

A Proceedings of the Court of Justice in 2000

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1. This report is intended to provide a picture of the judicial activity of the Court of Justice over the past 12 months.

2. The Court increased its activity in 2000. It brought 526 cases to a close (395 in 1999 gross figure, that is to say disregarding joinder), delivered 273 judgments (235 in 1999) and made 190 orders (143 in 1999). The number of new cases annually seems to be stabilising (503 in 2000 as against 543 in 1999 and 485 in 1998, gross figures), a development which enabled the Court to reduce the number of pending cases (from 896 to 873, gross figure). Nevertheless, the number of cases pending before the Court is still higher than in 1998 (748, gross figure).

The average duration of proceedings was unchanged overall compared with the preceding year, with the exception of an appreciable reduction in the time taken to deal with appeals (from 23 months in 1999 to 19 months in 2000).

Finally, a certain constancy may be observed as regards the distribution of cases between the Court in plenary session and Chambers of Judges: the Court in plenary session disposed of approximately one case in four, while the remaining judgments and orders were pronounced by Chambers of five Judges (almost one case in two) or Chambers of three Judges (more than one case in four).

3. The following pages provide a selective summary of the most significant developments in the case-law in 2000. As a summary of this kind necessarily takes the form of a synthesis, the Opinions of the Advocates General are not included. The full texts of the judgments and Opinions are available, in all the official Community languages, on the Court's Internet site: www.curia.eu.int.

4. On 1 July 2000 and 1 February 2001, important amendments to the Rules of Procedure of the Court of Justice entered into force.¹ Further amendments will follow on 1 February 2001.
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4.1. The first set of amendments is intended to enable actions brought before the Court, especially references for preliminary rulings, to be dealt with more effectively.

Among the procedural instruments available to the Court following these amendments, which concern preliminary reference proceedings in particular, the reader's attention is drawn to the simplified procedure, requests for information, requests for clarification and the accelerated procedure.

The *simplified procedure* (Article 104(3) of the Rules of Procedure) allows the Court to give its decision by reasoned order where a question referred to it for a preliminary ruling is identical to

¹ OJ 2000 L 122, p. 43.

² OJ 2000 L 322, p. 4.

³ It may be noted for the sake of completeness that on 28 November 2000 the Court approved two amendments relating to Articles 16(7) and 103(4) of its Rules of Procedure and submitted them to the Council for approval.

a question on which it has already ruled (previously the two questions had to be manifestly identical), where the answer to such a question may be clearly deduced from existing case-law or where the answer to the question admits of no reasonable doubt. It did not take the Court long to make use of this new possibility, which enables the duration of proceedings to be reduced considerably in the circumstances specified. By order of 19 September 2000 in Case C-89/00 *Bicakci*, the Court answered a question referred to it for a preliminary ruling, concerning the interpretation of a decision adopted by the Association Council set up by the Association Agreement between the European Economic Community and Turkey, which was identical to one of the questions which had given rise to the judgment of 10 February 2000 in Case C-340/97 *Nazli*. In its order of 20 October 2000 in Case C-242/99 *Vogler*, the Court likewise chose to decide by reasoned order certain questions submitted for a preliminary ruling which admitted of no reasonable doubt, concerning the validity and interpretation of provisions 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.⁴

The new version of the Rules of Procedure also provides that the Judge-Rapporteur and/or the Advocate General may *request from the parties all such information* relating to the facts, and all such documents or other particulars, as they may consider relevant (Article 54a of the Rules of Procedure). In addition, the Court may *request clarification from national courts* (Article 104(5) of the Rules of Procedure).

At the request of a national court, the President of the Court of Justice may exceptionally decide to apply an *accelerated procedure* to a reference for a preliminary ruling where the circumstances referred to by the national court establish that a ruling on the question put to the Court of Justice is a matter of exceptional urgency (Article 104a of the Rules of Procedure).

Finally, with regard both to preliminary reference proceedings and to direct actions, the Court may henceforth issue *practice directions* relating in particular to the preparation and conduct of the hearings before it and to the lodging of written statements of case or written observations (Article 125a of the Rules of Procedure) and may decide not to hold a hearing if none of the parties concerned submits an application setting out the reasons for which he wishes to be heard (Articles 44a and 104(4) of the Rules of Procedure).

As to the remainder, the amendments, which entered into force on 1 July 2000, are intended to adapt the Rules of Procedure to the new procedures for interpretation of Title IV of the EC Treaty and for the settlement of disputes under Title VI of the Treaty on European Union.

4.2. The second set of amendments to the Rules of Procedure of the Court of Justice concerns direct actions.

In order to reduce the duration of such proceedings, an *expedited procedure* is introduced, in which the written procedure is restricted to a single exchange of pleadings between the parties, while the oral procedure becomes mandatory and has decisive importance. The Court may also *shorten the time-limit for intervening*, a possibility which is linked to the expedited procedure (new Article 62a of the Rules of Procedure).

In addition, the amendments approved adjust communication between the Court and the parties and other interested persons to take account of modern communication methods, regulating the

⁴ Regulation (EEC) No 1408/71 of 14 June 1971, in the amended and updated version contained in Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Council Regulation (EC) No 307/1999 of 8 February 1999 (OJ 1999 L 38, p. 1).

transmission of documents by fax in particular and making consequential amendments to the provisions relating to the extension of time-limits on account of distance.

The amendments also clarify, in the light of experience, the provision of the Rules of Procedure relating to replies and rejoinders, in order to make it clear that, where the President grants an appellant's application to submit a reply, the other party is entitled to respond to it by lodging a rejoinder without first having to obtain leave to do so (Article 117(1) of the Rules of Procedure).

5. Certain conditions governing the *proceedings* which may be brought before the Community judicature were clarified in 2000, in particular with regard to the submission of observations on an Advocate General's Opinion, Treaty infringement proceedings, actions for annulment, references for a preliminary ruling, non-contractual liability of the Community and appeals against judgments of the Court of First Instance.

5.1. By order of 4 February 2000 in Case C-17/98 *Emesa Sugar*, the Court dismissed Emesa Sugar's application for leave to submit written observations in response to the Advocate General's Opinion, a possibility not provided for by the EC Statute of the Court of Justice or its Rules of Procedure. In response to the applicant's argument that it should nevertheless be allowed that opportunity by virtue of the case-law of the European Court of Human Rights concerning the scope of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, and in particular the judgment of 20 February 1996 in *Vermeulen v Belgium* (Reports of Judgments and Decisions, 1996 I, p. 224), the Court found that, having regard to both the organic and the functional link between the Advocate General and the Court, that case-law does not appear to be transposable to the Opinions of the Court's Advocates General. The applicant's fundamental right to adversarial procedure was not infringed in that, with a view to the very purpose of adversarial procedure, the Court may of its own motion, on a proposal from the Advocate General or at the request of the parties, reopen the oral procedure, in accordance with Article 61 of its Rules of Procedure, if it considers that it lacks sufficient information or that the case must be dealt with on the basis of an argument which has not been debated between the parties.

5.2. With regard to Treaty infringement proceedings, in its judgment of 4 July 2000 in Case C-387/97 *Commission v Greece* the Court was given its first opportunity to apply the third subparagraph of Article 171(2) of the Treaty (now the third subparagraph of Article 228(2) EC). Under Article 171(2), where a Member State fails to take the necessary measures to comply with a judgment of the Court of Justice, the Commission may bring fresh Treaty infringement proceedings before the Court, specifying the amount of the periodic penalty payment to be paid by that State which it considers appropriate in the circumstances. By judgment of 7 April 1992 in Case C-45/91 *Commission v Greece* [1992] ECR I-2509, the Court had held that the Hellenic Republic had failed to fulfil certain obligations owed by it under two Community directives relating to waste and to toxic and dangerous waste respectively. In fresh proceedings brought by the Commission, the Court found that Greece had not implemented all the necessary measures to comply with the judgment in Case C-45/91 and that it had thus failed to fulfil its obligations under Article 171 of the Treaty. The Court stated that, while Article 171 does not specify the period within which a judgment finding a failure by a Member State to fulfil its obligations must be complied with, the importance of immediate and uniform application of Community law means that the process of compliance must be initiated at once and completed as soon as possible. As to the amount of the penalty payment, the Court found that, in the absence of provisions in the Treaty, the Commission may adopt guidelines such as those contained in its memorandum on applying Article 171 of the Treaty⁵ and its communication on the method of calculating the

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Memorandum 96/C 242/07 of 21 August 1996 on applying Article 171 of the EC Treaty (OJ 1996 C 242, p. 6).

penalty payments⁶ for determining how the penalty payments which it intends to propose to the Court are calculated, so as, in particular, to ensure equal treatment between the Member States. While suggestions of the Commission cannot bind the Court, they are nevertheless a useful point of reference. The Court pointed out that, since the principal aim of penalty payments is that the Member State should remedy the breach of obligations as soon as possible, a penalty payment must be set that will be appropriate to the circumstances and proportionate both to the breach which has been found and to the ability to pay of the Member State concerned. It also acknowledged that the degree of urgency that the Member State concerned should fulfil its obligations may vary in accordance with the breach. The Court then held that the basic criteria which must be taken into account in order to ensure that penalty payments have coercive force and Community law is applied uniformly and effectively are, in principle, the duration of the infringement, its degree of seriousness and the ability of the Member State to pay. In applying those criteria, regard should be had in particular to the effects of failure to comply on private and public interests and to the urgency of getting the Member State concerned to fulfil its obligations. Since the infringements in the case before it were serious or particularly serious and of considerable duration, the Court ordered Greece to pay to the Commission a penalty payment of EUR 20 000 for each day of delay in implementing the measures necessary to comply with the judgment in Case C-45/91, from delivery of its judgment until the judgment in Case C-45/91 has been complied with.

By order of 13 September 2000 in Case C-341/97 *Commission v Netherlands*, the Court held that a detailed opinion sent by the Commission to a Member State under Article 9(1) of Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations⁷ does not amount to a letter of formal notice meeting the requirements of Article 169 of the Treaty (now Article 226 EC). At the time when such an opinion is delivered, the Member State to which it is addressed cannot have infringed Community law, since the measure providing for a technical regulation exists only in draft form. The Court observed that the contrary view would result in the detailed opinion constituting a conditional formal notice whose existence would be dependent on the action taken by the Member State concerned in relation to the opinion and that the requirements of legal certainty, which are inherent in any procedure capable of becoming contentious, preclude such incertitude. It accordingly dismissed as inadmissible the action for failure to fulfil obligations brought by the Commission.

5.3. The concept of a measure against which an action for annulment may be brought was at the heart of Case C-514/99 *France v Commission* (order of 21 June 2000), which forms part of the body of litigation concerning the emergency measures adopted by the Commission to protect against bovine spongiform encephalopathy. The French Republic had brought an action for annulment of the decision allegedly adopted by the Commission not to amend, or indeed to repeal, the act by which it decided to lift the ban on British beef as from 1 August 1999. France contended that the existence of such a decision had been revealed by a statement made by the Commissioner responsible on 29 October 1999 and by the decision of the college of Commissioners to send the applicant a letter of formal notice for failure to comply with the act lifting the ban. The Court declared the application manifestly inadmissible, holding that neither the statement made nor the sending of the letter of formal notice could be regarded as the expression of a Commission decision refusing to amend the act lifting the ban, against which an action for annulment could be brought. In the statement, the Commissioner had merely set forth the opinion of the Scientific Steering Committee and expressed the hope that a solution would be found to the specific difficulties. Such a statement did not constitute the definition of a position by the Commission with regard to the allegedly new evidence forwarded by France to the

⁶ Communication 97/C 63/02 of 28 February 1997 on the method of calculating the penalty payments provided for pursuant to Article 171 of the EC Treaty (OJ 1997 C 63, p. 2).

⁷ Council Directive 83/189/EEC of 28 March 1983 (OJ 1983 L 109, p. 8).

Commission on the possible existence of a third route of contamination of cattle. With regard to the sending of the letter of formal notice, that action merely demonstrated the intention to bring before the Court the failure to implement the act lifting the ban.

In its judgment of 23 May 2000 in Case C-106/98 P *Comité d'Entreprise de la Société Française de Production and Others v Commission*, the Court ruled on the question whether bodies representing the employees of an undertaking in receipt of State aid are individually concerned by a Commission decision declaring such aid incompatible with the common market. The Court of First Instance had declared an application by bodies representing employees for annulment of such a decision inadmissible on the ground that it was not of direct and individual concern to them. In an appeal brought by those bodies, the Court of Justice upheld the analysis of the Court of First Instance relating to their lack of individual interest. Dismissing the appeal, it held that, by itself, the status as negotiators with regard to social aspects of a decision declaring State aid incompatible with the common market does not suffice to distinguish individually bodies representing the employees of the undertaking in receipt of the aid just as in the case of the person to whom that decision was addressed, where it is clear from the account of the facts in the decision at issue that that status constitutes only a tenuous link with the actual subject-matter of the decision and the bodies did not participate in the procedure initiated under Article 93(2) of the Treaty (now Article 88(2) EC). The position of the appellants was therefore not comparable to the position in Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others v Commission* [1988] ECR 219 and Case C-313/90 *CIRFS and Others v Commission* [1993] ECR I-1125.

In its judgment in *Sardegna Lines*, the Court stated that, in certain circumstances, an undertaking is entitled to contest a Commission decision prohibiting a sectoral aid scheme (judgment of 19 October 2000 in Joined Cases C-15/98 and C-105/99 *Italian Republic and Sardegna Lines v Commission*). The Court held that an individual interest to contest such a decision before it may be invoked by an undertaking which is concerned not only by virtue of being an undertaking in the sector which might benefit from the aid scheme at issue but also by virtue of being an actual beneficiary of individual aid granted under that scheme, the recovery of which has been ordered by the Commission.

5.4. With regard to the preliminary reference procedure, the cases of *Gabalfrisa*, *Abrahamsson* and *Österreichischer Gewerkschaftsbund* may be noted, in which the Court found it necessary to interpret the concept of a court or tribunal within the meaning of Article 177 of the EC Treaty (now Article 234 EC).

It should be remembered that, in order to determine whether a body making a reference is a court or tribunal for the purposes of Article 177 of the Treaty, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is adversarial, whether it applies rules of law and whether it is independent (see, in particular, Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 23, and the case-law cited).

In Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* (judgment of 21 March 2000) and Case C-407/98 *Abrahamsson* (judgment of 6 July 2000), the Court was given the opportunity to explain the factor related to the independence of the body making the reference. In *Gabalfrisa*, a question was referred to the Court for a preliminary ruling by a Tribunal Económico-Administrativo (Economic and Administrative Court) enjoying jurisdiction, in the Spanish tax administration, to hear and decide fiscal complaints within the framework of a kind of internal administrative action. The Court found that a separation of functions was ensured by law between, on the one hand, the departments of the tax authority responsible for taking the decisions and, on the other hand, the Tribunales Económico-Administrativos which ruled on complaints lodged against those decisions without receiving any instruction from the tax authority. It

deduced therefrom that the *Tribunales Económico-Administrativos*, unlike the *Directeur des Contributions Directes et des Accises* (head of the Direct Taxes and Excise Duties Directorate) in question in Case C-24/92 *Corbiau* [1993] ECR I-1277, at paragraphs 15 and 16, had the character of a third party in relation to the departments which adopted the decision forming the subject-matter of the complaint and the independence necessary for them to be regarded as courts or tribunals for the purposes of Article 177 of the Treaty. In *Abrahamsson*, the Court referred to the same criteria of functional separation and third-party status in concluding that the *Överklagandenämnden*, an appeals committee with jurisdiction in Sweden to undertake an independent examination of appeals lodged against decisions on appointments which are taken in universities and higher educational institutions, had the necessary independence for it to be treated as a court or tribunal within the meaning of Article 177 of the Treaty.

In its judgment of 30 November 2000 in Case C-195/98 *Österreichischer Gewerkschaftsbund*, the Court dealt with a reference for a preliminary ruling from the *Oberster Gerichtshof* (Austrian Supreme Court) adjudicating as a court of first and last instance on applications relating to substantive law in the field of employment law disputes which are brought by employers' or employees' bodies capable of entering into collective agreements. In such proceedings, the *Oberster Gerichtshof* does not rule on disputes in a specific case involving identified persons. It must base its legal assessment on the facts alleged by the applicant without further examination. Its decision is declaratory in nature and the right to bring proceedings is exercised collectively. Pointing out that the procedure is none the less intended to result in a decision that is judicial in character, the Court observed that the final decision is binding on the parties who cannot make a second application for a declaration relating to the same factual situation and raising the same legal questions and that, in addition, the decision is intended to have persuasive authority for parallel proceedings concerning individual employers and employees. The Court accordingly held that the *Oberster Gerichtshof* constitutes a court or tribunal within the meaning of Article 177 of the Treaty when it is called on to rule in such proceedings.

5.5. In the area of non-contractual liability of the Community, the Court brought to a close *Mulder and Others v Council and Commission*, in which the European Community, represented by the Council and the Commission, had been ordered by interlocutory judgment of 19 May 1992 ([1992] ECR I-3061) to make good the damage suffered by the applicants by reason of the fact that a Council regulation, as supplemented by a Commission regulation, did not provide for the allocation of a reference quantity to certain milk producers. Since the negotiations between the parties with a view to assessing the damage were not concluded, the applicants submitted their claims for compensation with supporting figures to the Court. By judgment of 27 January 2000 in Joined Cases C-104/89 and C-37/90 *Mulder and Others v Council and Commission*, the Court fixed the amount of compensation to be paid by the Council and the Commission to the milk producers.

5.6. As regards appellate review by the Court of Justice of judgments of the Court of First Instance, the Court stated in its judgment of 13 July 2000 in Case C-210/98 P *Salzgitter v Commission* that a question which touches on the competence of the Commission must be raised by the Court of its own motion even though none of the parties has asked it to do so. This case centred on a Commission decision refusing to authorise planned German Government aid to a steel undertaking in one of the new German *Länder*, not because of the late notification of the plan but because the Commission lacked competence *ratione temporis* to approve it. An action for annulment of the Commission's decision was dismissed by the Court of First Instance without the question of the lateness of the notification being addressed in its judgment. In an appeal brought against that judgment, the Court of Justice stated that the period for notification of aid plans laid down by the Fifth Steel Aid Code operates as a time-bar such as to preclude the approval of any aid plan notified subsequent to it. Accordingly, where the plan has not been notified to it before the time-limit specifically laid down, the Commission is not entitled to authorise the aid. Inasmuch as that was a question which touched on the competence of the Commission and

therefore had to be raised by the Court of its own motion, the Court of Justice found that the Court of First Instance erred in not holding that the aid plan had not been notified until after the expiry of the period laid down in Article 6 of the Fifth Code and that the Commission could in no way authorise the corresponding aid. However, since the operative part of the judgment of the Court of First Instance was shown to be well founded for other legal reasons, the Court of Justice dismissed the appeal.

6. During the past year, there were certain important developments in the Court's case-law relating to *general principles*. They essentially concerned Community and Member State liability for damage caused to individuals by breaches of Community law, the relationship between the principle of procedural autonomy and the general principle of access to Commission documents, and rights of the defence.

6.1. As regards liability of the Community for damage caused to individuals by breaches of Community law, the Court held in its judgment of 4 July 2000 in Case C-352/98 P *Laboratoires Pharmaceutiques Bergaderm and Goupil v Commission* that the concept of a "sufficiently serious breach" of Community law by an institution, which constitutes one of the three conditions for such liability to arise, must be interpreted in the same way with regard to an institution as it is for a Member State. A pharmaceutical company in liquidation and its chief executive had brought an action, which the Court of First Instance dismissed, seeking compensation for damage which they purportedly suffered as a result of the preparation and the adoption of a Commission directive relating to cosmetic products. Dismissing in turn the appeal brought before it, the Court of Justice recalled the principle laid down in Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029 that the conditions under which the Member States may incur liability for damage caused to individuals by a breach of Community law cannot, in the absence of particular justification, differ from those governing the liability of the Community in like circumstances. The protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage. Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between that breach and the damage sustained by the injured parties. As regards both non-contractual liability of the Community and that of the Member States, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion. Where the Member State or the institution has only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach. With regard to the argument that the Court of First Instance erred in law in considering that the directive at issue was a legislative measure, the Court of Justice stated that the general or individual nature of a measure taken by an institution is not a decisive criterion for identifying the limits of the discretion enjoyed by that institution.

The judgment of 4 July 2000 in Case C-424/97 *Haim* also contains some guidance as to the discretion of which account should be taken when establishing whether or not a Member State has committed a sufficiently serious breach of Community law. Mr Haim, a dentist, brought an action against an association of dental practitioners of social security schemes, a public-law body, in order to obtain compensation for the loss of earnings which he claimed to have suffered as a result of the refusal of that body to enrol him on the register of dental practitioners, in breach of Community law. The Court was asked for a preliminary ruling as to whether, where a national official has either applied national law conflicting with Community law or applied national law in a manner not in conformity with Community law, the mere fact that he did not have any discretion in taking his decision gives rise to a serious breach of Community law, within the meaning of the case-law of the Court. The Court answered that the existence and scope of the

discretion which should be taken into account when establishing whether or not a Member State has committed a sufficiently serious breach of Community law must be determined by reference to Community law and not by reference to national law. The discretion which may be conferred by national law on the official or the institution responsible for the breach of Community law is therefore irrelevant in this respect. The Court added that it is for each Member State to ensure that individuals obtain reparation for loss and damage caused to them by non-compliance with Community law, whichever public authority is responsible for the breach and whichever public authority is in principle, under the law of the Member State concerned, responsible for making reparation. Reparation for loss and damage caused to individuals by national measures taken in breach of Community law does not necessarily have to be provided by the Member State itself in order for its obligations under Community law to be fulfilled. Thus, in those Member States where certain legislative or administrative tasks are devolved to territorial bodies with a certain degree of autonomy or to any other public-law body legally distinct from the State, reparation for such loss and damage, caused by measures taken by a public-law body, may be made by that body. Community law therefore does not preclude, as in the case in point, a public-law body, in addition to the Member State itself, from being liable to make reparation for loss and damage caused to individuals as a result of measures which it took in breach of Community law.

6.2. In Joined Cases C-174/98 P and C-189/98 P *Netherlands and van der Wal v Commission* (judgment of 11 January 2000), the Court found it necessary to rule on the relationship between the right to a fair trial, the general principle of access to Commission documents, and the exception to that principle based on the protection of the public interest in the context of court proceedings within the meaning of Decision 94/90/ECSC, EC, Euratom on public access to Commission documents.⁸ Mr van der Wal, a lawyer and member of a firm which deals with cases raising questions of Community law, asked the Commission for copies of certain letters by which it had replied to questions put to it by national courts within the framework of the cooperation between the latter and the Commission in applying Articles 85 and 86 of the EC Treaty (now Articles 81 EC and 82 EC).⁹ Relying on the fact that disclosure of the replies could undermine the protection of the public interest, in particular the sound administration of justice, the Commission adopted a decision refusing Mr van der Wal access to the documents in question. Mr van der Wal then brought an action before the Court of First Instance for annulment of that decision, which was dismissed. In an appeal brought before it, the Court of Justice observed that the general principle of Community law under which every person has a right to a fair trial, inspired by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, comprises the right to a tribunal that is independent of the executive in particular, but that it is not possible to deduce from that right or from the constitutional traditions common to the Member States that the court hearing a dispute is necessarily the only body empowered to grant access to the documents in the proceedings in question. The existence of an obligation on the Commission to refuse access to documents which it holds, on the ground that the protection of the public interest within the meaning of Decision 94/90 may be undermined, depends, in the context of its cooperation with national courts with a view to the application by them of Articles 85 and 86 of the Treaty, on the manner in which such cooperation works in practice. Where the documents supplied by the Commission to national courts are documents which it already possessed or which, although drafted with a view to particular proceedings, merely refer to the earlier documents, or in which the Commission merely expresses an opinion of a general nature, independent of the data relating to the case pending before the national court, the Commission must assess in each individual case whether such documents fall within the exceptions laid down by Decision 94/90. On the other hand, where the documents supplied by the Commission contain legal or economic analyses drafted on the basis of data supplied by the

⁸ Decision 94/90/ECSC, EC, Euratom of 8 February 1994 (OJ 1994 L 46, p. 58).

⁹ Notice 93/C 39/05 on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EC Treaty (OJ 1993 C 39, p. 6).

national court, they must be subject to national procedural rules in the same way as any other expert report, in particular as regards disclosure. The Commission must ensure that disclosure of documents of this kind does not constitute an infringement of national law. In the event of doubt, it must consult the national court and refuse access only if that court objects to disclosure of the documents. Accordingly, by interpreting Decision 94/90 as meaning that the exception based on protection of the public interest in the context of court proceedings obliges the Commission to refuse access to documents which it drafted solely for the purposes of such proceedings, the Court of First Instance erred in law. The Court of Justice therefore set aside the judgment of the Court of First Instance and annulled the decision of the Commission refusing Mr van der Wal access to the documents in question.

6.3. In its judgment of 21 September 2000 in Case C-462/98 P *Mediocrurso v Commission*, the Court recalled that respect for the rights of defence is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings in question. That principle requires that the addressees of decisions which significantly affect their interests should be placed in a position in which they may effectively make known their views. A company had brought an action for annulment of two Commission decisions reducing assistance of the European Social Fund for training programmes which had been funded, contending in particular that its right to a prior hearing had not been observed. The Court of First Instance rejected the plea alleging breach of the rights of defence and the company thus brought an appeal before the Court of Justice. The latter found that the appellant had not been invited by or on behalf of the Commission to submit its observations after a reasonable period on the documents recording the actions for which it was criticised and on the basis of which the Commission adopted the decisions reducing the assistance of the European Social Fund, and that the appellant therefore had not been placed in a position effectively to make known its views on the accusations made against it. In such circumstances, the Court of First Instance was wrong to consider that the appellant's right to a proper hearing had been observed. The Court of Justice therefore set aside the judgment of the Court of First Instance and annulled the decisions of the Commission reducing the assistance of the European Social Fund.

7. So far as concerns the *relationship between Community law and international law*, the Court was given the opportunity in judgments of 4 July 2000 in Case C-62/98 *Commission v Portugal* and Case C-84/98 *Commission v Portugal* to explain the effect of the first paragraph of Article 234 of the EC Treaty (now, after amendment, the first paragraph of Article 307 EC) relating to the rights and obligations of Member States arising from agreements concluded before the entry into force of the Treaty. The Commission had brought two actions before the Court for declarations that, by failing to denounce or adjust two agreements concerning merchant shipping concluded with non-member States before its accession to the Communities, the Portuguese Republic had failed to fulfil its obligations under Regulation (EEC) No 4055/86 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries.¹⁰ The Court recalled that the purpose of the first paragraph of Article 234 of the Treaty is to make it clear, in accordance with the principles of international law, that application of the Treaty does not affect the duty of the Member State concerned to respect the rights of third countries under a prior agreement and to perform its obligations thereunder. However, the second paragraph of Article 234 requires Member States to take all appropriate steps to eliminate any incompatibilities between such an agreement and the EC Treaty. The Court found that the Portuguese Republic had not succeeded in adjusting the agreements in question by diplomatic means within the time-limit laid down by Regulation No 4055/86. It stated that the existence of a difficult political situation in a third State which is a

¹⁰ Council Regulation (EEC) No 4055/86 of 22 December 1986 (OJ 1986 L 378, p. 1).

contracting party cannot justify a continuing failure on the part of a Member State to fulfil its obligations under the Treaty. If a Member State encounters difficulties which make adjustment of an agreement impossible, it is incumbent on it to denounce the agreement in so far as such denunciation is possible under international law. The balance between the foreign-policy interests of a Member State and the Community interest is incorporated in Article 234 of the Treaty, in that it allows a Member State, first, not to apply a Community provision in order to respect the rights of third countries deriving from a prior agreement and to perform its obligations thereunder and, second, to choose the appropriate means of rendering the agreement concerned compatible with Community law. In the present cases, the agreements in question contained clauses expressly enabling the contracting parties to denounce the agreements, so that denunciation by the Portuguese Republic would not encroach upon the rights which the non-member States derived from those agreements. The Court therefore declared that Portugal had failed to fulfil its obligations.

The Court also revisited its jurisdiction to interpret Article 50 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPs Agreement, annexed to the Agreement establishing the World Trade Organisation). It will be recalled that, in Case C-53/96 *Hermès* [1998] ECR I-3603, the Court had already held that, to forestall future differences of interpretation, it had jurisdiction in the field of trade marks to interpret Article 50 of TRIPs even though the measures envisaged by that provision and the relevant procedural rules were those provided for by the domestic law of the Member State concerned, since TRIPs was an agreement concluded by the Community and its Member States under joint competence and Article 50 of TRIPs could apply both to situations falling within the scope of national law and to situations falling within the scope of Community law.

In Joined Cases C-300/98 and C-392/98 *Dior and Assco* (judgment of 14 December 2000), the national court asked whether the jurisdiction of the Court of Justice to interpret Article 50 of TRIPs is restricted solely to situations covered by trade-mark law. The Court replied that its jurisdiction to interpret Article 50 is not restricted to those situations. Article 50 constitutes a procedural provision which should be applied in the same way in every situation falling within its scope and is capable of applying both to situations covered by national law and to situations covered by Community law. The obligation of close cooperation which the Member States and the Community institutions have in fulfilling the commitments which were undertaken by them under joint competence when they concluded the WTO Agreement, including TRIPs, requires the judicial bodies of the Member States and the Community, for practical and legal reasons, to give a uniform interpretation to such a provision. Only the Court of Justice acting in cooperation with the courts and tribunals of the Member States pursuant to Article 177 of the Treaty is in a position to ensure such uniform interpretation. The Court was also asked about the direct effect of Article 50(6) of TRIPs under Community law. It replied that, in a field to which TRIPs applies and in respect of which the Community has already legislated, the judicial authorities of the Member States are required by virtue of Community law, when they apply national rules with a view to ordering provisional measures for the protection of rights falling within such a field, to do so as far as possible in the light of the wording and purpose of Article 50 of TRIPs. In a field in respect of which the Community has not yet legislated and which consequently falls within the competence of the Member States, the protection of intellectual property rights, and measures adopted for that purpose by the judicial authorities, do not fall within the scope of Community law. Accordingly, Community law neither requires nor forbids that the legal order of a Member State should accord to individuals the right to rely directly on the rule laid down by Article 50(6) of TRIPs or that it should oblige the courts to apply that rule of their own motion.

