an assessment of the facts and evidence carried out by that court, and second, also limits such liability solely to cases of intentional fault and serious misconduct on the part of the court. The Court held (i) that Community law precludes national legislation which excludes State liability, in a general manner, for damage caused to individuals by an infringement of Community law attributable to a court adjudicating at last instance by reason of the fact that the infringement in question results from an interpretation of provisions of law or an assessment of facts or evidence carried out by that court and (ii) that Community law also precludes national legislation which limits such liability solely to cases of intentional fault and serious misconduct on the part of the court, if such a limitation may lead to exclusion of the liability of the Member State concerned in other cases where a manifest infringement of the applicable law was committed, as set out in paragraphs 53 to 56 of the judgment in Case C-224/01 *Köbler* [2003] ECR I-10239.

Case C-432/04 *Commission v Cresson* (judgment of 11 July 2006, not yet published in the ECR) gave the Court the opportunity to clarify the obligations owed by Members of the Commission as referred to in Article 213 EC. It held that the concept of 'obligations arising from their office as a Member of the Commission' must be construed broadly and encompasses, in addition to the obligations of integrity and discretion, the obligation to be completely independent and to act in the general interest of the Community. In the event of a breach of a certain degree of gravity, the penalty provided for by the Treaty is compulsory retirement or the deprivation of the Member's right to a pension or other benefits in its stead. A Member of the Commission whose term of office has come to an end can be punished in respect of a breach which occurred during his term of office but is discovered subsequently. Since compulsory retirement can no longer be ordered, the only penalty available to the Court is the deprivation of rights, which may be total or partial depending on the degree of gravity of the breach. However, the period for taking action is not unlimited, given the requirement of legal certainty and the right to be heard by virtue of which the person against whom an administrative procedure has been initiated by the Commission must be afforded the opportunity to make known his views. The Court also stated that the fact that no appeal may be brought against the Court's decision does not in any way constitute, in light of the right of Members of the Commission to effective judicial protection, a deficiency which would preclude exercise of its jurisdiction. So far as concerns the examination of the complaints levelled against the Commissioner proceeded against, the Court held that findings made in the course of criminal proceedings may be taken into account but the Court is not bound by the legal characterisation of the facts that is made and it is for the Court to investigate whether the conduct complained of constitutes a breach of the obligations arising from the office of Member of the Commission. On the basis of these considerations and following a detailed examination of the facts placed before it, the Court partially upheld the action, reaching the conclusion that the Member of the Commission concerned had acted in breach of the obligations arising from her office of Member of the Commission for the purposes of Articles 213(2) EC and 126(2) EA. However, having regard to the circumstances of the case, the Court held that the finding of breach

constituted, of itself, an appropriate penalty, and it did not impose on Mrs Cresson a penalty in the form of a deprivation of her right to a pension or other benefits in its stead.

In Case C-145/04 *Spain v United Kingdom* (judgment of 12 September 2006, not yet published in the ECR) and Case C-300/04 *Eman and Sevinger* (judgment of 12 September 2006, not yet published in the ECR), the Court adjudicated on the Treaty rules relating to European citizenship and the election of representatives to the European Parliament, in particular with regard to the right to vote in such elections and the exercise of that right. In *Spain v United Kingdom*, the Court was required to consider the power of the Member States to extend the right to vote in European Parliament elections to residents who are not citizens of the European Union. The Kingdom of Spain was contesting, in the case in point, a statute of the United Kingdom of Great Britain and Northern Ireland which provides, in relation to Gibraltar, that Commonwealth citizens resident in Gibraltar who are not Community nationals have the right to vote and to stand as a candidate in elections to the European Parliament. The Court held that it is for the Member States to define, in compliance with Community law, the persons entitled to vote and to stand as a candidate in elections to the European Parliament. Articles 189 EC, 190 EC, 17 EC and 19 EC do not preclude the Member States from granting that right to vote and to stand as a candidate to certain persons who have close links to them other than their own nationals or citizens of the Union resident in their territory. Nor, according to the Court, can a clear link between citizenship and the right to vote be deduced from the Treaty provisions relating to the composition of the European Parliament and to citizenship of the Union. Finally, observing that a principle cannot be derived from the Treaty's articles relating to citizenship of the Union that its citizens are the only persons entitled under all the other provisions of the Treaty, the Court concluded that the contested United Kingdom legislation was consistent with Community law.

In *Eman and Sevinger*, the Court ruled on the interpretation of Articles 17 EC, 19(2) EC, 190 EC and 299(3) EC in response to a reference for a preliminary ruling from the Raad van State (Netherlands). The proceedings before the national court concerned two Netherlands nationals resident in Aruba who contested the rejection, on the basis of their place of residence, of their application for registration on the electoral roll for the election of Members of the European Parliament on 10 June 2004. The Court held that persons who possess the nationality of a Member State and who reside or live in a territory which is one of the overseas countries and territories referred to in Article 299(3) EC may rely on the rights conferred on citizens of the Union in Part Two of the Treaty. However, the overseas countries and territories (OCTs) are subject to the special association arrangements set out in Part Four of the Treaty (Articles 182 EC to 188 EC) with the result that, failing express reference, the general provisions of the Treaty do not apply to them. Articles 189 EC and 190 EC, relating to the European Parliament, therefore do not apply to those countries and territories, with the consequence that the Member States are not required to hold elections to the European Parliament there. Furthermore, in the current state of Community law, there is nothing which precludes the Member States from defining, in compliance with Community law, the conditions of the right to vote and to stand as a candidate in elections to the European Parliament by reference to the criterion of residence in the territory in which the elections are held. The principle of equal treatment prevents, however, the criteria chosen from resulting in different treatment of nationals who are in comparable situations, unless that difference in treatment is objectively justified.

Joined Cases C-392/04 and C-422/04 *i-21 Germany and Arcor* (judgment of 19 September 2006, not yet published in the ECR) gave the Court the opportunity to strike a balance between the primacy of Community law and legal certainty with regard to the treatment to be accorded to an administrative act which is unlawful because it infringes Community law. The Court stated that, in accordance with the principle of legal certainty, administrative bodies are not placed under an obligation to reopen an administrative decision which has become final upon expiry of the reasonable time limits for legal remedies or by exhaustion of those remedies. It acknowledged, however, that there may be a limit to this principle if four conditions are met: the administrative body must, under national law, have the power to reopen that decision; the administrative decision in question must have become final as a result of a judgment of a national court ruling at final instance; that judgment must, in the light of a decision given by the Court subsequent to it, be based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling; and the person concerned must have complained to the administrative body immediately after becoming aware of that decision of the Court (see Case C-453/00 *Kühne & Heitz* [2004] ECR I-837). In addition, the principle of equivalence requires that all the rules applicable to appeals, including the prescribed time limits, apply without distinction to appeals on the ground of infringement of Community law and to appeals on the ground of disregard of national law. Where, pursuant to rules of national law, the administration is required to withdraw an administrative decision which has become final but is manifestly incompatible with domestic law, that same obligation must exist if the decision is manifestly incompatible with Community law. The national court will ascertain whether legislation incompatible with Community law constitutes manifest unlawfulness within the meaning of the national law concerned and, if that is the case, draw the necessary conclusions under national law.

In two cases, an issue was raised as to the admissibility of an action for annulment. First, Case C-417/04 P *Regione Siciliana v Commission* [2006] ECR I-3881, which was an appeal in which the Regione Siciliana sought the setting aside of an order of the Court of First Instance that had declared its action for annulment of a Commission decision closing financial assistance from the European Regional Development Fund to be inadmissible, allowed the Court to give further consideration to the concept of a 'Member State'. The Court recalled that an action by a local or regional entity cannot be treated in the same way as an action by a Member State, the term 'Member State' within the meaning of Article 230 EC referring only to government authorities of the Member States. It stated, however, that, on the basis of that article, a local or regional entity may, to the extent that it has legal personality under national law, institute proceedings against a decision addressed to it or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to it. Nevertheless, a regional authority responsible for the execution of a project of the European Regional Development Fund cannot be regarded as directly concerned by a Commission decision addressed to the Member State in question relating to the closing of the financial assistance from that Fund. Second, Case C-131/03 P *Reynolds Tobacco and Others v Commission* (judgment of 12 September 2006, not yet published in the ECR) caused the Court to examine whether decisions taken by the Commission to bring legal proceedings may be annulled. The Court stated that only measures the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position are acts or decisions which may be the subject of an action for annulment. Thus, a decision to

commence proceedings constitutes an indispensable step for the purpose of obtaining a binding judgment but it does not per se determine definitively the obligations of the parties to the case and therefore does not in itself alter the legal position in question. Individuals who nevertheless consider that they have suffered damage because of an institution's unlawful conduct are not, however, denied access to justice since an action for non-contractual liability is available if the conduct in question is of such a nature as to entail liability on the part of the Community.

In Case C-344/04 *International Air Transport Association and Others* [2006] ECR I-403, the Court held, with regard to Article 234 EC, that the fact that the validity of a Community act is contested before a national court is not in itself sufficient to warrant referral of a question to the Court of Justice for a preliminary ruling. A court against whose decisions there is a judicial remedy under national law is required to stay proceedings and make a reference to the Court for a preliminary ruling on the validity of a Community act only where it considers that one or more arguments for invalidity of the act which have been put forward by the parties or otherwise raised by it of its own motion are well founded.

Finally, in a whole series of cases the Court was faced with the problem of the choice of the legal basis for Community measures. Six cases merit specific attention.

Of these, the first to be noted are Case C-94/03 *Commission v Council* [2006] ECR I-1 and Case C-178/03 *Commission v Parliament and Council* [2006] ECR I-107, concerning Decision 2003/106/EC⁴ and Regulation (EC) No 304/2003 respectively⁵. In each of these cases, the Court reaffirmed the main guiding principles which it has already laid down in its case-law concerning dual legal basis. The Court recalled (i) that the choice of the legal basis for a Community measure must be founded on objective factors which are amenable to judicial review and include in particular the aim and content of the measure, (ii) that if examination of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the act must be founded on a single legal basis, namely that required by the main or predominant purpose or component, and (iii) that, exceptionally, if on the other hand it is established that the act simultaneously pursues a number of objectives or has several components that are indissociably linked, without one being secondary and indirect in relation to the other, such an act will have to be founded on the various corresponding legal bases, but recourse to a dual legal basis is not possible where the procedures laid down for each legal basis are incompatible with each other or where the use of two legal bases is liable to undermine the rights of the Parliament. Applying that case-law, the Court held in the first case that Decision 2003/106/EC should have been founded on Articles 133 EC and 175(1) EC, in conjunction with the relevant provisions of Article 300 EC, and therefore had to be annulled since it was based solely on Article 175(1) EC, in conjunction with the first sentence of the first subparagraph of Article 300(2) EC and the first subparagraph of Article 300(3) EC. Similarly, in the second

⁴ Council Decision 2003/106/EC of 19 December 2002 concerning the approval, on behalf of the European Community, of the Rotterdam Convention on the Prior Informed Consent Procedure for certain hazardous chemicals and pesticides in international trade (OJ L 63, 6.3.2003, p. 27).

⁵ Regulation (EC) No 304/2003 of the European Parliament and of the Council of 28 January 2003 concerning the export and import of dangerous chemicals (OJ L 63, 6.3.2003, p. 1).

case the Court held that Regulation (EC) No 304/2003 should have been founded on Articles 133 EC and 175(1) EC and therefore had to be annulled since it was based solely on Article 175(1) EC.

The other four cases have the common feature that they concern the conditions governing recourse to Article 95 EC as a legal basis.

