

## **A — The Court of Justice in 2004: changes and proceedings**

by Mr Vassilios Skouris, President of the Court of Justice

This part of the Annual Report gives an overview of the activity of the Court of Justice of the European Communities in 2004. It describes, first, the way the Court developed during that year, with the emphasis on the institutional changes affecting the Court and the changes in its internal organisation and methods of work (section 1). It includes, second, an analysis of the statistics on the Court's workload and the average length of proceedings (section 2). It presents, third, as each year, the main developments in the case-law, arranged by subject-matter (section 3).

**1.** For the Court of Justice, the year 2004 was undoubtedly characterised principally by the enlargement of the European Union and the organisational changes that enlargement entailed for the Court (section 1.1). Also deserving of attention, however, are the transfer of some jurisdiction of the Court of Justice to the Court of First Instance and the creation of the European Union Civil Service Tribunal (section 1.2), the important decisions taken by the Court with a view to improving the efficiency of its methods of work (section 1.3), and the amendments to the Protocol on the Statute of the Court of Justice and to the Rules of Procedure (section 1.4).

**1.1.** Enlargement of the European Union represented a great challenge for the Court, at both jurisdictional and administrative level. The Court had to receive 20 new judges with their chambers (10 Judges of the Court of Justice and 10 Judges of the Court of First Instance) and make ready for the introduction of 9 new official languages. In its concern to cope with enlargement in the best possible conditions, it had taken certain measures from the beginning of 2002. Those measures related in particular to planning the installation of the new chambers, creating a nucleus of staff to be assigned to the nine new language units in the translation department, and organising an ad hoc working group with the task of identifying the needs of the various departments with an eye to the forthcoming accessions.

Enlargement became reality for the Court on 11 May 2004, the date of the formal sitting held for the swearing in of the 10 new members of the Court of Justice. On 12 May 2004, at the formal sitting for the swearing in of the 9 new judges of the Court of First Instance, the Court met for the first time as a body of 33 members. It was thus before a Court of Justice containing members from their own countries that the new members of the Court of First Instance were sworn in. For the Court of Justice as for the Court of First Instance, the very last stage of the enlargement process took place on 7 July 2004 when the 10th new member of the Court of First Instance took the oath.

At organisational level, the arrival of the new judges made it necessary to create an additional five-judge Chamber at the Court of Justice. There thus now exist at the Court three Chambers of five judges (the First, Second and Third Chambers) and three Chambers of three judges (the Fourth, Fifth and Sixth Chambers). Each five-judge chamber consists of eight judges and each three-judge chamber of seven judges, who sit in rotation, in accordance with the relevant provisions of the Rules of Procedure. It should also be noted that the three Presidents of the five-judge Chambers do not belong to a three-judge Chamber.

The new members' chambers were set up and installed quickly and without incident. A number of training and information seminars were arranged for the staff working with the new judges, which made their regular integration into the judicial work of the Court of Justice and Court of First Instance much easier. From taking office, each of the new judges was allocated a number of cases. Preliminary reports have already been presented in several of these cases, in connection with which several hearings have already been held, Opinions of the Advocates General submitted, or even judgments delivered. The installation and rapid integration of the new judges and their staff has had a significant impact on the statistics of the Court (see section 2).

At linguistic level, enlargement meant the addition of 9 new official languages – clearly a challenge for an institution with an integral multi-language system – so that the Court now has to be capable of functioning in 20 potential languages of the case, producing 380 possible linguistic combinations. Nine new language divisions were set up within the Court's translation department, one for each new language. Recruitment of staff to work in the new divisions took place particularly efficiently. On 31 December 2004 about 83% of the posts provided for those divisions were already filled. As to the availability of judgments in the new languages, the first indications are very encouraging: thus one might mention, as an example, that, for the judgments delivered on 16 December 2004, approximately 85% of the translations into the new languages were available on the date of the judgment.

At general administrative level, the impact of enlargement was no less significant. The staff of the Court increased by about 50% in 2004. Special efforts were made for the recruitment of staff, and a number of changes were made in the organisation and functioning of the departments of the Court, listing which would go beyond the objectives of this part of the Annual Report.

**1.2.** The year 2004 was also characterised by changes to the judicial structure of the European Union.

First, by Decision 2004/407/EC, Euratom amending Articles 51 and 54 of the Protocol on the Statute of the Court of Justice (OJ 2004 L 132, p. 5, corrigendum at OJ 2004 L 194, p. 3), the Council transferred to the Court of First Instance certain jurisdiction which had previously been reserved to the Court of Justice. The Court of First Instance has thus acquired jurisdiction over direct actions for annulment and for failure to act brought by the Member States against:

- decisions of the Council concerning State aid;
- acts of the Council adopted pursuant to a Council regulation concerning measures to protect trade;
- acts of the Council by which it directly exercises implementing powers;
- acts of the European Central Bank, and acts of the Commission with the exception of those that concern enhanced cooperation under the EC Treaty.