8. In the *institutional domain*, most of the litigation was once again concerned with determining the legal basis for Community measures. In two cases, the Court explained the relationship between Article 129 of the Treaty (now, after amendment, Article 152 EC) and two

other Treaty articles, namely Article 43 (now, after amendment, Article 37 EC) and Article 100a (now, after amendment, Article 95 EC).

First, in Case C-269/97 *Commission v Council* (judgment of 4 April 2000) the Commission brought an action for annulment of a Council regulation establishing a system for the identification and registration of bovine animals and the labelling of beef and beef products, adopted unanimously on the basis of Article 43 of the Treaty. The Commission contended that the correct legal basis for that regulation was Article 100a of the Treaty and that it therefore should have been adopted in accordance with the co-decision procedure. According to the Commission, recourse to Article 100a of the Treaty was justified by the fact that the principal objective of the regulation, adopted within the context of the bovine spongiform encephalopathy crisis, was the protection of human health referred to in Article 129 of the Treaty and that, in such an important field, the Parliament had to be able to participate in the legislative process. Dismissing the action, the Court recalled that, in the context of the organisation of the powers of the Community, the choice of the legal basis for a measure must rest on objective factors which are amenable to judicial review. Those factors include in particular the aim and the content of the measure. In this connection, the fact that an institution wishes to participate more fully in the adoption of a given measure, the work carried out in other respects in the sphere of action covered by the measure and the context in which the measure was adopted are irrelevant. Article 43 of the Treaty is the appropriate legal basis for any legislation concerning the production and marketing of agricultural products listed in Annex II to the Treaty which contributes to the attainment of one or more of the objectives of the common agricultural policy set out in Article 39 of the Treaty (now Article 33 EC). In regulating the conditions for the production and marketing of beef and beef products with a view to improving the transparency of those conditions, the contested regulation was essentially intended to attain the objectives of Article 39 of the Treaty, in particular the stabilisation of the market in the products concerned. It was, therefore, rightly adopted on the basis of Article 43 of the Treaty. That conclusion is not undermined by the fact that the system introduced by the contested regulation will have positive effects for the protection of public health. Besides, the protection of health contributes to the attainment of the objectives of the common agricultural policy which are laid down in Article 39(1) of the Treaty, particularly where agricultural production is directly dependent on demand amongst consumers who are increasingly concerned to protect their health.

Second, in Case C-376/98 *Germany v Parliament and Council* (judgment of 5 October 2000), the Federal Republic of Germany applied for the annulment of Directive 98/43/EC of the Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, which had been adopted on the basis of, *inter alia*, Article 100a of the Treaty. The Federal Republic of Germany contended in support of its application that Article 100a was not the proper legal basis for that directive. In its judgment, the Court considered in turn the question of the internal market and that of distortion of competition. With regard to the internal market, it observed that the measures referred to in Article 100a(1) are intended to improve the conditions for the establishment and functioning of the internal market. To construe that article as meaning that it vests in the Community legislature a general power to regulate the internal market would not only be contrary to the express wording of Articles 3(c) and 7a of the Treaty (now, after amendment, Articles 3(1)(c) EC and 14 EC), but would also be incompatible with the principle embodied in Article 3b of the Treaty (now Article 5 EC) that the powers of the Community are limited to those specifically conferred on it. Moreover, a measure adopted on the basis of Article 100a of the Treaty must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market. While it is true that recourse to Article 100a as a legal basis is possible if the aim is to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them. The Court also pointed out that the first indent of Article 129(4) of the Treaty excludes any harmonisation of laws and regulations

of the Member States designed to protect and improve human health and that other articles of the Treaty may not be used as a legal basis in order to circumvent that express exclusion of harmonisation. In the case in point, the Court found that, in principle, a directive prohibiting the advertising of tobacco products in periodicals, magazines and newspapers could be adopted on the basis of Article 100a with a view to ensuring the free movement of press products. However, the prohibition, in particular, of advertising on posters, parasols, ashtrays and other articles used in hotels, restaurants and cafés and the prohibition of advertising spots in cinemas in no way helped to facilitate trade in the products concerned. Moreover, the contested directive did not ensure free movement of products which were in conformity with its provisions. With regard to the question of distortion of competition, the Court held that, while appreciable distortions could be a basis for recourse to Article 100a in order to prohibit certain forms of sponsorship, they were not such as to justify the use of that legal basis for an outright prohibition of advertising of the kind imposed by the contested directive. The Court therefore allowed the application and annulled the directive.

9. With regard to *free movement of goods*, the Court considered whether Article 30 or 34 of the EC Treaty (now, after amendment, Articles 28 EC and 29 EC) precluded national legislation concerning the labelling, and the sale on rounds, of foodstuffs, the detention under customs control of goods presumed to be counterfeit, and an obligation to bottle wine in the region of production in order to be able to use the designation of origin. In other cases, it interpreted directives concerning more specific aspects of the free movement of goods, such as the import of plants originating in a non-member country and the procedure for the provision of information in the field of technical standards and regulations.

9.1. So far as concerns Article 30 of the Treaty, the judgment of 12 September 2000 in Case C-366/98 *Geffroy* may be noted in particular. In that case, national legislation provided, *inter alia*, that all mandatory labelling particulars for foodstuffs had to be written in French. The Court held that Article 30 of the Treaty and a directive on the harmonisation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs precluded a national provision from requiring the use of a specific language for the labelling of foodstuffs, without allowing for the possibility for another language easily understood by purchasers to be used or for the purchaser to be informed by other means.

In Case C-254/98 *TK-Heimdienst* (judgment of 13 January 2000), the Court held that Article 30 of the Treaty precludes national legislation which provides that certain vendors of food products may not make sales on rounds in a given administrative district unless they also carry on their trade at a permanent establishment situated in that administrative district or in an adjacent municipality, where they also offer for sale the same goods as they do on their rounds. Such legislation relates to the selling arrangements for certain goods in that it lays down the geographical areas in which each of the traders concerned may sell his goods by that method. The application of such legislation to all traders operating in the national territory in fact impedes access to the market of the Member State of importation for products from other Member States more than it impedes access for domestic products. That conclusion is not affected by the fact that, in each part of the national territory, the legislation affects both the sale of products from other parts of the national territory and the sale of products imported from other Member States: for a national measure to be categorised as discriminatory or protective for the purposes of the rules on the free movement of goods, it is not necessary for it to have the effect of favouring national products as a whole or of placing only imported products at a disadvantage and not national products. Legislation of that kind cannot be justified either by objectives designed to protect the supplying of goods at short distance, since such aims of a purely economic nature cannot justify a barrier to the fundamental principle of the free movement of goods, or by the protection of public health, since that can be achieved by measures that have effects less restrictive of intra-Community trade.

In Case C-23/99 *Commission v France* (judgment of 26 September 2000), the Commission applied to the Court for a declaration that, by implementing, pursuant to the French Intellectual Property Code, procedures for the detention by the customs authorities of goods lawfully manufactured in a Member State of the European Community which were intended, following their transit through French territory, to be placed on the market in another Member State where they could be lawfully marketed, the French Republic had failed to fulfil its obligations under Article 30 of the EC Treaty. Granting the declaration, the Court pointed out that the national legislation at issue authorised the national customs authorities, on an application from the proprietor of the right in designs of spare parts for motor vehicles, to detain spare parts presumed to be counterfeit goods for a period of 10 days during which the applicant could refer the matter to the competent national courts. Such legislation had the effect of restricting the free movement of goods. The Court then stated that intra-Community transit consisted in the transportation of goods from one Member State to another across the territory of one or more Member States and involved no use of the appearance of the protected design. That transit did not therefore form part of the specific subject-matter of the right of industrial and commercial property in designs. Since the manufacture and marketing of the product were lawful in the Member States where those operations took place, the impediment to the free movement of goods caused by the product's detention under customs control in the Member State of transit in order to prevent transit of the product was not justified on grounds of protection of industrial and commercial property set out in Article 36 of the EC Treaty (now, after amendment, Article 30 EC).

As regards Article 34 of the Treaty, mention will be made of the important judgment delivered on 16 May 2000 in Case C-388/95 *Belgium v Spain*. This case is a rare example of Treaty infringement proceedings brought by one Member State against another Member State under Article 170 of the EC Treaty (now Article 227 EC). The Kingdom of Belgium contended that, by maintaining in force national legislation under which wine has to be bottled in its region of production if the designation of origin is to be used, the Kingdom of Spain had failed to fulfil its obligations under Article 34 of the Treaty, as interpreted by the Court in its judgment of 9 June 1992 in Case C-47/90 *Delhaize* [1992] ECR I-3669, and Article 5 of the Treaty (now Article 10 EC). In *Delhaize*, the Court had held that such national provisions applicable to wine of designated origin which limited the quantity of wine that might be exported in bulk but otherwise permitted sales of wine in bulk within the region of production constituted measures having equivalent effect to a quantitative restriction on exports which were prohibited by Article 34 of the Treaty.

In *Belgium v Spain*, the Court confirmed that national provisions applicable to wine of designated origin under which use of the name of the region of production as a designation of origin is conditional on bottling in that region constitute such measures having equivalent effect, because they have the effect of specifically restricting patterns of exports of wine eligible to bear the designation of origin in question and thereby of establishing a difference of treatment between trade within a Member State and its export trade. As regards the compatibility with the Treaty of such a barrier, while the Court had found in *Delhaize* that it had not been shown that bottling in the region of production was an operation needed to preserve particular characteristics of the wine or to guarantee the origin of the wine or that the confinement of bottling to a specified area was, in itself, capable of affecting the quality of the wine, the Court now stated that new information had been produced to it in order to demonstrate that the reasons underlying the obligation to bottle in the region of production were capable of justifying that obligation, and that it was necessary to examine the case before it in the light of that information. The Court observed that such an obligation pursued the aim of better safeguarding the quality of the product and, consequently, preserving the considerable reputation of the wine bearing the designation of origin, by strengthening control over its particular characteristics and its quality. The obligation was justified as a measure protecting the designation of origin which could be used by all the operators in the wine growing sector of the region of production and was of decisive importance to them. In addition, for wines transported and bottled in the region of production, the controls were far-

reaching and systematic and were the responsibility of the totality of the producers themselves, who had a fundamental interest in preserving the reputation acquired. Only consignments which had been subjected to those controls could bear the designation of origin. Finally, the risk to which the quality of the product finally offered to consumers was exposed was greater where it has been transported and bottled outside the region of production than when those operations had taken place within the region. Following that examination, the Court concluded that legislation under which wine had to be bottled in its region of production if the designation of origin was to be used had to be regarded as compatible with Community law, despite its restrictive effects on trade, because it constituted a necessary and proportionate means of attaining the objective pursued, in that there were no less restrictive alternative measures capable of attaining it. The Court therefore dismissed the action brought by the Kingdom of Belgium.

9.2. The interpretation of directives relating to more specific aspects of the free movement of goods was at the heart of the cases of *Anastasiou* and *Unilever*.

In *Anastasiou and Others*, the Court specified the conditions which a Member State may impose for the import of plants originating in a non-member country when no phytosanitary certificate has been issued by the authorities empowered to issue certificates in the plants' country of origin (judgment of 4 July 2000 in Case C-219/98).

In *Unilever*, the Court was again asked about the consequences for individuals of breach of an obligation laid down by Directive 83/189/EEC.¹¹ Article 8 of that directive imposes an obligation on Member States to notify any draft technical regulation to the Commission. Article 9 obliges them to postpone the adoption of a draft technical regulation if the Commission or another Member State delivers a detailed opinion to the effect that the measure envisaged may create obstacles to the free movement of goods within the internal market. The Court had already held in Case C-194/94 *CIA Security International* [1996] ECR I-2201 that breach of the obligation to notify laid down by Article 8 of Directive 83/189 rendered the technical regulations at issue inapplicable, so that they were unenforceable against individuals, and that individuals might rely on Articles 8 and 9 of the directive before the national courts, which must decline to apply a national technical regulation which has not been notified in accordance with the directive.

In its judgment of 26 September 2000 in Case C-443/98 *Unilever*, the Court stated that the inapplicability of a technical regulation as a legal consequence of failure to comply with the obligation to notify laid down in Article 8 of the directive can be invoked in proceedings between individuals. The same applies to breach of the obligation, laid down in Article 9 of the directive, to postpone the adoption of a draft technical regulation. Whilst it is true that a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual, the case-law to that effect does not apply in proceedings between individuals where non-compliance with Article 8 or Article 9 of Directive 83/189, which constitutes a substantial procedural defect, renders a technical regulation adopted in breach of either of those articles inapplicable. In proceedings of that kind, Directive 83/189 does not in any way define the substantive scope of the legal rule on the basis of which the national court must decide the case before it. It creates neither rights nor obligations for individuals. The Court therefore ruled that a national court is required, in civil proceedings between individuals concerning contractual rights and obligations, to refuse to apply a national technical regulation which was adopted during a period of postponement of adoption prescribed in Article 9 of Directive 83/189.

¹¹ Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1983 L 109, p. 8), as amended by Directive 94/10/EC.

10. Case-law relating to the *agricultural sector* was again plentiful in the past year, as is indicated by the cases of *France v Commission*, *Commission v Council* and *Mulder and Others v Council and Commission* which have already been referred to.