First of all, in Case C-436/03 *Parliament v Council* [2006] ECR I-3733, the Court recalled its case-law which states that Article 95 EC empowers the Community legislature to adopt (i) measures to improve the conditions for the establishment and functioning of the internal market — and they must genuinely have that object, contributing to the elimination of obstacles to the economic freedoms guaranteed by the Treaty, which include the freedom of establishment, and (ii) measures whose aim is to prevent the emergence of obstacles to trade resulting from heterogeneous development of national laws, provided that the emergence of such obstacles is likely and the measure in question is designed to prevent them. The Court accordingly held in the case in point that Article 95 EC could not constitute an appropriate legal basis for the adoption of Regulation (EC) No 1435/2003⁶ and that it was correctly adopted on the basis of Article 308 EC. It was also in application of that case-law that the Court held in Case C-217/04 *United Kingdom v Parliament and Council* [2006] ECR I-3771 that Regulation (EC) No 460/2004⁷ was rightly based on Article 95 EC. Conversely, in Joined Cases C-317/04 and C-318/04 *Parliament v Council and Commission* [2006] ECR I-4721, the Court held that Decision 2004/496/EC⁸ was not validly adopted on the basis of Article 95 EC, read in conjunction with Article 25 of Directive 95/46/EC⁹, since the agreement that was the subject of that decision related to data processing which concerned public security and the activities of the State in areas of criminal law and was therefore excluded from the scope of Directive 95/46/EC by virtue of the first indent of Article 3(2) of that directive. Finally, in Case C-380/03 *Germany v Parliament and Council* (judgment of 12 December 2006, not yet published in the ECR), the Court recalled that, provided that the conditions for recourse to Article 95 EC as a legal basis are fulfilled, the Community legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made. It then held, principally on the basis of that case-law, that by adopting Articles 3 and 4 of Directive 2003/33/EC¹⁰ solely on the basis of Article 95 EC, the Community legislature did not

⁶ Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) (OJ L 207, 18.8.2003, p. 1).

⁷ Regulation (EC) No 460/2004 of the European Parliament and of the Council of 10 March 2004 establishing the European Network and Information Security Agency (OJ L 77, 13.3.2004, p. 1).

⁸ Council Decision 2004/496/EC of 17 May 2004 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection (OJ L 183, 20.5.2004, p. 83, and corrigendum at OJ L 255, 30.8.2005, p. 168).

⁹ 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 L 281, 23.11.1995, p. 31), as amended.

¹⁰ Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (OJ L 152, 20.6.2003, p. 16).

infringe Article 152(4)(c) EC and that the action brought by the Federal Republic of Germany challenging those provisions of the directive consequently had to be dismissed.

European citizenship

In this field, two cases deserve attention in addition to the cases noted above relating to the election of representatives to the European Parliament.

In Case C-406/04 *De Cuyper* (judgment of 18 July 2006, not yet published in the ECR), the Court examined the compatibility of Belgian legislation on unemployment with the freedom of movement and residence conferred on citizens of the European Union by Article 18 EC. Under Belgian legislation, unemployed persons over 50 years of age, although no longer obliged to remain available for work, are subject to a residence requirement. The Court pointed out first of all that the right of residence of citizens of the Union is not unconditional, but is conferred subject to the limitations and conditions laid down by the Treaty and by the measures adopted to give it effect. The Court found that the Belgian legislation places certain Belgian nationals at a disadvantage simply because they have exercised their freedom of movement and residence, and is thus a restriction on the freedoms conferred by Article 18 EC. It accepted, however, that the restriction was justified by objective considerations of public interest independent of the nationality of the persons concerned. The Court stated that a residence condition reflects the need to monitor the employment and family situation of unemployed persons by allowing inspectors to check whether the situation of a recipient of the unemployment allowance has undergone changes which may have an effect on the benefit granted. The Court also noted that the specific nature of monitoring with regard to unemployment justifies the introduction of arrangements that are more restrictive than for other benefits and that more flexible measures, such as the production of documents or certificates, would mean that the monitoring would no longer be unexpected and would consequently be less effective.

The compatibility of a residence condition with Article 18 EC was also at issue in Case C-192/05 *Tas-Hagen and Tas* (judgment of 26 October 2006, not yet published in the ECR), concerning legislation on the award of benefits to civilian war victims which requires the person concerned to be resident on national territory at the time at which the application is submitted.

The Court sought first to determine whether such an issue falls within the scope of Article 18 EC. It observed in this regard that, as Community law now stands, a benefit to compensate civilian war victims falls within the competence of the Member States, although they must exercise that competence in accordance with Community law. In the case of legislation of the kind at issue, exercise of the right of free movement and of residence which is accorded by Article 18 EC is such as to affect the prospects of receiving the benefit, so that the situation cannot be considered to have no link with Community law. With regard to the permissibility of the residence condition, the Court stated that it is liable to deter exercise of the freedoms accorded by Article 18 EC and therefore constitutes a restriction on those freedoms. It observed that the condition may admittedly be justified in principle by the wish to limit the obligation of solidarity with war victims to those who had links with the population of the State concerned during and after the war, the condition

of residence thereby demonstrating the extent to which those persons are connected to its society. However, while noting the wide margin of appreciation enjoyed by the Member States with regard to benefits that are not covered by Community law, the Court held that a residence condition cannot be a satisfactory indicator of that connection when it is liable to lead to different results for persons resident abroad whose degree of integration is in all respects comparable. A residence criterion based solely on the date on which the application for the benefit is submitted is not a satisfactory indicator of the degree of attachment of the applicant to the society which is demonstrating its solidarity with him and therefore fails to comply with the principle of proportionality.

Free movement of goods

In Joined Cases C-23/04 to C-25/04 *Sfakianakis* [2006] ECR I-1265, the Court was required to interpret the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part¹¹, and more specifically Articles 31(2) and 32 of Protocol No 4 to that agreement, in response to a reference for a preliminary ruling from a Greek court which had to decide a case relating to imports into Greece, under the preferential scheme established by that agreement, of automobiles from Hungary.

The Court held that Articles 31(2) and 32 of Protocol No 4 to the agreement, as amended by Decision No 3/96 of the Association Council between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part, are to be interpreted as meaning that the customs authorities of the State of import are bound to take account of judicial decisions delivered in the State of export on actions brought against the results of verifications of the validity of goods movement certificates conducted by the customs authorities of the State of export, once they have been informed of the existence of those actions and the content of those decisions, regardless of whether the verification of the validity of the movement certificates was carried out at the request of the customs authorities of the State of import. In the same judgment the Court held that the effectiveness of the abolition of the imposition of customs duties under the agreement also precludes administrative decisions imposing the payment of customs duties, taxes and penalties taken by the customs authorities of the State of import before the definitive result of actions brought against the findings of the subsequent verification has been communicated to them, when the decisions of the authorities of the State of export which initially issued the goods movement certificates have not been revoked or cancelled.

Agriculture

With regard to the common agricultural policy, mention will be made of Case C-310/04 *Commission v Spain* (judgment of 7 September 2006, not yet published in the ECR), where the Kingdom of Spain brought an action for annulment of the new Community support

¹¹ Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part, approved by decision of the Council and of the Commission of 13 December 1993 (OJ L 347, 31.12.1993, p. 1).

scheme for cotton which was established by Regulation (EC) No 864/2004¹², by its insertion in Regulation (EC) No 1782/2003¹³ that implemented the 'Mac Sharry reforms'. Of the various pleas in law put forward by the Kingdom of Spain, the Court upheld the plea relating to breach of the principle of proportionality. It found that the Council, the author of Regulation (EC) No 864/2004, had not shown that in adopting the new cotton support scheme established by that regulation it actually exercised its discretion, which, according to the Court, involved the taking into consideration of all the relevant factors and circumstances of the case, and especially labour costs and the potential effects of the reform of the cotton support scheme on the economic viability of the ginning undertakings. The Court thus held that the information submitted to it did not enable it to ascertain whether the Community legislature had been able, without exceeding the bounds of the broad discretion it enjoys in the matter, to reach the conclusion that fixing the amount of the specific aid for cotton at 35 % of the total existing aid under the previous support scheme would suffice to guarantee the objective set out in recital 5 in the preamble to Regulation (EC) No 864/2004, namely to ensure the profitability and hence the continuation of that crop, an objective reflecting that laid down in paragraph 2 of Protocol 4 annexed to the Act of Accession of the Hellenic Republic. The Court therefore annulled Article 1(20) of Regulation (EC) No 864/2004 which had inserted Chapter 10a of Title IV of Regulation (EC) No 1782/2003. However, it suspended the effects of that annulment until the adoption, within a reasonable time, of a new regulation.

Free movement of persons, services and capital

In this vast field, the year's significant cases must be arranged thematically.

First of all, the Court had to point out the limits preventing application of the provisions on the freedoms of movement in the case of, first, purely internal situations and, second, abuse of rights. It is settled case-law that a situation whose features are entirely confined to a single Member State is not covered by the provisions relating to the freedoms of movement. In this context, the Court is frequently required to examine whether the establishment, by a taxpayer who is a Community resident, of his residence in the territory of a Member State other than the one in which he engages in economic activity constitutes an external element sufficient to enable him to rely on the free movement of persons, services or capital. Two cases in 2006 merit specific attention in this regard: Case C-152/03 *Ritter-Coulais* [2006] ECR I-1711 and Case C-470/04 *N* (judgment of 7 September 2006, not yet published in the ECR).

¹² Council Regulation (EC) No 864/2004 of 29 April 2004 amending Regulation (EC) No 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers, and adapting it by reason of the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia to the European Union (OJ L 161, 30.4.2004, p. 48).

¹³ Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) No 1868/94, (EC) No 1251/1999, (EC) No 1254/1999, (EC) No 1673/2000, (EEC) No 2358/71 and (EC) No 2529/2001 (OJ L 270, 21.10.2003, p. 1).

In *Ritter-Coulais*, the dispute before the national court concerned a couple who were German nationals and were employed in Germany, where they were liable to taxation, but who resided in France. The Court was asked whether Mr and Mrs Ritter-Coulais could rely upon the provisions relating to freedom of movement for workers against the German tax authorities in order to have income losses resulting from their own use of the house in France which they owned and were living in taken into account. The Court replied that the situation of Mr and Mrs Ritter-Coulais, who worked in a Member State other than that of their actual place of residence, fell within the scope of Article 39 EC.

N concerned the provisions of Netherlands tax law under which departure from national territory is treated as a disposal of shares, resulting in the payment of tax on increases in value at that date. The main proceedings involved a Netherlands national who was resident in the Netherlands until he moved to the United Kingdom, where he would engage in no economic activity for a long time. In answer to the question whether this Netherlands national, who was the sole shareholder of three Netherlands companies, could rely upon the provisions relating to freedom of establishment against the Netherlands tax authorities in order to contest the use made of the disputed legislation in his regard, the Court, referring expressly to its judgment in *Ritter-Coulais*, stated that since the transfer of his residence N had fallen within the scope of Article 43 EC.

As regards abuse of rights, a national court asked the Court of Justice whether it is an abuse of the freedom of establishment for a company established in a Member State to set up and capitalise companies in another Member State solely to take advantage of the more favourable tax regime in that State. In Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* (judgment of 12 September 2006, not yet published in the ECR), the Court replied in the negative. The fact that a company has been established in a Member State for the avowed purpose of benefiting from more favourable legislation does not in itself suffice to constitute abuse and thereby to justify a national measure restricting the freedom of establishment. Such a measure would, on the other hand, be justified if it sought to prevent the creation of wholly artificial arrangements which do not reflect economic reality and are intended to escape the tax normally due on the profits generated by activities carried out on national territory.

While the field of application of the provisions relating to the freedoms of movement is therefore not unlimited, the powers retained by States with regard to direct taxation are not either, and the Court had various opportunities to add to its already plentiful case-law in this area.

Under the common body of rules established by the Court's case-law, not only overt discrimination by reason of nationality is prohibited but also all covert forms of discrimination (all indirect discrimination) which, by the application of ostensibly neutral criteria, lead to the same result. However, in order for a difference in treatment to be classified as discrimination, there must be an intention to apply different rules to comparable situations or the same rules to dissimilar situations. Should indirect discrimination be established, it is possible for it to be justified by overriding reasons in the general interest, subject to compliance with the principle of proportionality.

Of the various national fiscal measures examined by the Court, some were held compatible with Community law, and others incompatible.