The cases transferred to the Court of First Instance on this basis may be estimated quantitatively at approximately 5% of the cases before the Court of Justice (25 cases pending before the Court of Justice were transferred to the Court of First Instance in 2004).

Second, the Council made use for the first time of the possibility, introduced by the Treaty of Nice, of creating judicial panels to hear and determine at first instance certain classes of action, subject to appeal to the Court of First Instance. By Decision 2004/752/EC, Euratom of 2 November 2004 (OJ 2004 L 333, p. 7), it established the European Union Civil Service Tribunal. That Tribunal, which will have jurisdiction to hear disputes involving the European Union civil service, should begin to operate in the course of 2005. The creation of the Civil Service Tribunal is a decisive step towards improving the efficiency of Community administration of justice. The Court of First Instance should thereby be relieved of a not insubstantial volume of cases (about 25% of the cases brought each year) and the Court of Justice relieved of hearing appeals relating to those cases (about 10% of the cases brought each year).

**1.3.** In the first months of 2004 the Court thought long and hard about its methods of work, in order to make them more efficient and counteract the expanding average length of proceedings. The result was the adoption of a series of measures which were put into practice progressively from May 2004.

Among the most important of those measures is, first, the putting in place of a more rigorous system for managing the Court's judicial work. That system is ensured with the aid of computer tools developed specially for the purpose. In addition, to speed up the written procedure in direct actions and appeals, the Court has decided to adopt a much stricter approach to granting extensions of time-limits for submitting pleadings.

Moreover, the Reports for the Hearing drawn up by the Judge-Rapporteur are now drafted in a shorter and more summary form and contain only the essential elements of the case. Where the procedure in a case, in accordance with the Rules of Procedure, does not require an oral hearing, a report of the Judge-Rapporteur is no longer produced. In accordance with the wording of Article 20 of the Statute of the Court, such a report is compulsory only where a hearing takes place.

Finally, the Court has re-examined its practice of publishing judgments in the European Court Reports. Two factors were identified at the centre of the problem. First, it was found that the volume of the Reports, which exceeded 12 000 pages in 2002 and 13 000 pages in 2003, is liable seriously to compromise the accessibility of the case-law. Second, all judgments published in the Reports necessarily have to be translated into all the official languages of the Union, which represents a substantial workload for the Court's translation department. Given that not all the judgments it delivers are equally significant from the point of view of the development of Community law, the Court, after careful consideration, decided to adopt a policy of selective publication of its decisions in the European Court Reports.

In an initial stage, as regards direct actions and appeals, judgments will no longer be published in the Reports if they come from a Chamber of three judges, or from a Chamber of five judges if, pursuant to the last paragraph of Article 20 of the Statute of the Court of Justice, the case is decided without an Opinion of the Advocate General. It will, however, be open to the formation giving judgment to decide to publish such a decision in whole or in part in exceptional circumstances. It must be noted that texts of the decisions not published in the Reports will still be accessible to the public in electronic form in the language or languages available.

The Court decided not to extend this new practice to references for a preliminary ruling, in view of their importance for the interpretation and uniform application of Community law in all the Member States.

The reduction in the workload of the Court's translation department following the adoption of the selective publication policy was already clearly noticeable in 2004. The total saving as a result of selective publication amounted in 2004 to approximately 20 000 pages.

**1.4.** The Court's reflections on the course of proceedings and methods of work also prompted it to suggest certain amendments to its Rules of Procedure, again with the intention of shortening the length of proceedings. Those proposals, which relate to various aspects of the procedure before the Court, are still being discussed in the Council and have not yet been approved by that institution.

One decision amending the Rules of Procedure was, however, adopted in 2004. As a result of the accession of the new Member States, and in view of the fact that the Council had amended the provision of the Protocol on the Statute of the Court of Justice concerning the number of judges in the Grand Chamber, the Court consequently adjusted the provisions of the Rules of Procedure relating to the composition of that formation of the Court. The Grand Chamber thus now consists of 13 judges.

**2.** The cumulative effect of the measures taken to improve the efficiency of the methods of work of the Court, the implementation of the changes made by the Treaty of Nice to the working of the Court, and the arrival of 10 new judges following enlargement is clearly visible in the Court's judicial statistics for 2004. The number of cases brought to a close increased by approximately 30%, that of cases pending fell by about 14%, and there was a considerable improvement in the duration of proceedings before the Court.