Amongst that case-law, *Eurostock Meat Marketing* is also to be noted, a case which arose in the context of the bovine spongiform encephalopathy crisis (judgment of 5 December 2000 in Case C-477/98). Acting pursuant to Directive 89/662/EEC concerning veterinary checks in intra-Community trade with a view to the completion of the internal market, the Commission adopted a decision in July 1997 prohibiting the use for any purpose of specified material presenting risks as regards transmissible spongiform encephalopathies, namely, in the case of bovine animals, the skull, tonsils and spinal cord of animals aged over 12 months. That list does not include cheek meat. The date on which that decision was to become applicable, initially set at 1 January 1998, was postponed several times and finally fixed at 30 June 2000. In December 1997, several days after the date on which the decision was to become applicable had been postponed for the first time, the Department of Agriculture for Northern Ireland enacted an order, as part of its programme to deal with the risk of bovine spongiform encephalopathy, prohibiting the import into Northern Ireland of specified risk material from a bovine animal which had been slaughtered or had died outside the United Kingdom at an age greater than 12 months and of any food containing such material. The list of specified risk material for the purposes of the Order was the same as that contained in the Commission decision. Pursuant to the 1997 Order, the Department of Agriculture seized and condemned a consignment of heads of bovine animals which had been imported from Ireland by a company which removes cheekmeat for human consumption, on the ground that the consignment contained specified risk material. The company maintained that the 1997 Order constituted a measure having an effect equivalent to a quantitative restriction on the free movement of goods, contrary to Article 30 of the EC Treaty, and that it was a measure which was neither justified nor authorised under Community law. According to the Department of Agriculture, on the other hand, the importation of the consignment in question could be prohibited as an interim protective measure authorised by Directive 89/662. Agreeing with such an interpretation of the relevant Community rules, the Court pointed out that, under Directive 89/662, the Member State of destination may, on serious public or animal-health grounds, take interim protective measures pending the measures to be taken by the Commission. The adoption by the Commission of a decision which is not immediately applicable cannot, as such, be regarded as precluding a Member State from itself taking interim protective measures pursuant to Directive 89/662. That directive is designed to set up a Community-wide protective system to replace possibly disparate interim protective measures taken in an emergency by Member States to counter serious risks. However, it is not until the Community rules are adopted, enter into force and become applicable to the products concerned that there is a risk of conflict between those rules and the interim protective measures previously adopted by the Member States. A national measure such as the 1997 Order, prohibiting imports of any specified risk material and also of any food containing such material, was justified under Directive 89/662 and was not disproportionate in the light of the risk of possible transmission of bovine spongiform encephalopathy. It was permissible to prohibit imports of heads of bovine animals, since they contained material with very high infectivity and the slaughtering and transport methods used gave rise to a serious risk of contamination of healthy tissues.

The case of *Emsland-Stärke*, concerning abuses in the area of export refunds on agricultural products, should also be mentioned (judgment of 14 December 2000 in Case C-110/99). In that case, the Court held that a Community exporter can forfeit his right to payment of a non-differentiated export refund if (a) the product in respect of which the export refund was paid, and which is sold to a purchaser established in a non-member country, is, immediately after its release for home use in that non-member country, transported back to the Community under the external Community transit procedure and is there released for home use on payment of import duties, without any infringement being established and (b) that operation constitutes an abuse on the part of that Community exporter. A finding that there is an abuse presupposes an intention on the part

of the Community exporter to benefit from an advantage as a result of the application of the Community rules by artificially creating the conditions for obtaining it. Evidence of this must be placed before the national court in accordance with the rules of national law, for instance by establishing that there was collusion between that exporter and the importer of the goods into the non-member country. The fact that, before being re-imported into the Community, the product was sold by the purchaser established in the non-member country concerned to an undertaking also established in that country with which he has personal and commercial links, is one of the facts which can be taken into account by the national court when ascertaining whether the conditions giving rise to an obligation to repay refunds are fulfilled.

11. During the past year, the Court found it necessary to consider the consequences of *freedom of movement for persons* in the most diverse areas: proof of bilingualism of job applicants, rules for the grant of compensation on termination of employment, the grant of leave to remain to the spouse of a migrant worker, temporary admission of Community nationals and the application of social security rules.

11.1. In Case C-281/98 *Angonese* (judgment of 6 June 2000), an Italian national whose mother tongue was German applied for a post with a bank in Italy. He challenged before the national court an obligation to prove his bilingualism (Italian/German) exclusively by means of a certificate issued by a single Italian province, when it was not in dispute that he was perfectly bilingual. The Court noted that the principle of non-discrimination laid down in Article 48 of the EC Treaty (now, after amendment, Article 39 EC) was drafted in general terms and was not specifically addressed to the Member States. It therefore applied to conditions of work and employment set by private persons as well. An obligation requiring candidates to a recruitment competition to prove their linguistic knowledge only by means of one particular bilingualism certificate issued in a single province of a Member State put nationals of the other Member States at a disadvantage, given that persons not residing in that province had little chance of acquiring the certificate and it would be difficult, or even impossible, for them to gain access to the employment in question. Even though obliging an applicant for a post to have a certain level of linguistic knowledge could be legitimate and possession of a diploma, such as the certificate at issue here, could constitute a criterion for assessing that knowledge, the fact that it was impossible to submit proof of the required linguistic knowledge by any other means, in particular by equivalent qualifications obtained in other Member States, had to be considered disproportionate in relation to the aim in view. The requirement in question therefore constituted discrimination on grounds of nationality contrary to Article 48 of the Treaty.

Case C-190/98 *Graf* (judgment of 27 January 2000) related to Austrian legislation denying a worker entitlement to compensation on termination of employment if he terminates his contract of employment himself in order to take up employment with a new employer established in that Member State or in another Member State, but granting entitlement to such compensation if the contract ends without the termination being at the worker's own initiative or attributable to him. In answer to a question referred to it for a preliminary ruling, the Court held that Article 48 of the Treaty does not preclude such legislation. The legislation applies irrespective of the nationality of the worker concerned and does not affect migrant workers to a greater extent than national workers.

11.2. In Case C-356/98 *Kaba* (judgment of 11 April 2000), the applicant, married to a migrant worker who was a national of a Member State, had been refused indefinite leave to remain in another Member State because he had not previously resided there for four years. Pointing out that the legislation of the second State required prior residence of only 12 months for the spouses of persons settled in its territory, which persons are not subject to any restriction on the period for which they may remain there, the applicant contended before the national court that such legislation constituted discrimination contrary to Regulation No 1612/68 on freedom of movement

for workers within the Community.¹² The Court pointed out that, as Community law stands at present, the right of nationals of a Member State to reside in another Member State is not unconditional. That situation derives, first, from the provisions on the free movement of persons contained in Title III of Part Three of the EC Treaty and the secondary legislation adopted to give them effect and, second, from the provisions of Part Two of the Treaty, and more particularly Article 8a (now, after amendment, Article 18 EC), which, whilst granting citizens of the Union the right to move and reside freely within the Member States, expressly refers to the limitations and conditions laid down by the Treaty and by the measures adopted to give it effect. The Member States are therefore entitled to rely on any objective difference there may be between their own nationals and those of other Member States when they lay down the conditions under which leave to remain indefinitely in their territory is to be granted to the spouses of such persons. Consequently, legislation such as that at issue does not constitute discrimination contrary to Regulation No 1612/68.

Case C-357/98 *Yiadam* (judgment of 9 November 2000) concerned the position of a Community national not in possession of a residence permit who had been temporarily admitted to the territory of a Member State many months previously and was physically present there when the competent national authorities notified her of a decision prohibiting her from entering its territory for the purposes of national law. The Court held that a legal fiction under national law, according to which a national who is physically present in the territory of the host Member State is regarded as not yet having been the subject of a decision concerning entry, cannot result in that national being denied the procedural safeguards laid down in Article 9 of Directive 64/221.¹³

11.3. With regard to *social security*, the Court was called on to apply several provisions of Regulation No 1408/71 to persons working temporarily in another Member State. The cases of *FTS* and *Banks* are to be noted.

Case C-202/97 *FTS* (judgment of 10 February 2000) concerned the interpretation of a provision of Regulation No 1408/71, in the version codified by Regulation (EEC) No 2001/83, which derogates from the rule that a worker is to be subject to the legislation of the Member State in whose territory he is employed and allows the undertaking to which he is normally attached to keep him registered under the social security system of the Member State in which it is established. The Court held that, in order to benefit from the advantage afforded by that provision, an undertaking engaged in providing temporary personnel which, from one Member State, makes workers available on a temporary basis to undertakings based in another Member State must normally carry on its activities in the first State. That condition is satisfied where such an undertaking habitually carries on significant activities in the Member State in which it is established. The Court also held in this case that an E 101 certificate issued by the institution designated by the competent authority of a Member State is binding on the social security institutions of other Member States in so far as it certifies that workers posted by an undertaking providing temporary personnel are covered by the social security system of the Member State in which that undertaking is established. However, where the institutions of other Member States raise doubts as to the correctness of the facts on which the certificate is based or as to the legal assessment of those facts and, consequently, as to the conformity of the information contained in the certificate with Regulation No 1408/71, the issuing institution must re-examine the grounds on which the certificate was issued and, where appropriate, withdraw it.

¹² Regulation (EEC) No 1612/68 of the Council of 15 October 1968 (OJ, English Special Edition 1968 (II), p. 475).

¹³ 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).

Case C-178/97 *Banks* (judgment of 30 March 2000) concerned a provision of Regulation No 1408/71 as last amended and updated by Regulation (EEC) No 3811/86, which, for self-employed persons, is the provision corresponding to that at issue in *FTS*. Under that provision, a person normally self-employed in the territory of a Member State who performs work in the territory of another Member State is to continue to be subject to the legislation of the first Member State, provided that the anticipated duration of the work does not exceed 12 months. The Court held that the term "work" used in that provision covers any performance of work, whether in an employed or self-employed capacity. With regard to E 101 certificates, the Court confirmed the decision reached in *FTS*, adding that there is nothing to prevent an E 101 certificate from producing retroactive effects where appropriate.

In other cases, the Court ruled on aspects of national social security legislation directly in relation to Treaty provisions.

Case C-262/97 *Engelbrecht* (judgment of 26 September 2000) was concerned with the overlapping of pensions awarded under the legislation of different Member States. The Court held that the exercise of the right to free movement within the Community is impeded if a social advantage is lost or reduced simply because a benefit of the same kind awarded to a worker's spouse under the legislation of another Member State is taken into account when, on the one hand, the grant of that latter benefit has not led to any increase in the couple's total income and, on the other, there has been a concomitant reduction of the same amount in the pension received by the worker under the legislation of that same State. Such a result might well discourage Community workers from exercising their right to free movement and would therefore constitute a barrier to that freedom enshrined in Article 48 of the Treaty.

In Case C-34/98 *Commission v France* and Case C-169/98 *Commission v France* (judgments of 15 February 2000) the Commission brought two actions before the Court for declarations that, by applying the social debt repayment contribution (contribution pour le remboursement de la dette sociale) and the general social contribution (contribution sociale généralisée) respectively to the employment income and substitute income of employed and self-employed persons resident in France (but as regards the social debt repayment contribution working in another Member State) who, by virtue of Regulation No 1408/71 were not subject to French social security legislation, the French Republic had failed to fulfil its obligations under that regulation and Articles 48 and 52 of the Treaty (now, after amendment, Articles 39 EC and 43 EC). Granting both applications, the Court found that both those contributions were allocated specifically and directly to the financing of the French social security scheme. They therefore fell within the scope of Regulation No 1408/71 and constituted levies caught by the prohibition against double contributions laid down by that regulation and by Articles 48 and 52 of the Treaty which that regulation was designed to implement. Such a conclusion could not be affected by the specific detailed allocation of the sums levied, the fact that payment of those contributions did not give entitlement to any direct and identifiable benefit in return, the limited number of the workers concerned or the minimal rate of the levies at issue.

In Case C-411/98 *Ferlini* (judgment of 3 October 2000) a Commission official contended before the national court that the invoice in respect of the care given at his wife's confinement and her stay in a public hospital of a Member State was drawn up on the basis of discriminatory scales of fees which were fixed on a uniform and unilateral basis by all the hospitals of that State operating as a group and applied to persons not affiliated to the national social security scheme, including EC officials; this resulted in a charge 71.43% higher than that applicable, for the same services, to persons subject to the national social security scheme. The Court stated first of all that there can be no doubt that an EC official has the status of a migrant worker. A national of a Member State working in another Member State does not lose his status of worker within the meaning of Article 48(1) of the Treaty through occupying a post within an international organisation, even if the rules relating to his entry into and residence in the country in which he

is employed are specifically governed by an international agreement. The Court then stated that the first paragraph of Article 6 of the EC Treaty (now, after amendment, the first paragraph of Article 12 EC), which prohibits discrimination on grounds of nationality, also applies in cases where a group or organisation, such as the hospitals group at issue, exercises a certain power over individuals and is in a position to impose on them conditions which adversely affect the exercise of the fundamental freedoms guaranteed under the Treaty. The Court found that the criterion of affiliation to the national social security scheme, on which the differentiation of fees for medical and hospital care was based, constituted indirect discrimination on the ground of nationality. First, the great majority of those affiliated to the Sickness Insurance Scheme common to the Institutions of the European Communities and not to the national social security scheme, although in receipt of medical and hospital care given in national territory, were nationals of other Member States. Second, the overwhelming majority of residents who were nationals were covered by the national social security scheme. The Court then stated that the considerable difference in treatment between persons affiliated to the national social security scheme and EC officials, in respect of the scales of fees for healthcare connected with childbirth, was not justified. The Court accordingly ruled that the application, on a unilateral basis, by a group of healthcare providers of a Member State to EC officials of scales of fees for medical and hospital maternity care which are higher than those applicable to residents affiliated to the national social security scheme of that State constitutes discrimination on the ground of nationality prohibited under the first paragraph of Article 6 of the Treaty, in the absence of objective justification in this respect.

Finally, in Case C-135/99 *Elsen* (judgment of 23 November 2000) the Court considered whether the competent institution of a Member State is required, for the purpose of the grant of an old-age pension, to take into account periods devoted to child-rearing completed in another Member State as though they had been completed in national territory. The question was asked with regard in particular to a person who, at the time when the child was born, was a frontier worker employed in the territory of the Member State to which the institution concerned belonged and residing in the territory of the other State. The Court found that to answer the question in the negative would disadvantage Community nationals who have exercised their right to move and reside freely in the Member States, as guaranteed in Article 8a of the EC Treaty (now, after amendment, Article 18 EC). It also noted that a number of provisions of Regulation No 1408/71 which concern this type of situation help to ensure freedom of movement not only for workers, but also for citizens of the Union, within the Community. The Court accordingly gave a positive answer to the question raised, interpreting the provisions of the EC Treaty directly.

12. A number of significant judgments related to the *freedom to provide services* within the Community. The cases of *Deliège* and *Corsten* may be noted in particular.

The important judgment of 11 April 2000 in Joined Cases C-51/96 and C-191/97 *Deliège* enabled the Court to define the scope of its judgment in Case C-415/93 *Bosman* [1995] ECR I-4921. *Deliège* centred on sports rules requiring judokas, professional or semi-professional athletes or persons aspiring to take part in a professional or semi-professional activity to have been authorised or selected by their federation in order to be able to participate in an international high-level sports competition which does not involve national teams competing against each other. Relying in particular on *Bosman*, the Court pointed out that the Treaty provisions concerning the freedom to provide services may apply to sporting activities and to the rules laid down by sports associations such as the selection rules referred to above. Those provisions not only apply to the action of public authorities but extend also to rules of any other nature aimed at regulating gainful employment and the provision of services in a collective manner. The Court then acknowledged that a high-ranking athlete's participation in an international competition is capable of involving the provision of a number of separate, but closely related, services which may fall within the scope of those provisions even if some of the services are not paid for by those for whom they are performed. However, in contrast to the rules applicable in the *Bosman* case, the selection rules

at issue here do not determine the conditions governing access to the labour market by professional sportsmen and do not contain nationality clauses limiting the number of nationals of other Member States who may participate in a competition. These rules concern a tournament in which, once selected, the athletes compete on their own account, irrespective of their nationality. Although such selection rules inevitably have the effect of limiting the number of participants in a tournament, a limitation of that kind is inherent in the organisation of an international high-level sports event, which necessarily involves certain selection rules or criteria being adopted. Such rules cannot therefore be regarded as constituting a restriction on the freedom to provide services prohibited by the Treaty.