National measures recognised as compatible with Community law include, first of all, measures applicable without distinction to objectively comparable situations. That was the position in Case C-513/03 *van Hilten-van der Heijden* [2006] ECR I-1957, concerning national legislation under which the estate of a national of a State who dies within 10 years after ceasing to reside in that State is taxed as if that transfer of residence did not take place, apart from relief in respect of inheritance taxes levied by other States. The Court observed that, by laying down identical taxation provisions for nationals who have transferred their residence abroad and those who have remained in the Member State concerned, such legislation cannot discourage investment flows from or to that State or diminish the value of the estate of nationals who have transferred their residence abroad. The difference in treatment existing between residents who are nationals of the Member State concerned and those who are nationals of other Member States cannot be regarded as constituting discrimination prohibited by Article 56 EC because it flows from the Member States' power to define the criteria for allocating their powers of taxation. That was also the position in Case C-513/04 *Kerckhaert and Morres* (judgment of 14 November 2006, not yet published in the ECR), concerning fiscal legislation which taxes at the same rate share dividends from companies established in national territory and those from companies established in another Member State, without taking account of the income tax already levied by deduction at source in the latter Member State. The Court stated that, in respect of the tax legislation of his State of residence, the position of a shareholder receiving dividends is not necessarily different merely because he receives those dividends from a company established in another Member State, which, in exercising its fiscal sovereignty, makes those dividends subject to a deduction at source. That legislation is therefore not contrary to Article 56 EC. The regrettable consequences, in terms of double taxation, which result from such legislation stem from the exercise in parallel by two Member States of their fiscal sovereignty. It is consequently for them to remedy those consequences by applying, in particular, the apportionment criteria followed in international tax practice.

National measures recognised as compatible with Community law include, next, measures which, although treating objectively comparable situations differently, ultimately prove neutral in light of the objective pursued. Case C-446/04 *Test Claimants in the FII Group Litigation* (judgment of 12 December 2006, not yet published in the ECR) illustrates this well. In generally applicable legislation intended to prevent or mitigate the imposition of a series of charges to tax or economic double taxation (double taxation of the same income in the hands of two different taxpayers), the United Kingdom of Great Britain and Northern Ireland had adopted, for the calculation of tax payable by resident companies, two distinct systems for the taxation of dividends, according to whether they were nationally sourced or foreign sourced. While dividends received by resident companies from other resident companies were subject to an exemption system, dividends received by resident companies from non-resident companies were subject to an imputation system. The Court stated that, in the context of such legislation, the situation of a company receiving foreign-sourced dividends is, however, comparable to that of a company receiving nationally sourced dividends insofar as, in each case, the profits made are, in principle, liable to be subject to a series of charges to tax. Provided that the difference in treatment does not prove to be disadvantageous in the case of foreign-sourced dividends it is not contrary to Articles 43 EC and 56 EC, a matter which is for the national courts to establish.

Other national measures recognised as compatible with Community law are measures treating differently situations that are not comparable. That was the position in Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* (judgment of 12 December 2006, not yet published in the ECR), concerning another aspect of the legislation in the United Kingdom of Great Britain and Northern Ireland intended to prevent or mitigate the imposition of a series of charges to tax or economic double taxation. The disputed measures related, this time, to the regime governing the taxation of dividends distributed by resident companies. While a resident company receiving dividends from another resident company was granted a tax credit, non-resident companies receiving such dividends were not entitled to any tax credit. The Court stated that this difference in tax treatment is not, however, discriminatory. While the situation of resident shareholders receiving nationally sourced dividends must be regarded as comparable to the situation of resident shareholders receiving foreign-sourced dividends (see *Test Claimants in the FII Group Litigation*), the same is not necessarily true, as regards the application of the tax legislation of the Member State in which the company making the distribution is resident, of the situations in which shareholders receiving dividends resident in that Member State and shareholders receiving dividends resident in another Member State are placed. Where the company making the distribution and the shareholder to whom it is paid are not resident in the same Member State, the Member State in which the company making the distribution is resident, that is to say the Member State in which the profits are derived, is not in the same position, as regards the prevention or mitigation of a series of charges to tax and of economic double taxation, as the Member State in which the shareholder receiving the distribution is resident. The difference in treatment between resident and non-resident companies is therefore not prohibited in a case of that kind by Articles 43 EC and 56 EC.

Finally, national measures have been recognised as compatible with Community law where they give rise to differences in treatment but those differences are justified by overriding reasons in the general interest, as in Case C-290/04 *FKP Scorpio Konzertproduktionen* (judgment of 3 October 2006, not yet published in the ECR). The main proceedings concerned national legislation under which a procedure of retention of tax at source is applied to payments made to providers of services not resident in the Member State in which the services are provided, whereas payments made to resident providers of services are not subject to a retention. The Court considered the obligation on the recipient of services to make a retention if he is not to incur liability to be an obstacle to the freedom to provide services. It held, however, that such legislation was justified by the need to ensure the effective collection of income tax from persons established outside the State of taxation and constituted a means proportionate to the objective pursued.

National measures held incompatible with Community law include, first, measures which, although dictated by overriding reasons in the general interest, prove disproportionate to the objective pursued. An example of this is provided by *N*. A taxpayer holding shares who becomes liable, simply by reason of transfer of his residence abroad, to taxation of increases in value which have not yet been realised, whereas, if he were to remain in the territory of the Member State of which he is a national, increases in value would become taxable only when, and to the extent that, they are actually realised, is deterred from exercising his right to freedom of movement. The Court acknowledged that the national provisions at issue pursued an objective in the general interest in that they allocated the power to tax between Member States on the basis of the territoriality principle, thereby avoiding cases

of a double legal charge to tax (double taxation of the same income in the hands of the same taxpayer). Nonetheless, both the obligation to provide guarantees in order to obtain a deferral of payment of the tax normally due and the inability to rely on reductions in value arising after the transfer of residence rendered the tax regime at issue disproportionate to the objective pursued.

National measures held incompatible with Community law also include measures treating comparable situations differently. In *Ritter-Coulais*, the Court held that national legislation constitutes an obstacle where it does not permit natural persons in receipt of income from employment in one Member State and assessable to tax on their total income there to request that account be taken, for the purposes of determining the rate of taxation applicable to that income in that State, of income losses resulting from their own use of a house located in another Member State which they own and use as their principal residence, whereas rental income would be taken into account. While that legislation is not specifically directed at non-residents, the latter are more likely to own a home outside national territory than resident citizens and are also more often than not nationals of other Member States. The less favourable treatment accorded to them is consequently contrary to Article 39 EC.

In Case C-386/04 *Centro di Musicologia Walter Stauffer* (judgment of 14 September 2006, not yet published in the ECR), the Court was asked whether a Member State may treat a non-resident foundation which satisfies the conditions in that State for recognition as a charity less favourably than a resident foundation of the same kind. The Court pointed out that, while Article 58 EC authorises the Member States to accord different fiscal treatment to non-resident taxpayers, it prohibits, however, measures constituting a means of arbitrary discrimination or a disguised restriction on the free movement of capital. Accordingly, different treatment of foundations with unlimited tax liability — which resident foundations have — and those with limited liability — which non-resident foundations have — is permissible only if it concerns situations which are not objectively comparable or is justified by overriding reasons in the general interest. Foreign foundations recognised as having charitable status in their Member State of origin which satisfy the requirements imposed for that purpose by the law of another Member State and whose object is to promote the very same interests of the general public as those promoted in the latter State are in a situation comparable to that of resident foundations of the same kind. In the absence of justification, unfavourable treatment of non-resident foundations is consequently contrary to Community law.

In *FKP Scorpio Konzertproduktionen*, the Court was once again confronted with the question of the deductibility of business expenses incurred by a non-resident provider of services. With regard to business expenses directly linked to the economic activity that has generated the taxable income, residents and non-residents are in a comparable situation. The Court had therefore held in Case C-234/01 *Gerritse* [2003] ECR I-5933 that a national provision which refuses to allow non-residents to deduct business expenses, where residents are allowed to do so, risks operating mainly to the detriment of nationals of other Member States and therefore constitutes indirect discrimination contrary to the Treaty. Here, the Court held that it was also contrary to the Treaty for national legislation not to allow business expenses to be taken into account in the very procedure for retention of tax at source but only in a subsequent refund procedure.

Lastly, in Case C-520/04 *Turpeinen* (judgment of 9 November 2006, not yet published in the ECR) the Court held that Article 18 EC, relating to freedom of movement of citizens of the Union, is infringed by legislation of a Member State under which a retirement pension paid by an institution of that State to a non-resident is taxed, in certain cases, more heavily than a pension paid to a resident would be, where that pension constitutes all or nearly all of the non-resident's income. In such a case, the situation of a non-resident taxpayer is, so far as concerns income tax, objectively comparable to that of a resident taxpayer.

With regard to freedom of establishment, the Court held in two parallel cases, one of which (Case C-506/04 *Wilson*) resulted from a reference for a preliminary ruling while the other (Case C-193/05 *Commission v Luxembourg*) was an action for failure to fulfil obligations (judgments of 19 September 2006, neither yet published in the ECR), that the provisions of Luxembourg law making the registration of lawyers who have obtained their professional qualification in another Member State subject to a prior test to establish proficiency in the three national languages were incompatible with the directive on practice of the profession of lawyer under the home-country professional title¹⁴. The Court explained that presentation of a certificate attesting to registration in the home Member State, in accordance with Article 3 of the directive, is the only condition to which registration in the host Member State may be subject, enabling the person concerned to practise in the latter State under his home-country professional title. The Court pointed out in this regard that the lack of a system of prior testing of knowledge under the directive is accompanied by a set of rules ensuring the protection of consumers and the proper administration of justice, in particular the obligation on the lawyer to practice under his home-country professional title and the obligation of professional conduct not to handle matters for which he lacks competence, for instance owing to lack of linguistic knowledge. In *Wilson*, the Court also found that the Luxembourg legislation was not compatible with Article 9 of the directive under which, where a decision is made refusing registration, a remedy must be available before a court or tribunal in accordance with the provisions of domestic law. The Court considered that a sufficient guarantee of impartiality was not ensured since in the case in point decisions refusing registration were subject to review by a body composed exclusively — at first instance — or for the most part — on appeal — of national lawyers, and an appeal to the Court of Cassation enabled judicial review of the law only and not the facts.

As regards, finally, freedom to provide services, in Case C-452/04 *Fidium Finanz* (judgment of 3 October 2006, not yet published in the ECR) the Court held that Community law does not preclude national legislation under which the granting of credit on national territory by a company established in a non-member country is subject to prior authorisation and such authorisation can be granted only if that company has its central administration or a branch on national territory. Since the freedom to provide services, unlike the free movement of capital, cannot be relied upon by a company established in a non-member country, the Court sought to determine which of these fundamental freedoms related to the activity in question. It found in this regard that that activity was in principle covered by both of them. Relying on a series of precedents, the Court stated that in such cases it is necessary to consider to what extent the exercise of those freedoms is affected and

¹⁴ Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (OJ L 77, 14.3.1998, p. 36).

whether, in the circumstances of the main proceedings, one of them is entirely secondary in relation to the other and may be considered together with it. Where that is the position, the measure at issue is in principle examined in relation to only one of those two freedoms. In the case in point, the Court held that the contested rules governing authorisation affected primarily the freedom to provide services, the requirement of a permanent establishment being the very negation of that freedom. By contrast, any restrictive effects of such rules on the free movement of capital are merely an inevitable consequence of the restriction imposed on the provision of services.

With regard to social security, attention is drawn to three judgments relating to the interpretation of Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended¹⁵.

First of all, in the context of what is sometimes called 'the free movement of patients', the important judgment delivered in Case C-372/04 *Watts* [2006] ECR I-4325 is to be noted. Here, the Court was required to consider the National Health Service (NHS) in the United Kingdom of Great Britain and Northern Ireland in the light of Article 22 of Regulation (EEC) No 1408/71 and of Article 49 EC. The second subparagraph of Article 22(2) of Regulation (EEC) No 1408/71 provides that the competent institution may not refuse a patient authorisation to go to another Member State to receive treatment there (that is to say, in practice, refuse to issue an E112 form) 'where he cannot be given such treatment within the time normally necessary for obtaining the treatment in question in the Member State of residence taking account of his current state of health and the probable course of his disease'. Hospital treatment is free under the NHS but subject to some quite lengthy waiting lists for the least urgent treatment, and the question thus arose as to the extent to which it is permitted to take account of waiting times in the State of residence when assessing the 'time normally necessary for obtaining the treatment', as referred to in Article 22 of the regulation. While the Court acknowledged the legitimacy of a system of waiting lists, it held that, in order to be entitled to refuse authorisation on a ground related to waiting time, the competent institution must establish that the waiting time does not exceed the period which is acceptable having regard to an objective medical assessment of the clinical needs of the person concerned in the light of his medical condition and the history and probable course of his illness, the degree of pain he is in and/or the nature of his disability at the time when the authorisation is sought. The Court added that the setting of waiting times should be carried out flexibly and dynamically, so that they may be reconsidered in the light of any deterioration in the patient's state of health. Regarding the freedom to provide services, the Court ruled that Article 49 EC applies where a person whose state of health necessitates hospital treatment goes to another Member State and there receives the treatment in question for consideration, regardless of the way in which the national system with which that person is registered and from which reimbursement of the cost of those services is subsequently sought operates. It then found that a national system, such as that under the NHS, where prior authorisation is a prerequisite for the

¹⁵ Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ L 28, 30.1.1997, p. 1).

assumption of the costs of hospital treatment available in another Member State whilst on the other hand the receipt of free treatment under that system does not depend on such authorisation, constitutes an obstacle to the freedom to provide services. That restriction may nevertheless be justified by overriding planning objectives of such a kind as to ensure that there is sufficient and permanent access to a balanced range of high-quality hospital treatment, control costs and prevent any wastage of financial, technical and human resources. The Court added that the conditions attached to the grant of such authorisation must be justified in the light of the overriding considerations in question and must satisfy the requirement of proportionality. In this connection, the Court stated with regard to the waiting lists envisaged under the NHS that, where the delay arising from such waiting lists appears to exceed in the individual case concerned a medically acceptable period, the competent institution may not refuse authorisation on the basis of the existence of those waiting lists, an alleged distortion of the normal order of priority of the cases to be treated, the fact that treatment under the national system is free of charge, the duty to make available specific funds to reimburse the cost of treatment provided in another Member State and/or a comparison between the cost of that treatment and that of equivalent treatment in the competent Member State. Finally, where treatment cannot be supplied within a medically acceptable period, the national authorities must provide mechanisms for the reimbursement of the cost of hospital treatment in another Member State.

Second, the Court held in Case C-466/04 *Acereda Herrera* (judgment of 15 June 2006, not yet published in the ECR), with regard to the reimbursement of certain costs incurred by a person insured under the social security system of a Member State when receiving, in another Member State, hospital treatment authorised in advance by the insurance institution, that Article 22(1)(c) and (2) and Article 36 of Regulation (EEC) No 1408/71, as amended, do not confer on the insured person the right to be reimbursed by that institution for the costs of travel, accommodation and subsistence which he and any person accompanying him have incurred in the territory of that other Member State, with the exception of the costs of accommodation and meals in hospital for the insured person himself. The Court pointed out that the term 'cash benefits' in Article 22(1)(c) of the regulation covers the cost of medical services strictly defined and the inextricably linked costs relating to the stay and meals in the hospital, and excludes reimbursement by the competent institution of ancillary costs such as the costs of travel, accommodation and subsistence which the insured person and any person accompanying him have incurred in the territory of that other Member State.

Finally, in Case C-50/05 *Nikula* (judgment of 18 July 2006, not yet published in the ECR), concerning the levying in a Member State of social contributions on pensions paid by an institution of another State, the Court held that Article 33(1) of Regulation (EEC) No 1408/71, as amended and updated by Regulation (EC) No 118/97, does not preclude, when the basis is determined for calculating sickness insurance contributions applied in the Member State of residence of the recipient of pensions paid by the institutions of that Member State responsible for the payment of benefits under Article 27 of that regulation, the inclusion in that basis of calculation, in addition to the pensions paid in the Member State of residence, also of pensions paid by the institutions of another Member State, provided that the sickness insurance contributions do not exceed the amount of pensions paid in the State of residence. However, Article 39 EC precludes the amount of pensions received from institutions of another Member State from being taken into account if

contributions have already been paid in that other State out of the income from work received in that State. It is for the persons concerned to prove that the earlier contributions were in fact paid.

Visas, asylum and immigration

In Case C-503/03 *Commission v Spain* [2006] ECR I-1097, which was an action for failure to fulfil obligations brought by the Commission against Spain because of the practice of that Member State's authorities of refusing entry onto its territory or issue of a visa to nationals of a third country married to a Member State national on the sole ground that they were persons for whom alerts were entered in the Schengen Information System (SIS), the Court explained the relationship between the Convention implementing the Schengen Agreement ('the CISA') and Community law on freedom of movement for persons. It also ruled on how Member States are expected to act in applying the SIS. On the first point, the Court held that the compliance of an administrative practice with the provisions of the CISA may justify the conduct of the competent national authorities only insofar as the application of the relevant provisions is compatible with the Community rules governing freedom of movement for persons. It thus stated that it is consistent with the CISA for Member States automatically to refuse entry or a visa to an alien for whom a Schengen alert has been issued for the purposes of refusing him entry. However, insofar as this automatic refusal provided for by the CISA does not distinguish as to whether or not the alien concerned is married to a Member State national, it is also necessary to verify whether, in the circumstances of the case, that automatic refusal is compatible with the rules governing freedom of movement for persons, in particular with Directive 64/221/EEC¹⁶. More specifically, the Court stated that the inclusion of an entry in the SIS does indeed constitute evidence that there is a reason to justify refusal of entry into the Schengen Area. However, such evidence must be corroborated by information enabling it to be verified before any refusal that the presence of the person concerned in the Schengen Area constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The Court added with regard to that verification that the State consulting the SIS must give due consideration to the information provided by the State which issued the alert and the latter must make supplementary information available to the consulting State to enable it to gauge, in the specific case, the gravity of the threat that the person for whom an alert has been issued is likely to represent.

In Case C-241/05 *Bot* (judgment of 3 October 2006, not yet published in the ECR) the Court, in response to a question referred for a preliminary ruling by the Conseil d'État (France), interpreted Article 20(1) of the CISA¹⁷, which provides that aliens not subject to a visa requirement may move freely within the territories of the Contracting Parties for a maximum period of three months during the six months following the date of first entry,

¹⁶ Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ, English Special Edition 1963–1964, p. 117).

¹⁷ Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ L 239, 22.8.2000, p. 19).

provided that they fulfil the entry conditions referred to in Article 5(1)(a), (c), (d) and (e) of that Convention. The case before the Conseil d'État concerned a Romanian national not requiring a visa who, after having made successive stays in the Schengen Area amounting to more than three months in all during the six months following the date of his very first entry into that area, entered the area again after that initial six-month period had elapsed and was subject to a check there less than three months after that new entry.

The Court held that Article 20(1) of the CISA is to be interpreted as meaning that the term 'first entry' in that provision refers, besides the very first entry into the territories of the Contracting States to the Schengen Agreement, to the first entry into those territories taking place after the expiry of a period of six months from that very first entry and also to any other first entry taking place after the expiry of any new period of six months following an earlier date of first entry.

In Case C-540/03 *Parliament v Council* (judgment of 27 June 2006, not yet published in the ECR), the Court dismissed an action for annulment brought by the European Parliament challenging the final subparagraph of Article 4(1), Article 4(6) and Article 8 of Directive 2003/86 on family reunification¹⁸. The Court held, contrary to the European Parliament's assertions, that those provisions — which state that the Member States are to authorise the entry and residence, pursuant to the directive, of, in particular, the minor children, including adopted children, of the sponsor and his or her spouse, and those of the sponsor or of the sponsor's spouse where that parent has custody of the children and they are dependent on him or her, and that Member States may require the sponsor to have stayed lawfully in their territory for a period not exceeding two years, before having his/her family members join him/her — respect fundamental rights as recognised in the Community legal order. In order to reach that conclusion, the Court compared the contested provisions with the right to respect for family life as laid down in Article 8 of the European Convention on Human Rights, with the Convention on the Rights of the Child and with the Charter of Fundamental Rights solemnly proclaimed in Nice in 2000¹⁹, while pointing out that those instruments do not create for the members of a family an individual right to be allowed to enter the territory of a State and cannot be interpreted as denying Member States a certain margin of appreciation when they examine applications for family reunification. The Court rejected the various arguments relied upon by the European Parliament, taking care to establish that, given the manner in which they are laid down, the derogations permitted by the contested provisions cannot be regarded as running counter to the fundamental right to respect for family life, to the obligation to have regard to the best interests of children or to the principle of non-discrimination on grounds of age, either in themselves or in that they expressly or impliedly authorise the Member States to act in such a way.

Competition rules

In the following presentation of the case-law on competition, a distinction will be drawn between the rules applicable to undertakings and the system of State aid.

¹⁸ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ L 251, 3.10.2003, p. 12).

¹⁹ Charter of Fundamental Rights of the European Union (OJ C 364, 18.12.2000, p. 1).

As regards the rules applicable to undertakings, 13 judgments are of particular interest. A first judgment is to be noted in that it adds to the definition of 'undertaking', which determines the scope of the competition rules. In Case C-205/03 P *FENIN v Commission* (judgment of 11 July 2006, not yet published in the ECR), the Court, after recalling that 'undertaking' covers, in the context of Community competition law, any entity engaged in an economic activity, regardless of the legal status of that entity and the way in which it is financed, stated that, in that regard, it is the activity consisting in offering goods and services on a given market that is the characteristic feature of an economic activity, so that, for the purposes of assessing the nature of such an activity, there is no need to dissociate the activity of purchasing goods from the subsequent use to which they are put and that the nature of the purchasing activity must be determined according to the subsequent use of the purchased goods.

In three other judgments, the Court reaffirmed, and defined in greater detail, a number of elements of the definition of an agreement restrictive of competition within the meaning of Article 81 EC. In Case C-551/03 *General Motors* [2006] ECR I-3173, an appeal by the eponymous car manufacturer against the judgment of the Court of First Instance in Case T-368/00 *General Motors Nederland and Opel Nederland v Commission* [2003] ECR II-4491, the Court observed that an agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives, and that for the purpose of determining whether it pursues an object of that type account must be taken not only of the terms of the agreement but also of other factors, such as the aims pursued by the agreement as such, in the light of the economic and legal context. It thus held that an agreement concerning distribution has a restrictive object for the purposes of Article 81 EC if it clearly manifests the will to treat export sales less favourably than national sales and thus leads to a partitioning of the market in question, and pointed out that such an objective can be achieved not only by direct restrictions on exports but also through indirect measures, such as the implementation by a supplier of motor vehicles, in the context of dealer agreements, of a measure excluding export sales from the system of bonuses paid to dealers, since they influence the economic conditions of such transactions. The Court also recalled that, while proof that the parties to an agreement intended to restrict competition is not a necessary factor in determining whether an agreement has such a restriction as its object, there is nothing to prohibit the Commission or the Community Courts from taking that intention into account. Last, the Court also held, in accordance with consistent case-law, that in order to determine whether an agreement is to be considered to be prohibited by reason of the distortion of competition which is its effect, the competition in question should be assessed within the actual context in which it would occur in the absence of the agreement in dispute and that, accordingly, in a situation such as that involving the implementation by a supplier of motor vehicles, in the context of dealer agreements, of a measure excluding export sales from the system of bonuses paid to dealers, it is necessary to examine what the conduct of those dealers and the competitive situation on the market in question would have been if export sales had not been excluded from the bonus policy. In Case C-74/04 P *Commission v Volkswagen* (judgment of 13 July 2006, not yet published in the ECR), an appeal by the Commission against the judgment of the Court of First Instance in Case T-208/01 *Volkswagen v Commission* [2003] ECR II-5141, the Court held, moreover, that in order to constitute an agreement within the meaning of Article 81(1) EC, it is sufficient that an act or conduct which is apparently unilateral be the expression of the concurrence of wills of at least two

parties and that the form in which that concurrence is expressed is not by itself decisive. It stated, more specifically, in that regard that while a call by a motor vehicle manufacturer to its authorised dealers does not constitute a unilateral act but an agreement within the meaning of Article 81(1) EC, provided that it forms part of a set of continuous business relations governed by a general agreement drawn up in advance, that does not, however, imply that any call by a motor vehicle manufacturer to dealers constitutes an agreement within the meaning of Article 81(1) EC and does not relieve the Commission of its obligation to prove that there was a concurrence of wills on the part of the parties to the dealership agreement in each specific case. According to the Court, such a will on the part of the parties may result from both the clauses of the dealership agreement in question and from the conduct of the parties, and in particular from the possibility of there being tacit acquiescence by the dealers in the measure adopted by the vehicle manufacturer. In another area, in Case C-519/04 P *Meca-Medina and Majcen v Commission* (judgment of 18 July 2006, not yet published in the ECR), the Court held, last, after emphasising that the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty, and in particular from the scope of the competition rules, a person engaging in the activity governed by that rule or the body which has laid it down, that, while anti-doping rules may be regarded as a decision of an association of undertakings limiting the freedom of action of the persons to whom they are addressed, they do not, for all that, necessarily constitute a restriction of competition incompatible with the common market, within the meaning of Article 81 EC, since they are justified by a legitimate objective. According to the Court, such a limitation is inherent in the organisation and proper conduct of competitive sport and its very purpose is to ensure healthy rivalry between athletes. Acknowledging, however, that the penal nature of such anti-doping rules and the magnitude of the penalties applicable if they are breached are capable of producing adverse effects on competition because they could, if penalties were ultimately to prove unjustified, result in an athlete's unwarranted exclusion from sporting events, and thus in impairment of the conditions under which the activity at issue is engaged in, the Court made clear that, in order not to be covered by the prohibition laid down in Article 81(1) EC, the restrictions thus imposed by such rules must be limited to what is necessary to ensure the proper conduct of competitive sport.