In Case C-58/98 *Corsten* (judgment of 3 October 2000) the Court held that Article 59 of the Treaty precludes rules of a Member State which make the carrying out on its territory of skilled trade work by providers of services established in other Member States subject to an authorisation procedure which is likely to delay or complicate exercise of the right to freedom to provide services, where examination of the conditions governing access to the activities concerned has been carried out in accordance with an applicable Community directive and it has been established that those conditions are satisfied. Furthermore, any requirement of entry on the trades register of the host Member State, assuming it was justified by the overriding public-interest requirement of seeking to guarantee the quality of skilled trade work and to protect those who have commissioned such work, should neither give rise to additional administrative expense nor entail compulsory payment of subscriptions to the chamber of trades.

13. As regards the *right of establishment*, the most significant cases which the Court had to decide in 2000 centred on practice of the professions.

13.1. So far as concerns the medical professions, Case C-238/98 *Hocsman v Ministre de l'Emploi et de la Solidarité* (judgment of 14 September 2000) gave the Court the opportunity to explain the obligations on the competent authorities of a Member State under Article 52 of the Treaty where, in a situation not regulated by a directive on mutual recognition of diplomas, a Community national applies for authorisation to practise a profession, access to which depends, under national law, on the possession of a diploma or professional qualification, or on periods of practical experience. The Court ruled that, in such a situation, those authorities must take into consideration all the diplomas, certificates and other evidence of formal qualifications of the person concerned and his relevant experience, by comparing the specialised knowledge and abilities certified by those qualifications and that experience with the knowledge and qualifications required by the national rules. Such an interpretation of Article 52 of the Treaty is merely the expression by the Court of a principle which is inherent in the fundamental freedoms of the Treaty and remains relevant in situations not covered by directives relating to the mutual recognition of diplomas.

13.2. Practice of the profession of lawyer gave rise to the important judgment delivered on 7 November 2000 in Case C-168/98 *Luxembourg v Parliament and Council*, in which the Court dismissed the action brought by the Grand Duchy of Luxembourg for annulment of a directive 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 (Directive 98/5/EC). The Grand Duchy of Luxembourg contended in particular that the directive infringes the second paragraph of Article 52 of the Treaty in that it introduces a difference in treatment between nationals and migrants and prejudices the public interest in consumer protection and in the proper administration of justice. The Court found that, in adopting Directive 98/5, the Community legislature did not infringe the principle of non-discrimination laid down by Article 52 of the Treaty, since the situation of a migrant lawyer practising under his home-country title and the situation of a lawyer practising under the professional title of the host Member State are not comparable. Unlike the latter, the former may be forbidden to pursue certain activities and, with

regard to the representation or defence of clients in legal proceedings, may be subject to certain obligations, as follows from the provisions of Directive 98/5. In adopting that directive with a view to making it easier for a particular class of migrant lawyers to exercise the fundamental freedom of establishment, the Community legislature chose, in preference to a system of *a priori* testing of qualification in the national law of the host Member State, a plan of action combining consumer information, restrictions on the extent to which or the detailed rules under which certain activities of the profession may be practised, a number of applicable rules of professional conduct, compulsory insurance, as well as a system of discipline involving both the competent authorities of the home Member State and the host State. The legislature has not abolished the requirement that the lawyer concerned should know the national law applicable in the cases he handles, but has simply released him from the obligation to prove that knowledge in advance. It has thus allowed, in some circumstances, gradual assimilation of knowledge through practice, that assimilation being made easier by experience of other laws gained in the home Member State. The legislature was also able to take account of the dissuasive effect of the system of discipline and the rules of professional liability. In making such a choice of the method and level of consumer protection and of ensuring the proper administration of justice, the Community legislature did not overstep the limits of the discretion available to it for the purpose of determining an acceptable level of protection of the public interest. In addition, contrary to the submissions advanced by the Grand Duchy of Luxembourg, Directive 98/5 was validly adopted by a qualified majority in accordance with the procedure laid down in Article 189b of the Treaty (now, after amendment, Article 251 EC) and on the basis of Article 57(1) and the first and third sentences of Article 57(2) of the Treaty (now, after amendment, Article 47(1) EC and the first and third sentences of Article 47(2) EC). The directive establishes a mechanism for the mutual recognition of the professional titles of migrant lawyers who wish to practise under their home-country professional title, supplementing the mechanism already in force, which, as regards lawyers, is intended to authorise the unrestricted practice of the profession under the professional title of the host Member State. Consequently, Directive 98/5 does not make any amendment to existing principles laid down by law governing the professions within the meaning of the second sentence of Article 57(2) of the Treaty, which would have required it to be adopted unanimously.

14. The judgments delivered in the past year concerning the *free movement of capital* allowed the Court to explain the restrictions which the Member States may impose on movements of capital on grounds of public policy or public security or for overriding reasons in the public interest such as the need to ensure the cohesion of the tax system.

Case C-54/99 *Église de Scientologie* (judgment of 14 March 2000) concerned Article 73d(1)(b) of the Treaty (now Article 58(1)(b) EC), under which the Member States may derogate from the prohibition on all restrictions on the movement of capital which is laid down and take measures which are justified on grounds of public policy or public security. The Court held that this provision precludes a system of prior authorisation for direct foreign investments which confines itself to defining in general terms the affected investments as being investments that are such as to represent a threat to public policy and public security, with the result that the persons concerned are unable to ascertain the specific circumstances in which prior authorisation is required. Such lack of precision does not enable individuals to be apprised of the extent of their rights and obligations deriving from the Treaty and is contrary to the principle of legal certainty.

In Case C-423/98 *Albore* (judgment of 13 July 2000), the Court stated that Article 73b of the Treaty (now Article 56 EC) precludes national legislation of a Member State which, on grounds relating to the requirements of defence of national territory, exempts the nationals of that Member State, and only them, from the obligation to apply for an administrative authorisation for any purchase of real estate situated within an area of national territory designated as being of military importance. The position would be different only if it could be demonstrated to the competent national court that, in a particular area, non-discriminatory treatment of nationals of all the

Member States would expose the military interests of the Member State concerned to real, specific and serious risks which could not be countered by less restrictive procedures.

In Case C-35/98 *Verkooijen* (judgment of 6 June 2000), the Court held that Directive 88/361/EEC for the implementation of Article 67 of the Treaty¹⁴ precludes a legislative provision of a Member State under which the grant of exemption from income tax payable on dividends that are paid to natural persons who are shareholders is subject to the condition that those dividends are paid by a company whose seat is in that Member State. A legislative provision of that kind has the effect of dissuading Community nationals residing in the Member State concerned from investing their capital in companies which have their seat in another Member State and also has a restrictive effect as regards such companies in that it constitutes an obstacle to the raising of capital in the Member State concerned, without the restriction being justified by an overriding reason in the public interest such as the need to ensure the cohesion of the tax system.

In Case C-251/98 *Baars* (judgment of 13 April 2000), the Court applied principles similar to those identified in *Verkooijen*, this time in relation to Article 52 of the Treaty.

15. In the field of *transport*, the judgment of 26 September 2000 in Case C-205/98 *Commission v Austria* may be noted.

In this case the Court found that, by twice raising the tolls for vehicles with more than three axles using the whole Brenner motorway, the Republic of Austria had failed to fulfil its obligations under Directive 93/89/EEC concerning taxes on certain vehicles used for the carriage of goods by road and road charges for the use of certain infrastructures. That directive provides that tolls are not to discriminate, direct or indirectly, on the grounds of the nationality of the haulier or of the origin or destination of the vehicle. In addition, toll rates must be related to the costs of infrastructure networks. The Court held that the increases imposed by the Republic of Austria constituted indirect discrimination on the grounds of the hauliers' nationality contrary to Directive 93/89, in so far as they affected vehicles with more than three axles which followed the full itinerary of the motorway and which, for the most part, were not registered in Austria, in contrast to vehicles with more than three axles carrying out similar transport operations on certain partial itineraries, the great majority of which were registered in Austria. The increases also constituted indirect discrimination on the grounds of the destination or origin of the vehicle contrary to Directive 93/89, since they operated to the detriment of vehicles engaged in transit traffic. Such tariff differences could not be justified in either case on grounds relating to environmental protection or based on national transport policy, since the directive, in the field covered by it, did not contemplate the possibility of reliance on such grounds in order to justify tariff arrangements which gave rise to indirect discrimination. In addition the toll regime did not comply with the requirement for a link between toll rates and the costs of construction, operation and development of the section in question, inasmuch as it took account of all sections of motorways financed by the Republic of Austria and not solely the section of that motorway for the use of which the toll was paid.

16. In the course of the past year the Court decided numerous disputes concerning *competition law*, brought before it by means of references for a preliminary ruling or appeals against decisions of the Court of First Instance.

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Council Directive 88/361/EEC of 24 June 1988 (OJ 1988 L 178, p. 5).

16.1. As regards appeal proceedings, the Court was required in particular to review decisions of the Court of First Instance relating to fines imposed on undertakings for infringements of Articles 85 and 86 of the Treaty.

In the "cartonboard" cases, heavy fines had been imposed on cartonboard producers for infringement of Community competition law by participating in an agreement and concerted practice. In actions brought by the fined undertakings, the Court of First Instance reduced slightly the overall amount of the fines.

Ten appeals were brought before the Court of Justice, seeking to have the fines imposed by the Court of First Instance set aside or reduced. The Court of Justice dismissed five of the appeals by judgments of 16 November 2000 in Case C-282/98 P *Enso Española v Commission*, Case C-283/98 P *Mo och Domsjö v Commission*, Case C-298/98 P *Metsä-Serla Sales v Commission*, Case C-294/98 P *Metsä-Serla and Others v Commission* and Case C-297/98 P *SCA Holding v Commission*.

In judgments delivered on the same day, the Court allowed the other five appeals in part. In Case C-279/98 P *Cascades v Commission* and Case C-286/98 P *Stora Kopparbergs Bergslags v Commission*, the Court set aside the judgments of the Court of First Instance for error of law and referred the cases back to it. Responsibility could not be attributed to the appellants for infringements committed by companies acquired by them in respect of the period prior to the acquisition. In Case C-248/98 P *Koninklijke KNP BT v Commission*, Case C-280/98 P *Moritz J. Weig v Commission* and Case C-291/98 P *Sarrió v Commission*, the Court reduced the amount of the fines. In the first case, the fine was reduced by EUR 100 000 because the Court of First Instance had failed to deal with the appellant's argument that it should be liable for the infringements of its subsidiary only with effect from its acquisition. In the second case, the Court reduced the fine by EUR 600 000, holding that the Court of First Instance had infringed the principle of equal treatment by not applying to the undertaking in question the same method for calculation of the fine as that adopted by it when setting the amount of the fines imposed on the other undertakings which had cooperated with the Commission. In the third and last case, the fine was reduced by EUR 250 000 since the method adopted for calculation of all the fines of the undertakings involved had, in the case of this undertaking, been departed from without explanation.

In Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports and Others v Commission* (judgment of 16 March 2000), undertakings which were members of a shipping conference had been fined by the Commission for infringement of Articles 85 and 86 of the Treaty. While reducing the amount of the fines imposed, the Court of First Instance dismissed the application for annulment brought by certain of those undertakings. On appeal, the Court of Justice upheld the judgment at first instance, save as regards the fines. It held that the Court of First Instance erred in law when it confirmed that the Commission was entitled to impose on members of a shipping conference individual fines, fixed in accordance with an assessment of their participation in the conduct in question, when the statement of objections was addressed only to the conference. The essential procedural safeguard which the statement of objections constitutes is an application of the fundamental principle of Community law which requires the right to a fair hearing to be observed in all proceedings. It follows that the Commission is required to specify unequivocally, in the statement of objections, the persons on whom fines may be imposed. A statement of objections which merely identifies a collective entity as the perpetrator of an infringement does not make the companies forming that entity sufficiently aware that fines will be imposed on them individually if the infringement is made out. Contrary to what the Court of First Instance held, the fact that the collective entity does not have legal personality is not relevant in this regard.

16.2. References to the Court for preliminary rulings related essentially to two distinct issues: first, the obligations of national courts in national proceedings relating to the application of Articles 85 and 86 of the Treaty where there are parallel proceedings before the Community Courts and, second, the interpretation of Article 90 of the EC Treaty (now Article 86 EC) concerning the application of the competition rules to public undertakings or undertakings with special or exclusive rights.

As regards the first issue, the Court delivered a judgment of fundamental importance on 14 December 2000 in Case C-344/98 *Masterfoods*. In that case, the Irish High Court had granted an injunction at first instance requiring an icecream manufacturer, Masterfoods, to observe an exclusivity clause contained in agreements concluded in Ireland between a competitor, HB, and retailers for the supply of freezer cabinets. The Commission, before which the matter had been brought in parallel with the national proceedings, adopted a decision running counter to that made by the High Court. According to the Commission, the exclusivity clause was contrary to Article 85(1) of the Treaty and HB's inducement to retailers to enter into freezer-cabinet agreements subject to such a clause constituted an infringement of Article 86 of the Treaty. HB brought an action, within the period prescribed in the fifth paragraph of Article 173 of the Treaty (now, after amendment, the fifth paragraph of Article 230 EC), seeking annulment of the Commission's decision, and obtained an interim order suspending the operation of that decision until the Court of First Instance had given judgment terminating the proceedings before it. The Irish Supreme Court, called on, as appellate court, to decide whether the exclusivity clause was compatible with Articles 85(1) and 86 of the Treaty, made a preliminary reference to the Court of Justice in order for the latter to indicate how it should proceed in such a situation. The Court of Justice stated in answer to the national court that when it rules on an agreement or practice whose compatibility with Article 85(1) and Article 86 of the Treaty is already the subject of a Commission decision it cannot take a decision running counter to that of the Commission, even if the latter's decision conflicts with the decision given by a national court of first instance. In that connection, the fact that the President of the Court of First Instance has suspended the operation of the Commission's decision is irrelevant. Acts of the Community institutions are in principle presumed to be lawful until such time as they are annulled or withdrawn. The decision of the judge hearing an application to order the suspension of the operation of a contested act has only provisional effect. In addition, where the national court has doubts as to the validity or interpretation of an act of a Community institution it may, or must, in accordance with the second and third paragraphs of Article 177 of the Treaty, refer a question to the Court of Justice for a preliminary ruling. If, as here, the addressee of a Commission decision has, within the prescribed period, brought an action for annulment of that decision, it is for the national court to decide whether to stay proceedings until a definitive decision has been given in the action for annulment or in order to refer a question to the Court for a preliminary ruling. When the outcome of the dispute before the national court depends on the validity of the Commission decision, it follows from the obligation of sincere cooperation that the national court should, in order to avoid reaching a decision that runs counter to that of the Commission, stay its proceedings pending final judgment in the action for annulment by the Community Courts, unless it considers that, in the circumstances of the case, a reference to the Court of Justice for a preliminary ruling on the validity of the Commission decision is warranted.

So far as concerns application of the competition rules to public undertakings or undertakings with special or exclusive rights, the cases of *Deutsche Post*, *FFAD* and *Pavlov* will be mentioned.

In Joined Cases C-147/97 and C-148/97 *Deutsche Post* (judgment of 10 February 2000), the Court ruled that, in the absence of an agreement between the postal services of the Member States concerned fixing terminal dues in relation to the actual costs of processing and delivering incoming trans-border mail, it is not contrary to Article 90 of the Treaty, read in conjunction with Articles 59 and 86 of the Treaty, for a body such as Deutsche Post to exercise the right provided for by the Universal Postal Convention, in the version adopted on 14 December 1989, to charge

internal postage on items of mail posted in large quantities with the postal services of a Member State other than the Member State to which that body belongs. If that body were obliged to forward and deliver to addressees resident in Germany mail posted in large quantities by senders resident in Germany using postal services of other Member States, without any provision allowing it to be financially compensated for all the costs occasioned by that obligation, the performance, in economically balanced conditions, of the task of general interest entrusted to it would be jeopardised. On the other hand, the exercise of such a right is contrary to Article 90(1) of the Treaty, read in conjunction with Article 86, in so far as the result is that such a body may demand the entire internal postage applicable in the Member State to which it belongs without deducting the terminal dues corresponding to those items of mail paid by the postal services of other Member States.

In Case C-209/98 *FFAD* (judgment of 23 May 2000), the Court held that Article 90 of the Treaty, read in conjunction with Article 86 of the Treaty, does not preclude the establishment of a local system under which, in order to resolve an environmental problem resulting from the absence of processing capacity for non-hazardous building waste destined for recovery, a limited number of specially selected undertakings may process such waste produced in the area concerned, thus making it possible to ensure a sufficiently large flow of such waste to those undertakings, and which excludes other undertakings from processing that waste, even though they are qualified to do so. However, Article 34 of the Treaty precludes a system for the collection and receipt of non-hazardous building waste destined for recovery, under which a limited number of undertakings are authorised to process the waste produced in a municipality, if that system constitutes, in law or in fact, an obstacle to exports in that it does not allow producers of waste to export it, in particular through intermediaries. Such an obstacle cannot be justified on the basis of Article 36 of the Treaty or in the interests of environmental protection, in particular by application of the principle referred to in Article 130r(2) of the Treaty (now, after amendment, Article 174(2) EC) that damage should as a priority be rectified at source, in the absence of any indication of danger to the health or life of humans, animals or plants or danger to the environment.

In Joined Cases C-180/98 to C-184/98 *Pavlov and Others* (judgment of 12 September 2000), the Court again ruled on whether compulsory affiliation to pension funds in the Netherlands is compatible with the competition rules. In three judgments of 21 September 1999 (in Case C-67/96 *Albany* [1999] ECR I-5751, Joined Cases C-115/97, C-116/97 and C-117/97 *Brentjens'* [1999] ECR I-6025 and Case C-219/97 *Drijvende Bokken* [1999] ECR I-6121), the Court had already held that the competition rules did not preclude the public authorities from deciding to make affiliation to a sectoral pension fund compulsory at the request of organisations representing employers and workers in a given sector or from granting such a fund the exclusive right to manage a supplementary pension scheme in a given sector.

In *Pavlov*, a Netherlands court asked the Court of Justice whether compulsory membership of an occupational pension scheme, this time for the members of a profession in *Pavlov*, the medical specialists' profession was compatible with the competition rules. A scheme of that kind originates in an agreement between the members of the profession under which they are to be guaranteed a certain level of pension, management of the scheme is to be entrusted to a fund and the public authorities are to be requested to make membership of the scheme compulsory for all members of the profession. The Court stated that, unlike the agreements concluded in the context of collective bargaining between employers and employees and aimed at improving employment conditions which were at issue in *Albany*, *Brentjens'* and *Drijvende Bokken*, cited above, an agreement between all the members of a profession could not be excluded, by reason of its nature and purpose, from the scope of Article 85(1) of the Treaty. Even though such an agreement is intended to guarantee a certain level of pension to all the members of a profession and thus to improve one aspect of their working conditions, namely their remuneration, it is not concluded in the context of collective bargaining between employers and employees. Furthermore, self-employed medical specialists carry on an economic activity and are thus undertakings within the

meaning of the Treaty competition rules. When they decide, through their national association, to contribute collectively to a single occupational pension fund, they act as undertakings within the meaning of those articles and not as final consumers. However, their decision to set up such a fund does not appreciably restrict competition within the common market inasmuch as the cost of the supplementary pension scheme has only a marginal and indirect influence on the final cost of the services offered by the members of the profession. As for the request made to the Netherlands public authorities to make membership compulsory, it is made under a scheme identical to those existing under the national law of a number of countries concerning the exercise of regulatory authority in the social domain. Such schemes are designed to promote the creation of supplementary pensions provided in connection with employed or self-employed activity and include a number of safeguards. That being so, a decision by the members of a profession to set up an occupational pension fund entrusted with the management of a supplementary pension scheme and to request the public authorities to make membership of that fund compulsory is not contrary to Article 85(1) of the Treaty, and Articles 5 and 85 of the Treaty cannot preclude public authorities from making membership of that fund compulsory. As to the remainder, the Court, referring to its judgments in *Albany*, *Brentjens'* and *Drijvende Bokken*, held that a pension fund which itself determines the amount of contributions and benefits and operates on the basis of the principle of capitalisation, which has been made responsible for managing a supplementary pension scheme set up by a profession's representative body and membership of which has been made compulsory by the public authorities for all members of that profession, is an undertaking within the meaning of the Treaty competition rules and that Articles 86 and 90 of the Treaty do not preclude the public authorities from conferring on a pension fund the exclusive right to manage a supplementary pension scheme for the members of a profession.

17. In the field of *supervision of State aid*, two cases will be noted, the first relating to aid in favour of a cooperative for the export of French books and the second to aid granted to undertakings in the new German *Länder*.

In Case C-332/98 *France v Commission* (judgment of 22 June 2000), the Court dismissed an action brought by the French Republic for the partial annulment of a Commission decision concerning State aid in favour of Coopérative d'Exportation du Livre Français. The French Republic argued that, while aid falling within the derogation from the competition rules provided for in Article 90(2) of the Treaty must be notified to the Commission, such aid is not subject to the obligation of temporary suspension laid down in the final sentence of Article 93(3) of the Treaty. The Court rejected that approach, since the purpose served by the provision introduced by Article 93(3) is not that of a mere obligation to notify but an obligation of prior notification which, as such, necessarily implies the suspensory effect required by the final sentence of Article 93(3). That provision does not therefore have the effect of disjoining the obligations laid down therein, that is to say, the obligation to notify any new aid and the obligation to suspend temporarily the implementation of that aid.

In its judgment of 19 September 2000 in Case C-156/98 *Germany v Commission*, the Court clarified the scope of the derogation provided for in Article 92(2)(c) of the Treaty (now, after amendment, Article 87(2)(c) EC). Under this provision, aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany is compatible with the common market, in so far as it is required in order to compensate for the economic disadvantages caused by that division. The Court stated that, since Article 92(2)(c) constitutes a derogation from the general principle that State aid is incompatible with the common market, it must be construed narrowly. Its application to the new *Länder* is conceivable only on the same conditions as those applicable in the old *Länder* during the period preceding reunification. Since the phrase "division of Germany" refers historically to the establishment of the dividing line between the two occupied zones in 1948, the "economic disadvantages caused by that division" can only mean the economic disadvantages caused in certain areas of Germany by the isolation

which the establishment of that physical frontier entailed, such as the breaking of communication links or the loss of markets as a result of the breaking off of commercial relations between the two parts of German territory. By contrast, the conception according to which Article 92(2)(c) of the Treaty permits full compensation for the undeniable economic backwardness suffered by the new *Länder*, disregards both the nature of that provision as a derogation and its context and aims. The economic disadvantages suffered by the new *Länder* as a whole have not been directly caused by the geographical division of Germany within the meaning of Article 92(2)(c) of the Treaty. The differences in development between the original and the new *Länder* are explained by causes other than the geographical rift caused by the division of Germany and in particular by the different politico-economic systems set up in each part of Germany.

18. In the past year, as in 1999, the Court delivered numerous judgments concerning *indirect taxation*. Only the cases relating to the charging of value added tax on road and bridge tolls will be mentioned in this report.

In those cases, the Commission brought infringement proceedings against five Member States for failure to charge value added tax on road and bridge tolls. By judgments of 12 September 2000 in Case C-276/97 *Commission v France*, Case C-358/97 *Commission v Ireland*, Case C-359/97 *Commission v United Kingdom*, Case C-408/97 *Commission v Netherlands* and Case C-260/98 *Commission v Greece*, the Court held that providing access to roads and bridges on payment of a toll constitutes a supply of services for consideration within the meaning of Directive 77/388/EEC.¹⁵ Use of the road or bridge depends on payment of a toll, the amount of which varies *inter alia* according to the category of vehicle used and the distance covered. There is, therefore, a direct and necessary link between the service provided and the financial consideration received. The Member States contended in defence that the operators of the roads and bridges are bodies governed by public law and are not to be considered to be taxable persons in respect of activities or transactions in which they engage as public authorities. The Court pointed out that, if the exemption from value added tax, laid down by the Sixth Directive, in respect of activities or transactions which bodies governed by public law engage in as public authorities is to apply, two conditions must be fulfilled: the activities must be carried out by a body governed by public law and they must be carried out by that body acting as a public authority. As regards the latter condition, activities pursued as public authorities are those engaged in by bodies governed by public law under the special legal regime applicable to them and do not include activities pursued by them under the same legal conditions as those that apply to private traders. In France, Ireland and the United Kingdom, the activity of providing access to roads and bridges on payment of a toll is, at least in certain cases, carried out not by a body governed by public law but by traders governed by private law. In such cases the exemption pleaded is not applicable. The Court therefore found that those three States had failed to fulfil their obligations. On the other hand, in Greece and the Netherlands the activity of providing access to roads and related infrastructures on payment of a toll is carried out by a body governed by public law and the Commission failed to establish that those bodies operate under the same conditions as private traders. Consequently, the Court dismissed the actions brought against Greece and the Netherlands.

19. So far as concerns *public procurement*, the Court was able, in a number of judgments, to interpret further the Community directives in this field, both in answer to questions referred to it by national courts for preliminary rulings and when deciding actions for annulment brought by

¹⁵ Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1).

the Commission against Member States. Among the latter, two actions brought against France may be noted.

First, in Case C-225/98 *Commission v France* (judgment of 26 September 2000), the Commission brought an action before the Court for a declaration that, in the course of various procedures for the award of public works contracts for the construction and maintenance of school buildings, the French Republic had failed to fulfil its obligations under Article 59 of the Treaty and Directives 71/305/EEC¹⁶ and 93/37/EEC.¹⁷ The Commission complained in particular that France had failed to publish prior information notices and had expressly set forth as an award criterion in a number of contract notices a condition relating to employment, linked to a local project to combat unemployment. Rejecting the first complaint, the Court held that the publication of a prior information notice is compulsory only where the contracting authorities exercise their option to reduce the time-limits for the receipt of tenders. As regards the second complaint, the Court, referring to the judgment in Case 31/87 *Beentjes* [1988] ECR 4635, pointed out that, under Directive 93/37, the criteria on which the contracting authorities are to base the award of contracts are either the lowest price only or, when the award is made to the most economically advantageous tender, various criteria depending on the contract, such as price, period for completion, running costs, profitability, technical merit. None the less, Article 30 of that directive does not preclude all possibility for the contracting authorities to use as a criterion a condition linked to the combatting of unemployment provided that the condition is consistent with all the fundamental principles of Community law, in particular the principle of non-discrimination flowing from the provisions of the Treaty on the right of establishment and the freedom to provide services. In addition, such a criterion must be applied in conformity with all the procedural rules laid down in Directive 93/37, in particular the rules on advertising. It follows that an award criterion linked to the combatting of unemployment must be expressly mentioned in the contract notice so that contractors may become aware of its existence. Since the Commission criticised only the reference to such a criterion as an award criterion in the contract notice, and did not claim that the criterion was inconsistent with the fundamental principles of Community law, in particular the principle of non-discrimination, or that it had not been advertised in the contract notice, the Court also rejected the second complaint.

Second, in Case C-16/98 *Commission v France* (judgment of 5 October 2000), the Commission brought an action before the Court for a declaration that, in the course of a procurement procedure initiated by an organisation comprising various joint municipal groupings for the award of contracts for electrification and street lighting work, the French Republic had failed to fulfil its obligations under Directive 93/38/EEC.¹⁸ The Commission took the view that the contested contracts were lots of a single "work", which originated with a single contracting entity, and that the rules of the directive should have been applied to all of them, not merely to the six main lots. The Court stated that it was clear from the definition of "work" in Directive 93/38 that the existence of a work had to be assessed in the light of the economic and technical function of the result of the works concerned. So far as concerns artificial splitting of the work into electrification works and street lighting works, the Court found that an electricity supply network and a street lighting network had a different economic and technical function. Accordingly, works on those networks could not be considered to constitute lots of a single work artificially split contrary to Directive 93/38. Also, the definition of the term "work" set out in that directive did not make the existence of a work dependent on matters such as the number of contracting

¹⁶ Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), as amended by Directive 89/440/EEC.

¹⁷ Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54).

¹⁸ Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199 p. 84).

entities or whether the whole of the works could be carried out by a single undertaking. As regards artificial splitting of the electrification work on a geographical basis, the Court found that the networks were interconnectable and, taken as a whole, they fulfilled one economic and technical function, which consisted in the supply and sale of electricity to consumers in the *département* concerned. Moreover, in the case in point, there were important factors which militated in favour of those contracts being aggregated at that level, such as the fact that the invitations for tenders for the contested contracts were made at the same time, the similarities between the contract notices and the fact that the body comprising the joint municipal groupings responsible for electrification within the *département* initiated and coordinated the contracts within a single geographical area. Accordingly, the Court upheld the complaint that the work was artificially split on a geographical basis. The Court also found the failure to fulfil obligations proven in that the value of all but one of the contracts for electrification exceeded the thresholds established by Directive 93/38 for application of the directive and, by artificially splitting the works at issue, the French Republic infringed the provisions of the directive concerning thresholds.