Three further judgments deserve special mention in regard to the substantive application of the competition rules by the Court. In Joined Cases C-94/04 and C-202/04 *Cipolla and Others* (judgment of 5 December 2006, not yet published in the ECR), on references for a preliminary ruling from the Corte d'appello di Torino (Italy) and the Tribunale di Roma (Italy), respectively, the Court held that Articles 10 EC, 81 EC and 82 EC do not preclude a Member State from adopting a legislative measure which approves, on the basis of a draft produced by a professional body of lawyers, a scale fixing a minimum fee for members of the legal profession from which there can generally be no derogation in respect of either services reserved to those members or those, such as out-of-court services, which may also be provided by any other economic operator not subject to that scale. The Court considered, however, that such legislation containing an absolute prohibition of derogation, by agreement, from the minimum fees set by a scale of lawyers' fees for services which are (a) court services and (b) reserved to lawyers constitutes a restriction on freedom to provide services laid down in Article 49 EC and that it is for the national court to determine whether such legislation, in the light of the detailed rules for its application, actually serves the objectives of protection of consumers and the proper administration of justice which

might justify it and whether the restrictions it imposes do not appear disproportionate having regard to those objectives. Last, in Case C-125/05 *Vulcan Silkeborg* (judgment of 7 September 2006, not yet published in the ECR) and in Joined Cases C-376/05 and C-377/05 *A. Brünsteiner* (judgment of 5 December 2006, not yet published in the ECR), also references for a preliminary ruling, the Court had for the first time the opportunity to adjudicate on a number of questions inherent in the entry into force of the last regulation on exemption by category applicable to the motor vehicle sector, Regulation (EC) No 1400/2002²⁰, and also to provide its first interpretations of that regulation. In those cases the Court, in particular, held that, while the entry into force of Regulation (EC) No 1400/2002 did not, of itself, require the reorganisation of the distribution network of a supplier within the meaning of the first indent of Article 5(3) of Regulation (EC) No 1475/95²¹, that entry into force might, however, in the light of the particular nature of the distribution network of each supplier, have required changes that were so significant that they must be truly considered as representing a reorganisation within the meaning of that provision and that in that regard it is for the national courts or arbitrators to determine, in the light of all the evidence in the case before them, whether that is the position. In *A. Brünsteiner*, the Court further held that, on a proper construction of Article 4 of Regulation (EC) No 1400/2002, once the transitional period provided for by Article 10 of that regulation had expired, the block exemption under that regulation did not apply to contracts satisfying the conditions for block exemption under Regulation (EC) No 1475/95 which had as their object at least one of the hardcore restrictions listed in Article 4, with the result that all the contractual terms restrictive of competition contained in such contracts were liable to be caught by the prohibition laid down in Article 81(1) EC, if the conditions for exemption under Article 81(3) EC were not satisfied. The Court made clear, in that regard, that the consequences, for all other parts of the agreement or for other obligations flowing from it, of the prohibition of contractual terms incompatible with Article 81 EC are not, however, a matter for Community law and that it is therefore for the national court to determine, in accordance with the national law applicable, the extent and consequences, for the contractual relation as a whole, of the prohibition of certain terms under Article 81 EC.

The other judgments which merit attention owing to the Court's application of the competition rules are more concerned with the questions relating to the implementation of those rules.

The contribution made by two of those judgments lies essentially in questions of procedure and questions relating to the production of evidence. In Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission* (judgment of 21 September 2006, not yet published in the ECR) and Case C-113/04 P *Technische Unie v Commission* (judgment of 21 September 2006, not yet published in the ECR), the Court, while reaffirming that compliance with the reasonable time requirement in the conduct of administrative procedures relating to competition policy constitutes a general principle of Community law whose observance the Community judicature ensures,

²⁰ Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector (OJ L 203, 1.8.2002, p. 30).

²¹ Commission Regulation (EC) No 1475/95 of 28 June 1995 on the application of Article [81](1) [EC] to certain categories of motor vehicle distribution and servicing agreements (OJ L 145, 29.6.1995, p. 25).

held that a finding that the duration of the procedure was excessive, and could not be imputed to the undertakings concerned, can entail annulment, on the ground of a breach of that principle, of a decision finding an infringement only if that duration, by adversely affecting the undertakings' rights of defence, was able to influence the outcome of the proceedings. The Court further observed that examination of any interference with the exercise of the rights of the defence owing to the excessive duration of the administrative procedure cannot be limited solely to the second phase of that procedure, but must also cover the phase preceding notification of the statement of objections and, especially, determine whether that excessive duration was capable of affecting the ability of the undertakings concerned to defend their rights in future. In the same two cases, the Court further held, on the basis of its case-law according to which the existence of an anti-competitive practice or agreement must in most cases be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules, that the fact that evidence of the existence of a continuous infringement had not been produced for certain specific periods did not preclude the infringement from being regarded as established during a longer overall period than those periods provided that such a finding was supported by objective and consistent indicia. Last, the Court also recalled in those judgments that, for the purposes of the application of Article 81(1) EC, where the various actions form part of an 'overall plan', owing to their identical object, which distorts competition within the common market, the Commission is entitled to impute liability for those actions according to participation in the infringement considered as a whole and that there is no need to take account of the actual effects of those actions where it appears that their object is to prevent, restrict or distort competition within the common market. In *Technische Unie v Commission*, the Court also referred to its consistent case-law, according to which it is sufficient for the Commission to demonstrate that an undertaking concerned in meetings during which agreements of an anti-competitive nature were concluded, without having manifestly opposed them, in order to prove to the requisite legal standard that the undertaking participated in a cartel and that, where it is established that an undertaking took part in such meetings, that undertaking must put forward indicia of such a kind as to establish that its participation was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs.

Three other judgments also merit attention in that they supplement the Court's case-law on fines. In two of them, the Court for the first time settled the question of the scope of the principle *non bis in idem* in relation to situations in which the authorities of a non-member State have intervened under their power to impose penalties in the sphere of competition law applicable on the territory of that State. In Case C-289/04 P *Showa Denko v Commission* (judgment of 29 June 2006, not yet published in the ECR) and Case C-308/04 *SGL Carbon v Commission* (judgment of 29 June 2006, not yet published in the ECR), the Court held, after reaffirming that the principle *non bis in idem*, also enshrined in Article 4 of Protocol No 7 to the European Convention on Human Rights, constitutes a fundamental principle of Community law the observance of which is guaranteed by the judicature, that that principle does not apply to situations in which the legal systems and competition authorities of non-member States intervene within their own jurisdiction. The Court considers that when the Commission imposes sanctions on the unlawful conduct of an undertaking, even conduct originating in an international cartel, it seeks to safeguard the free competition

within the common market which constitutes a fundamental objective of the Community under Article 3(1)(g) EC and that thus, on account of the specific nature of the legal interests protected at Community level, the Commission's assessments pursuant to its relevant powers may diverge considerably from those by authorities of non-member States. In an extension of that solution, the Court also held that any consideration concerning the existence of fines imposed by the authorities of a non-member State can be taken into account only under the Commission's discretion in setting fines for infringements of Community competition law and that, although it cannot be ruled out that the Commission may, on grounds of proportionality or fairness, take into account fines imposed previously by the authorities of non-member States, it cannot be required to do so.

Still in the context of its examination of those two cases, and of Case C-301/04 *Commission v SGL Carbon AG* (judgment of 29 June 2006, not yet published in the ECR), the Court also explained a number of principles of its case-law on fines. In *SGL Carbon v Commission*, the Court first of all observed that the Commission, in applying the Guidelines on the method of setting fines imposed for infringement of the competition rules²², may use a calculation method which adopts a flexible approach while complying with the turnover ceiling laid down in Article 15(2) of Regulation No 17²³. The Court proceeded to refer to the consistent case-law according to which the fact of taking aggravating circumstances into account when setting the fine is consistent with the Commission's task of ensuring that undertakings' conduct complies with the competition rules. Conversely, the Commission is not required, when determining the amount of the fine which it imposes on an undertaking, to take its poor financial situation into account, since recognition of such an obligation would be tantamount to giving unjustified competitive advantages to undertakings least well adapted to the market conditions. The Court, moreover, reaffirmed in that case that it is only the final amount of the fine imposed for an infringement of the competition rules that must comply with the 10 % limit referred to in Article 15(2) of Regulation No 17 and that, consequently, that article does not prohibit the Commission from arriving, during the various stages of calculation, at an intermediate amount higher than that limit, provided that the final amount of the fine imposed does not exceed it. Last, continuing its case-law according to which the powers conferred on the Commission under Article 15(2) of Regulation No 17 include the power to determine the date on which the fines are payable and that on which default interest begins to accrue, and the power to set the rate of such interest and to determine the detailed arrangements for implementing its decision, the Court stated that the Commission is entitled to adopt a point of reference higher than the applicable market rate offered to the average borrower, to an extent necessary to discourage dilatory behaviour in relation to payment of the fine. In *Commission v SGL Carbon AG* the Court applied its case-law according to which a reduction under the Leniency Notice²⁴ can be justified only where the information provided and, more generally, the conduct of the undertaking concerned might be considered to demonstrate a genuine spirit of cooperation on its part, holding that the conduct of an undertaking

²² Commission Notice entitled 'Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty' (OJ C 9, 14.1.1998, p. 3).

²³ Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959–62, p. 87).

²⁴ Commission Notice on the non-imposition or reduction of fines in cartel cases (OJ C 207, 18.7.1996, p. 4).

which, although it was not obliged to answer a question asked by the Commission, did answer it, but in an incomplete and misleading way, cannot be considered to reflect a spirit of cooperation. In *Showa Denko v Commission*, moreover, the Court also recalled that the fine imposed on an undertaking for an infringement of the competition rules may be calculated by including a deterrence factor and that that factor is assessed by taking into account a large number of factors and not merely the particular situation of the undertaking concerned.

Last, a final judgment must be mentioned in connection with fines, especially because it confirms the Court's *Courage* case-law (Case C-453/99 *Courage v Crehan* [2001] ECR I-6297). In Joined Cases C-295/04 to C-298/04 *Manfredi and Others* (judgment of 13 July 2006, not yet published in the ECR), the Court recalled that, as Article 81(1) EC produces direct effects in relations between individuals and creates rights for the individuals concerned which the national courts must safeguard, any individual is entitled to rely on the invalidity of an agreement or practice prohibited under Article 81 EC and, where there is a causal relationship between that agreement or practice and the harm suffered, to claim damages for that harm. In that regard, the Court also recalled that, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to determine the detailed rules governing the exercise of that right, including those on the application of the concept of 'causal relationship', provided that those rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness).

As regards State aid, five cases are particularly noteworthy. They allowed the Court to confirm its case-law, while providing certain information on matters as diverse as the concept of an 'undertaking' within the context of Article 87(1) EC, the definition of 'aid', or, again, the application of the principle of protection of legitimate expectations and the role of the national courts in implementing the system of control of State aid. In Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, a reference had been made to the Court by the Corte suprema di cassazione (Italy) for a preliminary ruling on a number of questions concerning the compatibility with Community law of the tax arrangements of entities which had arisen as a result of the privatisation of banks in the Italian public sector and, more specifically, of that compatibility in relation to the tax arrangements applicable to the banking foundations that replaced the traditional savings banks on that occasion. In answer to the first two questions, and on the basis of its consistent case-law on the concept of 'undertaking' in the context of competition law and also of its case-law relating to the concept of 'economic activity', the Court, first, held that an entity which, through owning controlling shareholdings in a company, actually exercises that control by involving itself directly or indirectly in the management thereof must be regarded as taking part in the economic activity carried on by the controlled undertaking and must therefore itself, on that basis, be regarded as an undertaking within the meaning of Article 87(1) EC. The Court concluded that a banking foundation which controls the capital of a banking company whose system includes rules which reflect a purpose going beyond the simple placing of capital by an investor and make possible the exercise of functions relating to control, such as direction and financial support, thus illustrating the existence of organic and functional links between the banking foundations and the banking companies, must be treated as an 'undertaking' within the meaning of that provision. In view of the role

entrusted to banking foundations by the national legislation in the fields of public interest and social assistance, the Court nonetheless took care to distinguish the simple payment of contributions to non-profit-making organisations and the activity carried on directly in those fields. It held that the Community rules on State aid were applicable only in the second hypothesis, emphasising that where a banking foundation, acting itself in the fields of public interest and social assistance, uses the authorisation given it by the national legislature to effect financial, commercial, real estate and asset operations necessary or opportune in order to achieve the aims prescribed for it, it is capable of offering goods or services on the market in competition with other operators and, accordingly, must be regarded as an undertaking and thus be subject to the application of the Community rules relating to State aid. In answer to the third question, the Court, after observing that the concept of aid is more general than that of a subsidy and that a measure by which the public authorities grant certain undertakings a tax exemption which, although not involving the transfer of State resources, places the recipients in a more favourable financial position than other taxpayers amounts to State aid within the meaning of Article 87(1) EC, further held that an exemption from retention on dividends which benefits banking foundations holding shares in banking companies and which pursue exclusively aims of social welfare, education, teaching, and study and scientific research, may be categorised as State aid.

In Joined Cases C-182/03 and C-217/03 *Belgique and Forum 187 v Commission* (judgment of 22 June 2006, not yet published in the ECR), the Kingdom of Belgium and the limited company Forum 187, the representative body for the coordination centres in Belgium, sought annulment of Decision 2003/757/EC²⁵, particularly insofar as it did not authorise the Kingdom of Belgium to grant, even temporarily, renewal of coordination centre status to the centres which benefited from that scheme as at 31 December 2000. As the basis for its finding that one of the applicants' pleas, alleging breach of the principle of protection of legitimate expectations, was well founded, the Court recalled that, in the absence of an overriding public interest, the Commission had infringed a superior rule of law by failing to couple the repeal of a set of rules with transitional measures for the protection of the expectations which a trader might legitimately have derived from the Community rules. The Court further held that there is a breach of both the principle of protection of legitimate expectations and the principle of equality when a Commission decision which reverses previous findings to the contrary requires the abolition of a specific tax regime, on the ground that it constitutes State aid incompatible with the common market, without providing for transitional measures in favour of traders whose approval, reviewable without difficulty and necessary to benefit from that scheme, expires at the same time as or shortly after the date of notification of the decision, but does not prevent authorisations in force on that date from continuing to produce their effects for several years, since the abovementioned traders, who cannot adapt to the change in the scheme in question at short notice, could, in any event, expect that a Commission decision reversing its previous finding would allow them the necessary time to take that change in assessment into account and since no overriding public interest prevents that time from being granted to them.

In Case C-88/03 *Portugal v Commission* (judgment of 6 September 2006, not yet published in the ECR) the Court heard an application by the Portuguese Republic for annulment of

²⁵ Commission Decision 2003/757/EC of 17 February 2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium (OJ L 282, 30.10.2003, p. 25).

Decision 2003/442/EC²⁶. The Court referred to its consistent case-law according to which the concept of State aid does not refer to State measures which differentiate between undertakings where that differentiation arises from the nature or the overall structure of the system of charges of which they are part and held, first of all, that a measure which creates an exception to the application of the general tax system may be justified on that ground only if the Member State concerned can show that that measure results directly from the basic or guiding principles of its tax system and stated, in that connection, that a distinction must be made between, on the one hand, the objectives attributed to a particular tax scheme which are extrinsic to it and, on the other, the mechanisms inherent in the tax system itself which are necessary for the achievement of such objectives. After observing that, when it is a question of examining whether a measure is selective, it is essential to determine the reference framework, the Court further held that that framework is not necessarily defined within the limits of the national territory and that thus, in a situation in which a regional or local authority, in the exercise of powers which are sufficiently autonomous vis-à-vis the central power, a tax rate which is lower than the national rate and which is applicable solely to undertakings present on the territory within its competence, the relevant legal framework for the purpose of determining the selectivity of a tax measure may be limited to the geographical area concerned where the infra-State body, in particular on account of its status and powers, occupies a fundamental role in the definition of the political and economic environment in which the undertakings present on the territory within its competence operate. According to the Court, in order that a decision taken in such circumstances can be regarded as having been adopted in the exercise of sufficiently autonomous powers, that decision must, first of all, have been taken by a regional or local authority which has, from a constitutional point of view, a political and administrative status separate from that of the central government. Next, it must have been adopted without the central government being able to directly intervene as regards its content. Finally, the financial consequences of a reduction of the national tax rate for undertakings in the region must not be offset by aid or subsidies from other regions or central government.

In Case C-526/00 *Laboratoires Boiron* (judgment of 7 September 2006, not yet published in the ECR), the Court, on a reference for a preliminary ruling by the Cour de cassation (France), examined two questions which had been raised in proceedings concerning the 'contribution' introduced by Article 12 of Law No 97-1164 of 19 December 1997 on social security funding for 1998 (Article L-245-6-1 of the French Social Security Code) and payable by pharmaceutical laboratories on their bulk sales of medicines reimbursable by the sickness insurance funds, but not paid by wholesale distributors and in respect of which the Court had already given a ruling on other points in Case C-53/00 *Ferring* [2001] ECR I-9607. In answer to the first question, the Court stated, with reference to its decision in Case C-390/98 *Banks* [2001] ECR I-6117, according to which persons liable to pay a charge cannot rely on the argument that the exemption enjoyed by other persons constitutes State aid in order to avoid payment of or obtain reimbursement of that charge, that that is true only in the case of an exemption in favour of certain traders of a charge having general scope and that the situation is quite different in the case of a situation involving a charge for which only one

²⁶ Commission Decision 2003/442/EC of 11 December 2002 on the part of the scheme adapting the national tax system to the specific characteristics of the Autonomous Region of the Azores which concerns reductions in the rates of income and corporation tax (OJ L 150, 18.6.2003, p. 52).

of the two categories of competing operators is liable. In such a case of unequal liability for a charge, the Court considers that the aid may derive from the fact that another category of economic operators with which the category subject to the charge is in direct competition is not liable for that charge and that, accordingly, in a system in which there are two directly competing distribution channels for medicines and in which the exemption of wholesale distributors seeks, in particular, to restore the balance of competition between the two distribution channels for medicines which, according to the legislature, are distorted by the imposition of public-service obligations on wholesale distributors alone it is the tax on direct sales itself and not some exemption which is separable from that tax that constitutes the aid measure in question. The Court concluded that it should be accepted that a pharmaceutical laboratory required to pay such a contribution is entitled to plead that the fact that wholesale distributors are not liable for that contribution constitutes State aid, in order to obtain reimbursement of the part of the sums paid which corresponds to the economic advantage unfairly obtained by wholesale distributors in that regard, and in answer to the second question, the Court ruled, with reference to its case-law on the procedural autonomy which, in the absence of Community rules governing the matter, is left to the domestic legal orders to ensure the protection of the rights which individuals derive from the direct effects of Community law and also to the dual limit relating to the need to comply with the principles of equivalence and effectiveness, that Community law does not preclude the application of rules of national law which make reimbursement of a mandatory contribution such as the tax at issue in the main proceedings subject to proof by the claimant seeking reimbursement that the advantage derived by wholesale distributors from their not being liable to pay that contribution exceeds the costs which they bear in discharging the public-service obligations imposed on them by the national rules and, in particular, that at least one of the so-called *Altmark* conditions²⁷ is not satisfied.

In Case C-368/04 *Transalpine Ölleitung in Österreich* (judgment of 5 October 2006, not yet published in the ECR), the Court had received a reference from the Verwaltungsgerichtshof (Austria) concerning the interpretation of the last sentence of Article 88(3) EC, which gave it the opportunity to confirm, and at the same time provide clarification of, a number of points on the role of the national courts in the implementation of the system of monitoring State aid, especially in a situation involving aid that is illegal on the ground that it is granted in breach of the obligation to notify aid laid down in that provision but is subsequently declared compatible with the common market by a Commission decision. In accordance with a consistent line of decisions, the Court, first, ruled that the last sentence of Article 88(3) EC must be interpreted as meaning that it is for the national courts to safeguard the rights of individuals against possible disregard, by the national authorities, of the prohibition on putting aid into effect before the Commission has adopted a decision authorising that aid and emphasised, as it had done shortly beforehand in Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* (judgment of 15 June 2006, not yet published in the ECR), that in doing so the national courts must take the Community interest fully into consideration, which precludes them from adopting a measure which would have the sole effect of extending the circle of recipients of the aid. Second, the Court also recalled that a Commission decision declaring aid that has not been notified

²⁷ Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747.

compatible with the common market does not have the effect of regularising *ex post facto* implementing measures which, at the time of their adoption, were invalid because they had been taken in disregard of the prohibition laid down in the last sentence of Article 88(3) EC, since otherwise the direct effect of that provision would be impaired and the interests of individuals, which are to be protected by national courts, would be disregarded. In that regard, it is little consequence, according to the Court, that the Commission decision states that its assessment of the aid in question relates to a period preceding the adoption of the decision or that an application for reimbursement is made before or after adoption of the decision declaring the aid compatible with the common market, since that application relates to the unlawful situation resulting from the lack of notification. Referring, last, to the decided principle that the national courts must offer to individuals who are entitled to rely on disregard of the obligation to notify State aid the certain prospect that all appropriate conclusions will be drawn, in accordance with national law, with regard to both the validity of the acts giving effect to the aid and the recovery of financial support granted in disregard of that provision or possible interim measures, the Court ruled that, depending on what is possible under national law and the remedies available thereunder, a national court may, according to the case, be called upon to order recovery of unlawful aid from its recipients, even if that aid has subsequently been declared compatible with the common market by the Commission, or required to rule on an application for compensation for the damage caused by reason of the unlawful nature of such a measure.

Approximation of laws and uniform laws

In this field, the Court had to turn its attention to various pieces of Community legislation.