Asked in Case C-324/98 *Telaustria and Telefonadress* (judgment of 7 December 2000) to give a preliminary ruling concerning the interpretation of the same directive, the Court held that public service concession contracts are not included in the concept of "contracts for pecuniary interest concluded in writing" appearing in Directive 93/38 and therefore do not come within the scope of the directive. Notwithstanding the fact that, as Community law stands at present, public service concession contracts are excluded from its scope, the contracting entities concluding them are, none the less, bound to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular.

20. As regards proceedings concerning *intellectual property*, apart from Case C-23/99 *Commission v France* which has already been referred to¹⁹ only the judgment of 7 November 2000 in Case C-312/98 *Warsteiner Brauerei* will be mentioned, concerning Regulation (EEC) No 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs.²⁰

In this judgment, the Court found that Regulation No 2081/92 only concerns geographical indications in respect of which there is a direct link between both a specific quality, reputation or other characteristic of the product and its specific geographical origin. Simple geographical indications of source, in the case of which there is no link between the characteristics of the product and its geographical provenance, do not fall within that definition of geographical indications and are not therefore protected under Regulation No 2081/92. However, such geographical indications may be protected under national legislation which prohibits the potentially misleading use of an indication of source in the case of which there is no link between the characteristics of the product and its geographical provenance.

21. In the field of *social policy*, the Court delivered a number of important judgments in the course of the past year relating to protection of the safety and health of workers, the safeguarding of employees' rights in the event of the transfer of an undertaking and the principle of equal treatment between men and women.

¹⁹ See point 9.1.

²⁰ Council Regulation (EEC) No 2081/92 of 14 July 1992 (OJ 1992 L 208, p. 1).

21.1. Protection of the safety and health of workers, specifically doctors in primary health care teams, was the central issue in Case C-303/98 *Simap* (judgment of 3 October 2000). A union of doctors in the public health service in a Spanish region contended before the national court that doctors in primary care teams at health centres were required to work without the duration of their work being subject to any daily, weekly, monthly or annual limits. In the absence of express national implementing measures, the union sought the application to those doctors of several provisions of Directive 93/104/EC concerning certain aspects of the organisation of working time.

²¹ The Court of Justice found that the activity of doctors in primary health care teams falls within the scope of Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work (the basic directive) and, in particular, of Directive 93/104. Their activity does not fall within the specific public service activities intended to uphold public order and security, essential for the proper functioning of society, which, because of their particular characteristics, are excluded from the scope of those directives. Time spent on call by doctors in primary health care teams must be regarded in its entirety as working time, and where appropriate as overtime, within the meaning of Directive 93/104 if the doctors are required to be present at the health centre. The characteristic features of working time are present in the case of time spent on call by the doctors where their presence at the health centre is required, that is to say they are working, at the employer's disposal and carrying out their duties: the fact that they are obliged to be present and available at the workplace with a view to providing their professional services means that they are carrying out their duties in that instance. To exclude duty on call from working time where physical presence is required would seriously undermine the objective pursued by the directive, which is to ensure the safety and health of workers by granting them minimum periods of rest and adequate breaks. The situation is different where doctors are on call by being contactable at all times without having to be at the health centre. In that situation they may manage their time with fewer constraints and pursue their own interests; accordingly, only time linked to the actual provision of primary care services must be regarded as working time. Next, the Court found that work performed by doctors in primary health care teams whilst on call constitutes shift work within the meaning of Directive 93/104: they are assigned successively to the same work posts on a rotational basis, which makes it necessary for them to perform work at different hours over a given period of days or weeks. The Court then held that, in the absence of national implementing provisions, Directive 93/104 confers on individuals a right whereby the reference period for the implementation of the maximum duration of their weekly working time must not exceed 12 months. Finally, the individual consent of the workers concerned is necessary in order for a Member State to be able to exercise its power under Directive 93/104 to derogate from the provisions concerning the maximum weekly working time. Such individual consent cannot be replaced by a collective agreement.

21.2. In *Collino* and *Mayeur* the Court confirmed that Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses ²² applies in two entirely contrasting situations: first, the transfer of an undertaking managed by a public body to a private-law company and, second, the transfer of an activity carried out by a private-law association to a legal person governed by public law.

Case C-343/98 *Collino and Chiappero* (judgment of 14 September 2000) concerned the transfer for value of an entity operating telecommunications services for public use and managed by a public body within the State administration to a private-law company established by a public body which held its entire capital. That transfer was effected, following decisions of the public authorities, by the grant of an administrative concession. The Court held that Directive 77/187

²¹ Council Directive 93/104/EC of 23 November 1993 (OJ 1993 L 307, p. 18).

²² Council Directive 77/187/EEC of 14 February 1977 (OJ 1977 L 61, p. 26).

may apply to such a situation provided that the persons concerned by the transfer were originally protected as employees under national employment law.

In Case C-175/99 *Mayeur* (judgment of 26 September 2000), the Court held that Directive 77/187 applies where a municipality, a legal person governed by public law operating within the framework of specific rules of administrative law, takes over activities relating to publicity and information concerning the services which it offers to the public, where such activities were previously carried out, in the interests of that municipality, by a non-profit-making association which was a legal person governed by private law, provided that the transferred entity retains its identity. The mere fact that the activity engaged in by the old and the new employer is similar does not justify the conclusion that an economic entity has been transferred. An entity cannot be reduced to the activity entrusted to it. Its identity also emerges from other factors, such as its workforce, its managerial staff, the way in which its work is organised, its operating methods or indeed, where appropriate, the operational resources available to it.

21.3. In 2000 the principle of equal treatment between men and women again gave rise to numerous questions referred to the Court for a preliminary ruling. The questions related, in particular, to equal pay, access to employment and positive action by States in favour of women in the public sector.

As regards equal pay, the cases to be noted are *Jämställdhetsombudsmannen*, concerning equal salaries, and *Deutsche Telekom* and *Preston and Fletcher*, concerning the exclusion of part-time workers from occupational pension schemes.

In Case C-236/98 *Jämställdhetsombudsmannen* (judgment of 30 March 2000), the Court replied in the negative to the question whether an inconvenient-hours supplement paid to midwives was to be taken into account in calculating the salary serving as the basis for a pay comparison for the purposes of Article 119 of the Treaty (Articles 117 to 120 of the Treaty have been replaced by Articles 136 EC to 143 EC) and Directive 75/117/EEC,²³ which concerns equal pay. That supplement varied from month to month according to the part of the day during which the hours were worked, a fact which made it difficult to make a comparison between, on the one hand, a midwife's salary and supplement, taken together, and, on the other hand, the basic salary of the comparator group (clinical technicians). The Court stated that if a difference in pay between the two groups compared was found to exist, and if the available statistical data indicated that there was a substantially higher proportion of women than men in the disadvantaged group, Article 119 of the Treaty required the employer to justify the difference by objective factors unrelated to any discrimination on grounds of sex. The Court also held that neither the reduction in working time, by reference to the standard working time for day-work of clinical technicians, awarded in respect of work performed by mid-wives according to a three-shift roster, nor the value of such a reduction, were to be taken into consideration when calculating the salary used as the basis for a comparison of the two groups' pay for the purposes of Article 119 of the Treaty and Directive 75/117. However, such a reduction could constitute an objective reason unrelated to any discrimination on grounds of sex such as to justify a difference in pay. It was for the employer to show that such was in fact the case.

In Case C-50/96 *Deutsche Telekom v Schröder*, Joined Cases C-234/96 and C-235/96 *Deutsche Telekom v Vick and Conze* and Joined Cases C-270/97 and C-271/97 *Deutsche Post v Sievers und Schrage* (judgments of 10 February 2000), the Court pointed out that the exclusion of part-time workers from an occupational pension scheme constitutes discrimination prohibited by Article 119 of the Treaty if that measure affects a considerably higher percentage of female

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Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19).

workers than male workers and is not justified on objective grounds unrelated to any discrimination based on sex. In the event of such discrimination, the possibility of relying on the direct effect of Article 119 of the Treaty is subject to a limitation in time whereby periods of service of the workers are to be taken into account only from 8 April 1976, the date of the judgment in Case 43/75 *Defrenne* [1976] ECR 455 (*Defrenne II*), for the purposes of their retroactive membership of the scheme and calculation of the benefits to which they are entitled, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or introduced an equivalent claim. The limitation in time of the possibility of relying on the direct effect of Article 119 of the Treaty, resulting from the judgment in *Defrenne II*, does not preclude provisions of a Member State which lay down a principle of equal treatment by virtue of which part-time workers are entitled to retroactive membership of an occupational pension scheme and to receive a pension under that scheme, notwithstanding the risk of distortions of competition between economic operators of the various Member States.

Case C-78/98 *Preston and Fletcher* (judgment of 16 May 2000) likewise arose from claims of part-time workers to retroactive membership of occupational pension schemes from which they had been excluded in a manner contrary to Article 119 of the Treaty. National law required workers, however, to bring their claims within six months of the end of their employment and restricted the period in respect of which they could obtain entitlement to retroactive membership of the pension scheme from which they had been excluded to the two years before the date on which proceedings were instituted. The question was raised before the national court of the compatibility of such procedural rules with Community law. The Court of Justice answered that Community law does not preclude a national procedural rule which requires that a claim for membership of an occupational pension scheme (from which the right to pension benefits flows) must, if it is not to be time-barred, be brought within six months of the end of the employment to which the claim relates. The setting of a limitation period of that kind, inasmuch as it constitutes an application of the fundamental principle of legal certainty, complies with the Community-law principle of effectiveness, under which procedural rules for proceedings designed to ensure the protection of the rights acquired through the direct effect of Community law are not to be framed in such a way as to render impossible or excessively difficult in practice the exercise of those rights. Such a limitation period must not, however, be less favourable for actions based on Community law than for those based on domestic law. On the other hand, the principle of effectiveness precludes a national procedural rule which restricts the periods of service taken into account when calculating pension rights to service after a date falling no earlier than two years prior to the date of claim. Even though such a rule does not totally deprive those concerned of access to membership, it prevents the entire record of service completed by them before the two years preceding the date on which they commenced their proceedings from being taken into account for the purposes of calculating the benefits which would be payable even after the date of the claim. The Court reiterated that the fact that a worker can claim retroactively to join an occupational pension scheme does not allow him to avoid paying the contributions relating to the period of membership concerned.

As regards access to employment, mention will be made of the cases of *Kreil*, relating to the limitation of access by women to military posts, and *Mahlburg*, which concerned a refusal to appoint a pregnant woman.

In Case C-285/98 *Kreil* (judgment of 11 January 2000), the applicant claimed before the national court that the Bundeswehr had refused to engage her in its maintenance branch. That refusal was founded on the German constitution, which imposes a general exclusion of women from military posts involving the use of arms and allows them access only to the medical and military-music services. Asked whether such an exclusion is compatible with Directive 76/207/EEC concerning

access to employment, vocational training and promotion, and working conditions,²⁴ the Court of Justice held that this directive precludes the application of national provisions such as those of German law. The Court acknowledged that it is for the Member States to take decisions on the organisation of their armed forces. It does not follow, however, that such decisions are bound to fall entirely outside the scope of Community law. Some specific cases are covered by certain provisions of the Treaty, but the latter does not contain a general exception concerning all measures adopted by a Member State to safeguard public security. Any limitation of access by women to military posts must therefore comply with Directive 76/207, which permits the Member States to exclude from its scope occupational activities for which, by reason of their nature or the context in which they are carried out, sex constitutes a determining factor; it must also comply with the principle of proportionality inasmuch as a derogation from an individual right – the equal treatment of men and women – is involved. In view of its scope, the exclusion at issue, which applied to almost all military posts in the Bundeswehr, could not be regarded as a derogating measure justified by the specific nature of the posts in question or by the particular context in which the activities in question were carried out.

In Case C-207/98 *Mahlburg* (judgment of 3 February 2000), the Court ruled that Directive 76/207 precludes a refusal to appoint a pregnant woman to a post for an indefinite period on the ground that a statutory prohibition on employment attaching to the condition of pregnancy prevents her from being employed in that post from the outset and for the duration of her pregnancy. The application of the provisions in the directive concerning the protection of pregnant women cannot result in unfavourable treatment regarding their access to employment.

The cases of *Badeck* and *Abrahamsson* concerned positive action by Member States in favour of women in the public sector.

Relying on Directive 76/207, the Court held in Case C-158/97 *Badeck* (judgment of 28 March 2000) that, in sectors of the public service where women were under-represented, a national rule could give priority, where male and female candidates had equal qualifications, to female candidates where that proved necessary for ensuring compliance with the objectives of a women's advancement plan, if no reasons of greater legal weight were opposed; however, the rule had to guarantee that candidatures were the subject of an objective assessment which took account of the specific personal situations of all candidates. The binding targets of the women's advancement plan for temporary posts in the academic service and for academic assistants, laid down by the national rule, could provide for a minimum percentage of women which was at least equal to the percentage of women among graduates, holders of higher degrees and students in each discipline. In so far as its objective was to eliminate under-representation of women, that rule could, in trained occupations in which women were under-represented and for which the State did not have a monopoly of training, allocate at least half the training places to women, unless despite appropriate measures for drawing the attention of women to the training places available there were not enough applications from women. It could also, where male and female candidates had equal qualifications, guarantee that qualified women who satisfied all the conditions required or laid down were called to interview, in sectors in which they were under-represented. Finally, a national rule relating to the composition of employees' representative bodies and administrative and supervisory bodies could recommend that the legislative provisions adopted for its implementation took into account the objective that at least half the members of those bodies had to be women.

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

In *Abrahamsson*, cited above,²⁵ the Court interpreted for the first time Article 141(4) EC, which allows the Member States to maintain or adopt measures providing for special advantages intended to prevent or compensate for disadvantages in professional careers in order to ensure full equality between men and women in professional life. It held that both Directive 76/207 and Article 141(4) EC preclude national legislation which automatically grants preference to candidates belonging to the under-represented sex, if they are sufficiently qualified, subject only to the proviso that the difference between the merits of the candidates of each sex is not so great as to result in a breach of the requirement of objectivity in making appointments. Such a method is not such as to be permitted by Directive 76/207 since the selection of a candidate from among those who are sufficiently qualified is ultimately based on the mere fact of belonging to the under-represented sex, and this is so even if the merits of the candidate so selected are inferior to those of a candidate of the opposite sex. Nor can national legislation of that kind be justified by Article 141(4) EC given that the selection method in question appears, on any view, to be disproportionate to the aim pursued. Furthermore, the mere fact of restricting the scope of a positive discrimination measure of the kind in point is not capable of changing its absolute and disproportionate nature, so that the foregoing provisions also preclude such national legislation where it applies only to procedures for filling a predetermined number of posts. Finally, Community law does not in any way make application of the principle of equal treatment for men and women concerning access to employment conditional upon the level of the posts to be filled.