In *International Air Transport Association and Others*, the Court, having been asked whether Article 6 of Regulation (EC) No 261/2004²⁸ relating to the rights of air passengers is consistent with the Montreal Convention, held that the measures laid down in that article for assisting and taking care of passengers in the event of a long delay to a flight are standardised and immediate compensatory measures which do not prevent the passengers concerned, should the same delay also cause them damage conferring entitlement to compensation, from being able also to bring actions to redress that damage under the conditions laid down by the Montreal Convention. The Court also held that the obligation to state reasons was complied with since the regulation clearly discloses the essential objective pursued by the institutions and it therefore cannot be required to contain a specific statement of reasons for each of the technical choices made. So far as concerns compliance with the principle of proportionality, a general principle of Community law requiring that measures implemented through Community provisions should be appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it, the Court held that the measures to assist, care for and compensate passengers that are prescribed by the regulation are not manifestly inappropriate in relation to the

²⁸ Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ L 46, 17.2.2004, p. 1).

objective pursued by the Community legislature, which is to strengthen the protection of passengers whose flights are cancelled or subject to a long delay. The Court found with regard to the principle of equal treatment that the obligations resulting from the regulation are not invalid even though such obligations are not imposed on other means of transport. Different modes of transport are not interchangeable and the situation of a passenger whose flight is cancelled or subject to a long delay is objectively different from that of a passenger using another means of transport. Furthermore, the damage suffered by passengers of air carriers in the event of cancellation of, or a long delay to, a flight is similar whatever the airline with which they have a contract and is unrelated to pricing policies. All airlines must accordingly be treated identically.

Two judgments concerning Directive 85/374/EEC²⁹ are of particular interest. One relates to the possibility of transferring the producer's liability to the supplier, the other to the moment at which a product is put into circulation. In Case C-402/03 *Skov and Bilka* [2006] ECR I-199, the Court was asked whether Directive 85/374/EEC precludes a national rule under which a supplier bears unlimited responsibility for the producer's no-fault liability under the directive. After stating that the directive introduces no-fault liability and imposes it on the producer, and that the directive seeks to achieve complete harmonisation in the matters regulated by it, the Court reached the conclusion that the determination of the class of persons liable must be regarded as exhaustive. Since the directive provides for the supplier to be liable only in the case where the producer cannot be identified, national legislation laying down that the supplier is to be answerable directly to injured persons for defects in a product extends the class of persons liable and is therefore not permissible. With regard to fault-based liability of producers, on the other hand, the Court held that the directive does not prevent a national rule under which the supplier is answerable without restriction for the fault-based liability of the producer, since the system of rules put in place by the directive does not preclude the application of other systems of contractual or non-contractual liability based on other grounds, such as fault or a warranty in respect of latent defects.

Case C-127/04 *O'Byrne* [2006] ECR I-1313 was concerned, first, with determining the moment at which a product may be regarded as put into circulation, given that the period of limitation in respect of the rights conferred on the injured person is 10 years from when the product is put into circulation, and second, with ascertaining whether one party may be substituted for another when an action is mistakenly brought against a company which is not the actual producer of the product. The Court held that a product is put into circulation when it is taken out of the manufacturing process operated by the producer and enters a marketing process in the form in which it is offered to the public in order to be used or consumed. It is unimportant whether the product is sold directly by the producer to the user or to the consumer or whether that sale is carried out using one or more links in a distribution chain. Accordingly, when one of the links in the distribution chain is closely connected to the producer, that connection can have the effect that that entity is to be regarded as involved in the manufacturing process of the product concerned. When an action is brought against a company mistakenly considered to be the producer of a product, it is for national law to determine the conditions in accordance with which

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 L 210, 7.8.1985, p. 25).

one party may be substituted for another, while ensuring that due regard is had to the personal scope of Directive 85/374/EEC, whose determination of the class of persons liable is exhaustive.

In Case C-356/04 *Lidl Belgium* (judgment of 19 September 2006, not yet published in the ECR), the Court was required to interpret Directive 84/450/EEC³⁰ in relation to comparative advertising. The Court was asked whether two specific forms of comparative advertising are legitimate, both founded on a price comparison without the advertisement specifying the goods compared and the corresponding prices. First, the Court held that the directive does not preclude comparative advertising from relating collectively to selections of basic consumables sold by two competing chains of stores insofar as those selections each consist of individual products which, when viewed in pairs, individually satisfy the requirement of comparability laid down by the directive. Nor does the requirement that the advertising 'objectively compares' the features of the goods at issue signify that the products and prices compared, that is to say both those of the advertiser and those of all of his competitors involved in the comparison, must be expressly and exhaustively listed in the advertisement. The features of those goods must, however, be verifiable, a requirement which is met by their prices, by the general level of the prices charged by a chain of stores in respect of its selection of comparable products and by the amount liable to be saved by consumers who purchase such products from one chain rather than the other. In cases where the details of the comparison which form the basis for the mention of a feature are not set out in the comparative advertising, the advertiser must indicate, in particular for the attention of the persons to whom the advertisement is addressed, where and how they may readily examine those details with a view to verifying their accuracy or to having it verified. Second, comparative advertising claiming that the advertiser's general price level is lower than his main competitors', where the comparison has related to a sample of products, may be misleading when the advertisement (i) does not reveal that the comparison related only to such a sample and not to all the advertiser's products, (ii) does not identify the details of the comparison made or inform the persons to whom it is addressed of the information source where such identification is possible, or (iii) contains a collective reference to a range of amounts that may be saved by consumers who make their purchases from the advertiser rather than from his competitors without specifying individually the general level of the prices charged, respectively, by each of those competitors and the amount that consumers are liable to save by making their purchases from the advertiser rather than from each of the competitors.

In Case C-168/05 *Mostaza Claro* (judgment of 26 October 2006, not yet published in the ECR), the Court was required to interpret Directive 93/13/EEC³¹. It was asked whether, where an action has been brought before a national court for annulment of an arbitration award against the consumer made following arbitration proceedings which were required by a clause, contained in a mobile telephone contract, that has to be classified as unfair,

³⁰ Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading and comparative advertising, as amended by Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 (OJ L 250, 19.9.1984, p. 17).

³¹ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993, p. 29).

the national court can uphold the action although the consumer did not plead that the clause was unfair before the arbitrator. The Court held that Directive 93/13/EEC is to be interpreted as meaning that a national court must determine whether the arbitration agreement is void and annul the award where the agreement contains an unfair term, even though the consumer has not pleaded that invalidity in the course of the arbitration proceedings, but only in the course of the action for annulment.

So far as concerns copyright and related rights, in Case C-306/05 *SGAE* (judgment of 7 December 2006, not yet published in the ECR), the Court explained the concept of 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29/EC³², which establishes the exclusive right for authors to authorise or prohibit such communication of their works. On a reference from the Audiencia Provincial de Barcelona (Spain) in proceedings between the SGAE, which is a Spanish body responsible for copyright management, and a hotel company, the Court was required, in particular, to determine whether that concept covers the broadcasting of programmes through television sets in hotel rooms. Interpreting the provision in question of Directive 2001/29/EC in the light of the international law to which the directive is intended to give effect at Community level, in the case in point the Berne Convention for the Protection of Literary and Artistic Works of 24 July 1971 and the World Intellectual Property Organisation (WIPO) Copyright Treaty of 20 December 1996, the Court adopted a global approach. It observed that the potential television viewers of the works are not only customers in rooms and customers present in other areas of the hotel where a television set is available, but also the hotel's successive customers. This amounts to a large number of persons, who must be considered to be a public within the meaning of Directive 2001/29/EC. The Court accordingly held that, while the installation of television sets in hotel rooms does not in itself constitute a communication to the public, on the other hand the distribution of a signal by means of those television sets by the hotel to customers is such a communication. In addition, the private nature of the rooms is not material.

Trade marks

In the field of trade mark law, Case C-108/05 *Bovemij Verzekeringen* (judgment of 7 September 2006, not yet published in the ECR) is to be noted. This judgment explains which territory must be taken into account in order to assess whether a sign has acquired a distinctive character through use, within the meaning of Article 3(3) of Directive 89/104/EEC³³, in a Member State or in a group of Member States which have common legislation on trade marks, such as, as in the case in point, Benelux (which is treated like a Member State under the Court's case-law). The Court held that, in order to assess whether the grounds for refusal listed in Article 3(1)(b) to (d) of that directive must be disregarded because of the acquisition of distinctive character through use under Article 3(3), only the situation prevailing in the part of the territory of the Member State concerned where the

³² 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 L 167, 22.6.2001, p. 10).

³³ First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ L 40, 11.2.1989, p. 1).

grounds for refusal have been noted is relevant. Consequently, in order for the exception to the grounds for refusal which is laid down in Article 3(3) to apply, the trade mark must have acquired distinctive character through use throughout the part of the territory of the Member State or throughout the part of the territory of Benelux in which there exists a ground for refusal. In addition, where a mark is composed of one or more words of an official language of the Member State concerned and the ground for refusal exists only in one of the linguistic areas of that Member State, it must be established that the mark has acquired distinctive character through use throughout that linguistic area. Thus, since the sign at issue in the case (EUROPOLIS) included a Dutch word (polis), it was necessary to take into account the part of Benelux where Dutch is spoken.

Taxation

In this field, one case concerned the prohibition on discriminatory internal taxation and three concerned the Community value added tax regime.

In Joined Cases C-290/05 and C-333/05 *Nádasdi* (judgment of 5 October 2006, not yet published in the ECR), the Court found Hungarian registration duty to be incompatible with Community law in that it is applied to used vehicles imported from other Member States without account being taken of their depreciation in value and therefore taxes them more heavily than similar used vehicles already registered in Hungary, which have borne the duty on first registration. Examining the duty at issue in the light of the prohibition, laid down in Article 90 EC, on internal taxation that discriminates against products from other Member States, the Court compared the effects of the duty in respect of a used vehicle imported from another Member State with the effects on a similar vehicle from Hungary. It stated that the vehicle from Hungary, upon which the duty is paid when it is new, loses with time part of its market value and the amount of the duty included in the residual value diminishes proportionately. By contrast, a vehicle of the same model, age, mileage and other characteristics, bought second-hand in another Member State, is subject to the duty without its being reduced in proportion to the vehicle's depreciation, so that the vehicle is taxed more heavily. The Court concluded that Article 90 EC requires account to be taken of the depreciation of used vehicles subject to the duty.

In Case C-415/04 *Stichting Kinderopvang Enschede* [2006] ECR I-1385, the Court was required to rule on the exemption from value added tax ('VAT') of the activities in the general interest referred to in Article 13A(1)(g) and (h) of Sixth Directive 77/388/EEC³⁴, namely activities closely linked to welfare and social security work and to the protection of children or young people. The case in point concerned services supplied by a non-profit-making organisation operating as an intermediary between persons seeking, and persons offering, a childcare service. The Court held that exemption of such an activity from VAT is subject to three conditions, it being for the national courts to establish whether they are met. First, the childcare service provided by the host parents, as the main transaction to which the organisation's activity is closely linked, must itself meet the conditions for exemption, in

³⁴ Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ L 145, 13.6.1977, p. 1), as amended by Council Directive 95/7/EC of 10 April 1995 (OJ L 102, 5.5.1995, p. 18).

particular the requirement that the service provider must fulfil the criterion of 'charitable'. Second, the services supplied by the organisation in question as an intermediary must be essential to the childcare service, in the sense that the effect of the selection and training of the host parents by the organisation must be to render the childcare service of such a nature or quality that it would be impossible to obtain a service of the same value without the assistance of that intermediary. Finally, the basic purpose of the intermediary services must not be to obtain additional income by carrying out transactions which are in direct competition with those of commercial enterprises liable for VAT.

In Case C-223/03 *University of Huddersfield* [2006] ECR I-1751 and Case C-255/02 *Halifax and Others* [2006] ECR I-1609, the Court stated that transactions constitute supplies of goods or services and an economic activity within the meaning of the Sixth Directive provided that they satisfy the objective criteria on which those concepts are based. Save for cases of tax evasion, the question whether the transaction concerned is carried out with the sole aim of obtaining a tax advantage is entirely irrelevant. The questions asked in *Halifax and Others* enabled the Court to add, however, that the principle prohibiting abusive practices, understood in the sense of transactions carried out not in the context of normal commercial operations but solely for the purpose of wrongfully obtaining advantages provided for by Community law, also applies in the field of VAT. Consequently, a taxable person cannot deduct input VAT where the transactions from which that right derives constitute an abusive practice. The Court explained that in the sphere of VAT two conditions must be met in order for there to be an abusive practice. First, the transactions concerned, notwithstanding formal application of the conditions laid down in the Sixth Directive and the national legislation transposing it, must result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions. Second, it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage, since the prohibition of abuse is not relevant where the economic activity carried out may have some other explanation.