22. With regard to *consumer protection*, the Court was required in Joined Cases C-240/98 to C-244/98 *Océano Grupo* (judgment of 27 June 2000) to interpret Directive 93/13/EEC on unfair terms in consumer contracts.²⁶ The Court found that, where a jurisdiction clause is included, without being individually negotiated, in a contract between a consumer and a seller or supplier within the meaning of Directive 93/13 and it confers exclusive jurisdiction on a court in the territorial jurisdiction of which the seller or supplier has his principal place of business, it must be regarded as unfair within the meaning of the directive in so far as it causes, contrary to the requirement of good faith, a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. The Court ruled that the protection provided for consumers by Directive 93/13 entails the national court being able to determine of its own motion whether a term of a contract before it is unfair when making its preliminary assessment as to whether a claim should be allowed to proceed before the national courts. Also, the national court is obliged, when it applies national law provisions predating or postdating Directive 93/13, to interpret those provisions, so far as possible, in the light of the wording and purpose of the directive. The requirement for an interpretation in conformity with the directive requires the national court, in particular, to favour the interpretation that would allow it to decline of its own motion the jurisdiction conferred on it by virtue of an unfair term.

23. In the past year, cases before the Court regarding *environmental protection* were in plentiful supply. They concerned now traditional areas, such as hazardous waste, the conservation of natural habitats and assessment of the effects of public and private projects on the environment, but also new areas such as the marketing of genetically modified organisms ("GMOs").

That last area was at the heart of Case C-6/99 *Greenpeace France and Others* (judgment of 21 March 2000), in which Greenpeace France and other associations applied to the national court for annulment of a ministerial decree authorising the marketing of seeds of certain varieties of genetically modified maize. Taking the view that the decree could have serious consequences,

²⁵ See point 5.4.

²⁶ Council Directive 93/13/EEC of 5 April 1993 (OJ 1993 L 95, p. 29).

the national court suspended it and asked the Court of Justice to rule on the margin of discretion available to a Member State under the machinery set up by Directive 90/220/EEC.²⁷ This directive lays down a mechanism for assessing the risks to human health and the environment posed by the deliberate release or the placing on the market of GMOs; the mechanism involves several stages of examination by the national or Community authorities before consent, valid throughout the Community, may be granted to place a GMO on the market. If the competent national authorities which receive an application from an undertaking to place a GMO on the market do not reject the application, they must forward the dossier to the Commission after issuing a favourable opinion. The Court stated that the national authorities which so forward a matter to the Commission have, at that stage, every possibility of assessing the risks which the product constitutes for human health or the environment. Once the application has been put before the Commission, Directive 90/220 provides for a period during which the competent national authorities of the other Member States are consulted. The Court found that observance of the precautionary principle is reflected, first, in the undertaking's obligation immediately to notify the competent authority of new information regarding the risks of the product to human health or the environment and that authority's obligation immediately to inform the Commission and the other Member States about this information and, secondly, in the right of any Member State provisionally to restrict or prohibit the use and/or sale on its territory of a product which has received consent where it has justifiable reasons to consider that the product constitutes a risk to human health or the environment. Also, the system of protection put in place by Directive 90/220 necessarily implies that the Member State concerned cannot be obliged to give its consent in writing if in the meantime it has new information which leads it to consider that the product for which notification has been received may constitute a risk to human health and the environment. In such a case, the Member State concerned must immediately inform the Commission and the other Member States about this information in order that a decision may be taken on the matter in accordance with the procedure provided for in Directive 90/220. However, where, as in the case in point, the Member State has forwarded the application, with a favourable opinion, and the Commission has taken a favourable decision, the Member State must issue the "consent in writing", allowing the product to be placed on the market. Finally, where the national court finds that there may have been irregularities in the conduct of the examination of the application to place a product on the market such as to affect the validity of the Commission's favourable decision, that court must refer the matter to the Court of Justice for a preliminary ruling, if necessary ordering the suspension of application of the measures for implementing that decision until the Court of Justice has ruled on the question of validity. The Court of Justice is the only court with power to declare a Community act invalid.

As regards more traditional environmental areas, Case C-318/98 *Fornasar* (judgment of 22 June 2000) on the definition of hazardous waste may be noted. The Court stated that Directive 91/689/EEC on hazardous waste²⁸ does not prevent the Member States including, for matters within their jurisdiction, the courts from classifying as hazardous waste other than that featuring on the list of hazardous waste laid down by Decision 94/904 establishing a list of hazardous waste pursuant to the directive,²⁹ and thus from adopting more stringent protective measures in order to prohibit the abandonment, dumping or uncontrolled disposal of such waste. If they do so, it is for the authorities of the Member State concerned which have competence under national law to notify the Commission of such cases in accordance with the directive.

²⁷ Council Directive 90/220/EEC of 23 April 1990 on the deliberate release into the environment of genetically modified organisms (OJ 1990 L 117, p. 15), as amended by Directive 97/35/EC.

²⁸ Council Directive 91/689/EEC of 12 December 1991 (OJ 1991 L 377, p. 20).

²⁹ Council Decision 94/904/EC of 22 December 1994 establishing a list of hazardous waste pursuant to Article 1(4) of Directive 91/689 (OJ 1994 L 356, p. 14).

Directive 85/337/EEC³⁰ was central to Case C-287/98 *Linster* (judgment of 19 September 2000). Under this directive, projects likely to have significant effects on the environment are to be subject to an environmental impact assessment and to procedures for informing the public. The directive does not apply to projects the details of which are adopted by a specific act of national legislation: the legislative process will normally enable the objectives pursued by the directive to be achieved, including the objective of supplying information. In the case in point, the owners of land to be acquired compulsorily, pursuant to an act of national legislation, for construction of a motorway link contested before the national court the legality of the compulsory purchase procedure on the basis that it did not comply with Directive 85/337. The Court of Justice held that the concept of a specific act of national legislation used in the directive must be given an autonomous interpretation because of requirements relating to the uniform application of Community law and the principle of equality. A measure adopted by a parliament after public parliamentary debate constitutes such an act where the legislative process has enabled the objectives pursued by Directive 85/337, including that of supplying information, to be achieved, and the information available to the parliament at the time when the details of the project were adopted was equivalent to that which would have been submitted to the competent authority in an ordinary procedure for granting consent for a project. The national court may review whether the national legislature kept within the limits of the discretion set by Directive 85/337, in particular where prior assessment of the environmental impact of the project has not been carried out, the information to be provided as a minimum by the developer has not been made available to the public and the members of the public concerned have not had an opportunity to express an opinion before the project is initiated, contrary to the requirements of the directive.

Finally, with regard to Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, the Court stated in Case C-371/98 *First Corporate Shipping* (judgment of 7 November 2000) that a Member State may not take account of economic, social and cultural requirements or regional and local characteristics when selecting and defining the boundaries of the sites to be proposed to the Commission as eligible for identification as sites of Community importance for the purposes of that directive. In order to produce a draft list of sites of Community importance, capable of leading to the creation of a coherent European ecological network of special areas of conservation, the Commission must have available an exhaustive list of the sites which, at national level, have an ecological interest which is relevant from the point of view of the directive's objective of conservation of natural habitats and wild fauna and flora. Only in that way is it possible to realise the objective, referred to in the directive, of maintaining or restoring the natural habitat types and the species' habitats concerned at a favourable conservation status in their natural range. That range may lie across one or more frontiers inside the Community and a Member State is not in a position to have precise detailed knowledge of the situation of habitats in the other Member States. That State therefore cannot of its own accord, whether because of economic, social or cultural requirements or because of regional or local characteristics, delete sites which at national level have an ecological interest relevant from the point of view of the objective of conservation without jeopardising the realisation of that objective at Community level.

24. So far as concerns interpretation of the *Brussels Convention* (Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters), the judgment of 28 March 2000 in Case C-7/98 *Krombach* is to be noted, concerning the concept of public policy as referred to in Article 27, point 1, of the Convention. Under that provision, a judgment given in a Contracting State is not to be recognised in another Contracting State if such recognition is contrary to public policy in the State in which recognition is sought. Relying on

³⁰ Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40).

the nationality of the victim to found its jurisdiction, the court of the first State (the State of origin) convicted Mr Krombach of an intentional offence under the contempt procedure, that is to say without hearing the defence counsel instructed by Mr Krombach. The court of the State in which enforcement was sought of the civil judgment also obtained in that case asked the Court of Justice whether, in such a situation, it could take account of the fact that the court of the State of origin based its jurisdiction on the nationality of the victim of an offence and denied Mr Krombach the right to defend himself without appearing in person. The Court held that the Contracting States in principle remain free, by virtue of the proviso in Article 27, point 1, of the Convention, to determine, according to their own conceptions, what public policy requires, but that the limits of that concept are a matter for interpretation of the Convention. Consequently, while it is not for the Court to define the content of the public policy of a Contracting State, it is none the less required to review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition to a judgment emanating from a court in another Contracting State. The court of the State in which enforcement is sought cannot, with respect to a defendant domiciled in that State, take account, for the purposes of the public-policy clause in Article 27, point 1, of the Convention, of the fact, without more, that the court of the State of origin based its jurisdiction on the nationality of the victim of an offence. Recourse to the public-policy clause can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order. The Court then found that recourse to the public policy clause must be regarded as being possible in exceptional cases where the guarantees laid down in the legislation of the State of origin and in the Convention itself have been insufficient to protect the defendant from a manifest breach of his right to defend himself before the court of origin, as recognised by the European Convention for the Protection of Human Rights and Fundamental Freedoms. It follows from the case-law of the European Court of Human Rights that a national court of a Contracting State is entitled to hold that a refusal to hear the defence of an accused person who is not present at the hearing constitutes a manifest breach of a fundamental right. Accordingly, the court of the State in which enforcement is sought can, with respect to a defendant domiciled in that State and prosecuted for an intentional offence, take account, in relation to the public-policy clause, of the fact that the court of the State of origin refused to allow that person to have his defence presented unless he appeared in person.

25. In the context of the *EEC-Turkey Association Agreement*, the Court interpreted the principle of non-discrimination on grounds of nationality laid down by Decision No 3/80 of the Association Council with regard to social security benefits granted by a Member State under its legislation to Turkish nationals resident in its territory (judgment of 14 March 2000 in Joined Cases C-102/98 and C-211/98 *Kocak and Örs*). The Court held that that principle does not preclude a Member State from applying to Turkish workers legislation which, for the purposes of awarding a retirement pension and determining the social security number allocated for that purpose, takes as the conclusive date of birth the one given in the first declaration made by the person concerned to a social security authority in that Member State and allows another date of birth to be taken into account only if a document is produced the original of which was issued before that declaration was made. Such national legislation applies irrespective of the nationality of the workers concerned and accords to the documents to be produced in order to set aside the date of birth indicated in the first declaration made to a social security authority the same probative value regardless of their provenance or origin. Unlike the provisions at issue in Case C-336/94 *Dafeki* [1997] ECR I-6761, the legislation at issue here does not place Turkish nationals in a different legal situation from that of nationals of the Member State in which they reside. Nor does it involve any difference of treatment such as to constitute indirect discrimination on grounds

of nationality, since it is not permissible, on the basis of the principle of non-discrimination on grounds of nationality, to require a Member State which lays down rules regarding the determination of dates of birth for the purpose of establishing a social security number and of awarding a retirement pension to take account of particular circumstances which derive from the Turkish legislation on civil status and of the detailed arrangements for its application in practice.

26. With regard to the *overseas countries and territories* ("OCTs"), Case C-17/98 *Emesa Sugar* (judgment of 8 February 2000) will be mentioned, in which a number of questions were referred to the Court concerning the validity of Council Decision 97/803/EC of 24 November 1997 amending at mid-term Decision 91/482/EEC on the association of the overseas countries and territories with the European Economic Community. Confirming the validity of the contested decision, the Court rejected *inter alia* the argument that, having regard in particular to the second paragraph of Article 136 of the Treaty (now, after amendment, the second paragraph of Article 187 EC), there is a "locking" principle whereby the advantages accorded to the OCTs as the process of association is taken forward in stages cannot be detracted from. In weighing the various objectives laid down by the Treaty and whilst taking overall account of the experience acquired as a result of its earlier decisions, the Council, which enjoys for that purpose a considerable margin of discretion reflecting the political responsibilities entrusted to it by the provisions of the Treaty relating to agricultural policy and by Article 136 of the Treaty, may be prompted, in case of need, to curtail certain advantages previously granted to the OCTs. Provided it was established that the application of the rule on cumulation of origin in the sugar sector was liable to lead to significant disturbances in the functioning of a common market organisation, the Council, after weighing the objectives of association of the OCTs against those of the common agricultural policy, was entitled to adopt, in compliance with the principles of Community law circumscribing its margin of discretion, any measure capable of bringing to an end or mitigating such disturbances, including the removal or limitation of advantages previously granted to the OCTs. That was particularly true where the advantages in question were of an extraordinary nature, having regard to the rules on the functioning of the Community market. The rule which allowed certain products from the ACP States, after certain operations had been carried out, to be classified as being of OCT origin fell into that category. As to the remainder, the Court rejected arguments alleging that the contested decision infringed the principle of the protection of legitimate expectations and the principle of proportionality, and Article 133(1) of the Treaty (now, after amendment, Article 184(1) EC) and the second paragraph of Article 136 of the Treaty.

27. This survey of the judgments delivered by the Court of Justice over the past year will end with a mention of Joined Cases C-432/98 P and C-433/98 P *Council v Chvatal and Others* (judgment of 5 October 2000), relating to the *regulations applicable to officials and other staff* of the European Communities. On the occasion of the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, the Council adopted a regulation in November 1995 authorising the European Parliament to adopt measures terminating the service of officials who had reached the age of 55. After the appointing authority had refused a request by certain officials of the Court of Justice to be entered on the list of persons having expressed an interest in such a measure for their release on the ground that only the Parliament could adopt such measures, those officials brought actions before the Court of First Instance for a declaration that the regulation in question was unlawful and for annulment of the decisions of the appointing authority. Their actions were successful. On appeal, the Court of Justice set aside the judgments of the Court of First Instance and, finding that the state of the proceedings allowed final judgment to be given, dismissed the actions brought by the officials. The Court of Justice pointed out that termination-of-service measures, such as those which were permitted by the contested regulation, do not have their legal origin in the Staff Regulations and therefore do not constitute a standard event in the careers of the persons concerned. Such measures must, on the contrary, be regarded as a practice to which the Community has resorted in specific cases in the interest of the proper

functioning of its institutions. It follows, first, that a request to be entered on a list of persons having expressed their interest in such a measure presupposes the existence of a specific and lawful legislative provision which supplies a legal basis for it and, second, that even if there is such a provision, the institution concerned is not obliged either to grant the requests submitted to it or to make even partial use of the power conferred on it to decide to terminate the service of some of its officials. The contested regulation authorised only the European Parliament to adopt measures to release staff. It therefore could not provide a legal basis for the requests of officials of other institutions. Thus, the Court of First Instance was wrong to declare admissible an objection of illegality raised against the contested regulation by the Court officials in proceedings for the annulment of a decision by which the appointing authority had rejected their requests to be entered on the list of officials interested in measures for their release.