In this context a third judgment, in Case C-419/02 *BUPA Hospitals and Goldsborough Developments* [2006] ECR I-1685, may also be noted. Here the Court held that the second subparagraph of Article 10(2) of the Sixth Directive, which provides that, where a payment is made on account, the VAT becomes chargeable without the supply having yet been made, does not apply to payments on account of supplies of goods or services that have not yet been clearly identified.

In Case C-475/03 *Banca popolare di Cremona* (judgment of 3 October 2006, not yet published in the ECR), the Court held the Italian regional tax on productive activities (IRAP) to be compatible with Sixth Directive 77/388/EEC, in particular with Article 33 of the directive which prohibits the Member States from introducing or retaining tax regimes which are in the nature of turnover taxes. In reaching this conclusion, the Court compared the characteristics of IRAP with those of VAT. It found that IRAP is calculated on the basis of the net value of the production of an undertaking in a given period (the difference between the 'value of production' and the 'production costs'), which includes elements that have no direct connection with the supply of goods or services as such. IRAP is therefore not proportional to the price of goods or services supplied, unlike VAT. Next, the Court observed that not all taxable persons have the possibility of passing on the burden of the tax at

issue, which is therefore not intended to be passed on to the final consumer, whereas VAT taxes only the final consumer and is completely neutral as regards the taxable persons involved in the production and distribution process prior to the stage of final taxation, regardless of the number of transactions involved. Thus, since IRAP does not exhibit all the essential characteristics of VAT, it does not constitute a tax that can be characterised as a turnover tax within the meaning of Article 33(1) of the Sixth Directive and that provision does not preclude its retention.

Social policy

Directive 93/104/EC concerning certain aspects of the organisation of working time³⁵ was central to three cases, while a fourth case concerned the prohibition on discrimination between male and female workers and a fifth case concerned the framework agreement on fixed-term work.

In Case C-124/05 *Federatie Nederlandse Vakbeweging* [2006] ECR I-3423, the Court, which had been asked whether the possibility of redeeming days of the minimum period of annual leave which have been saved up over the course of previous years is contrary to Article 7(2) of Directive 93/104/EC, ruled that that provision must be interpreted as precluding a national provision which, during a contract of employment, permits days of annual leave, within the meaning of Article 7(1) of the directive, that are not taken in the course of a given year to be replaced by an allowance in lieu in the course of a subsequent year. The entitlement of every worker to paid annual leave must be regarded as a particularly important principle of Community social law from which there can be no derogations and the implementation of which by the competent national authorities must be confined within the limits expressly laid down by the directive itself. The directive embodies the rule that a worker must normally be entitled to actual rest, with a view to ensuring effective protection of his safety and health, since it is only where the employment relationship is terminated that Article 7(2) permits an allowance to be paid in lieu of paid annual leave.

In Joined Cases C-131/04 and C-257/04 *Robinson-Steele and Others* [2006] ECR I-2531, the Court ruled on whether the payment for minimum annual leave is compatible with Article 7(1) of Directive 93/104/EC where it takes the form, under a local collective agreement, of attribution of part of the remuneration payable to a worker for work done, without the worker receiving, in that respect, a payment additional to that for work done. The Court clearly stated that Article 7 of the directive precludes the payment for minimum annual leave within the meaning of that provision from being made in the form of part payments staggered over the corresponding annual period of work and paid together with the remuneration for work done, rather than in the form of a payment in respect of a specific period during which the worker actually takes leave.

In Case C-484/04 *Commission v United Kingdom* (judgment of 7 September 2006, not yet published in the ECR), the Court ruled on an action for failure to fulfil obligations. By virtue

³⁵ Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ L 307, 13.12.1993, p. 18), as amended by Directive 2000/34/EC of 22 June 2000 (OJ L 195, 1.8.2000, p. 41).

of Directive 93/104/EC, as amended by Directive 2000/34/EC, a Member State fails to fulfil its obligations if it applies the derogation from certain rules concerning the right to rest to workers whose working time is partially not measured or predetermined, or can be determined partially by the worker himself, on account of the specific characteristics of his activity, or if it fails to adopt the measures necessary to implement the rights of workers to daily and weekly rest. The need for the rights conferred on workers by the directive to be effective means that Member States are under an obligation to guarantee that the right to benefit from effective rest is observed. A Member State which, upon transposition, provides for rights of workers to rest and which, in the guidelines for employers and workers on the implementation of those rights, indicates that the employer is nevertheless not required to ensure that the workers actually exercise such rights, does not guarantee compliance with either the minimum requirements laid down by that directive or its essential objective. By letting it be understood that, while employers cannot prevent the minimum rest periods from being taken by workers, they are under no obligation to ensure that the latter are actually able to exercise such a right, such guidelines are clearly liable to render the rights enshrined in the directive meaningless and are incompatible with the objective of the directive, in which minimum rest periods are considered to be essential for the protection of workers' health and safety.

In Case C-17/05 *Cadman* (judgment of 3 October 2006, not yet published in the ECR), the Court found it necessary to interpret Article 141 EC and to explain the judgment in Case 109/88 *Danfoss* [1989] ECR 3199 where, after stating that recourse to the criterion of length of service may involve less advantageous treatment of women than of men, the Court had held that the employer does not have to provide special justification for recourse to that criterion. The Court confirmed that since, as a general rule, recourse to the criterion of length of service is appropriate to attain the legitimate objective of rewarding experience acquired which enables the worker to perform his duties better, where recourse to that criterion as a determinant of pay leads to disparities in pay, in respect of equal work or work of equal value, between the men and women to be included in the comparison the employer does not have to establish specifically that recourse to that criterion is appropriate to attain that objective as regards a particular job, unless the worker provides evidence capable of raising serious doubts in that regard. It is in such circumstances for the employer to prove that that which is true as a general rule, namely that length of service goes hand in hand with experience and that experience enables the worker to perform his duties better, is also true as regards the job in question. Also, where a job classification system based on an evaluation of the work to be carried out is used in determining pay, there is no need to show that an individual worker has acquired experience during the relevant period which has enabled him to perform his duties better. By contrast, the nature of the work to be carried out must be considered objectively.

In Case C-212/04 *Adeneler and Others* (judgment of 4 July 2006, not yet published in the ECR), the Court was called upon to interpret clauses 1 and 5 of the framework agreement on fixed-term work concluded on 18 March 1999, which is annexed to Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP³⁶. While stating that the framework agreement does not lay down a general

³⁶ Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ L 175, 10.7.1999, p. 43).

obligation on the Member States to provide for the conversion of fixed-term employment contracts into contracts of indefinite duration, it held that the use of successive fixed-term employment contracts where the justification advanced for their use is solely that it is provided for by a general provision of statute or secondary legislation of a Member State is contrary to clause 5(1)(a) of the framework agreement. The concept of 'objective reasons', within the meaning of that clause, which justify the renewal of successive fixed-term employment contracts or relationships requires recourse to this particular type of employment relationship, as provided for by national legislation, to be justified by the presence of specific factors relating in particular to the activity in question and the conditions under which it is carried out. In addition, a national rule under which only fixed-term employment contracts or relationships that are not separated from one another by a period of time longer than 20 working days are to be regarded as 'successive' within the meaning of that clause is contrary to the framework agreement. Such a national provision compromises the object, the aim and the practical effect of the framework agreement inasmuch as it allows insecure employment of a worker for years since, in practice, the worker would as often as not have no choice but to accept breaks in the order of 20 working days in the course of a series of contracts with his employer. Finally, the framework agreement precludes the application of national legislation which, in the public sector alone, prohibits absolutely the conversion into an employment contract of indefinite duration of a succession of fixed-term contracts that, in fact, have been intended to cover 'fixed and permanent needs' of the employer and must therefore be regarded as constituting an abuse.

Cooperation in civil and judicial matters

In this field, the Court had to interpret the Brussels Convention of 1968 and Regulation (EC) No 1346/2000 on insolvency proceedings.

Within the framework of the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters³⁷, the Court ruled on the scope of the rule of exclusive jurisdiction, laid down in Article 16(4) of the Convention, for proceedings concerning the registration or validity of patents. In Case C-4/03 *GAT* (judgment of 13 July 2006, not yet published in the ECR) the question referred to the Court was whether the jurisdiction of the courts of the Contracting State in which the deposit or registration has been applied for, has taken place or is under the terms of an international convention deemed to have taken place concerns all proceedings regarding the registration or validity of a patent, irrespective of whether the issue is raised by way of an action or a plea in objection, or solely those cases in which the issue is raised by way of an action. The Court interpreted Article 16(4) of the Convention teleologically and concluded that the exclusive jurisdiction provided for by that provision should apply whatever the form of proceedings in which the issue of a patent's registration or validity is raised, be it by way of an action or a plea in objection, at the time the case is brought or at a later stage in the proceedings. Only this solution can ensure that the mandatory nature of the rule of jurisdiction laid

³⁷ OJ L 204, 2.8.1975, p. 28.

down is not circumvented, that the predictability of the rules of jurisdiction laid down by the Convention is safeguarded and that the risk of conflicting decisions is avoided.

In Case C-341/04 *Eurofood IFSC* [2006] ECR I-3813, the Court laid down some important case-law concerning Regulation (EC) No 1346/2000 on insolvency proceedings³⁸. In particular, it explained the concept of 'the centre of main interests' of a debtor, which determines which courts have jurisdiction to open insolvency proceedings and, in the case of companies, is presumed to be the place of the registered office in the absence of proof to the contrary. Where a parent company and its subsidiary have their respective registered offices in two different Member States, identifying the centre of main interests of the subsidiary company thus proves to be particularly important in the system established by the regulation for determining the jurisdiction of the courts of the Member States (the case in point concerned an Irish subsidiary of the Italian company Parmalat). After stating that, in that system, each debtor constituting a distinct legal entity is subject to its own court jurisdiction, the Court held that, in order to ensure legal certainty and foreseeability concerning the determination of the court having jurisdiction, the presumption in favour of the registered office can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating the centre of the main interests at that registered office is deemed to reflect. The Court gave the example of a 'letterbox' company not carrying out any business in the Member State where its registered office is situated. It stressed, on the other hand, that the mere fact that a company's economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption. A further point to be noted from this judgment is that the principle of mutual trust prevents the courts of a Member State from reviewing the jurisdiction of the State in which the main insolvency proceedings have been opened.

Police and judicial cooperation in criminal matters

In two cases concerning a reference for a preliminary ruling, the Court interpreted Article 54 of the Convention implementing the Schengen Agreement³⁹, which lays down the *non bis in idem* principle in the context of police and judicial cooperation in criminal matters; more specifically, the Court explained how 'the same acts' within the meaning of that provision is to be understood.

In Case C-436/04 *Van Esbroeck* [2006] ECR I-2333, the Court stated first that the *non bis in idem* principle must be applied to criminal proceedings brought in a Contracting State for acts for which a person has already been convicted in another Contracting State even though the Convention was not yet in force in the latter State at the time at which that person was convicted, insofar as the Convention was in force in the Contracting States in question at the time of the assessment, by the court before which the second proceedings

³⁸ Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ L 160, 30.6.2000, p. 1).

³⁹ Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ L 239, 22.9.2000, p. 19).

were brought, of the conditions of applicability of the *non bis in idem* principle. It then held that Article 54 of the Convention implementing the Schengen Agreement must be interpreted as meaning (i) that the relevant criterion for the purposes of the application of that article is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected and (ii) that punishable acts consisting of exporting and importing the same narcotic drugs and which are prosecuted in different Contracting States to the Convention are, in principle, to be regarded as 'the same acts' for the purposes of Article 54, the definitive assessment on this point being the task of the competent national courts.

In Case C-150/05 *Van Straaten* (judgment of 28 September 2006, not yet published in the ECR), where a similar question was asked and was given an identical answer, the Court stated that the *non bis in idem* principle falls to be applied in respect of a decision of the judicial authorities of a Contracting State by which the accused is acquitted finally for lack of evidence.