In particular, the Court brought 603 cases to a close in 2004 (net figure, taking account of joined cases). Of those cases, 375 were dealt with by judgments and 226 gave rise to orders. Those figures show a considerable increase over the previous year (455 cases brought to a close). The Court had 531 new cases brought before it (561 in 2003, gross figures). There were 840 cases (gross figure) pending at the end of 2004, compared with 974 at the end of 2003.

The upward trend in the length of proceedings observed during previous years changed in 2004. As regards references for preliminary rulings, the length was approximately 23 months, whereas it was approximately 25 months in 2003. As regards direct actions, it fell from 25 months in 2003 to 20 months in 2004. The average time taken to deal with appeals was 21 months (compared with 28 months in 2003).

As in the preceding year, the Court made use in 2004 of the various instruments at its disposal to expedite the treatment of certain cases (priority treatment, the accelerated or expedited procedure, the simplified procedure, and the possibility of giving judgment without an Opinion of the Advocate General). For the third time, the Court made use of the expedited or accelerated procedure provided for in Articles 62a and 104a of the Rules of Procedure, but this time in a direct action (judgment of 13 July 2004 in Case C-27/04 P *Commission v Council*, not yet published in the ECR, see section 3.11). As this instrument makes it possible to omit certain stages in the procedure, it was possible

to give judgment less than six months from the case being brought. Use of the expedited or accelerated procedure was requested in 12 other cases, but the exceptional conditions of urgency required by the Rules of Procedure were not satisfied. Following a new practice, requests for the use of the expedited or accelerated procedure are granted or dismissed by reasoned order of the President of the Court.

The Court also regularly used the simplified procedure provided for in Article 104(3) of the Rules of Procedure for answering certain questions referred to it for preliminary rulings. It made 22 orders on the basis of that provision.

In addition, the Court made frequent use of the possibility provided by Article 20 of the Statute of giving judgment without an Opinion of the Advocate General where the case does not raise any new point of law. It is noteworthy that about 30% of the judgments delivered in 2004 were delivered without an Opinion.

As regards the distribution of cases between the formations of the Court, it may be noted that the full Court (full Court, Grand Chamber, former plenary formations) dealt with nearly 12%, Chambers of five judges 54% and Chambers of three judges 34% of the cases brought to a close in 2004. There is a tendency for cases heard by Chambers of five judges to increase in number (50% of cases brought to a close in 2002). Five-judge Chambers are thus becoming the usual formation for hearing the cases brought before the Court. The substantial increase in the number of cases heard by Chambers of three judges should also be pointed out (20% of cases brought to a close in 2003).

For further information on the statistics for the 2004 judicial year, the reader is referred to Chapter IV of this Report.

**3.** It is, however, the judicial activity of the Court that I wish more particularly to dwell on in this Annual Report. This section presents the main developments in the case-law, arranged by subject-matter as follows:

law of the institutions (section 3.1); European citizenship (section 3.2); free movement of goods (section 3.3); freedom of movement for workers (section 3.4); freedom to provide services (section 3.5); free movement of capital (section 3.6); competition rules (section 3.7); trade mark law (section 3.8); harmonisation of laws (section 3.9); social law (section 3.10); economic and monetary policy (section 3.11).

This selection covers only 34 of the 603 judgments and orders handed down by the Court in 2004. They are, however, presented more fully than in previous editions of the Annual Report of the Court. While the selection naturally includes judgments of major importance in cases where an Opinion was written by the Advocate General, for purely practical reasons connected with the length of this Report those Opinions, which are nevertheless essential for understanding the issues at stake in a case, are not addressed here. The full texts of all the judgments, opinions and orders of the Court published in the European Court Reports, as well as the Opinions of the Advocates General, are available in all the official languages of the Communities on the Court's internet site ([www.curia.eu.int](http://www.curia.eu.int)) and the Europa site ([www.europa.eu.int/eur-lex](http://www.europa.eu.int/eur-lex)). In order to avoid any confusion and to assist the reader, this Report refers, unless otherwise stated, to the numbering of the articles of the Treaty on European Union and the EC Treaty established by the Treaty of Amsterdam.

**3.1.** Among cases with **constitutional** or **institutional** import, four are worthy of mention, one concerning the conclusion by the Community of international agreements with non-member countries, the other three the application of and compliance with Community law by the authorities of the Member States. In Case C-233/02 *France v Commission* [2004] ECR I-2759 the Court dismissed the action brought by France for annulment of the act by which the Commission had concluded an agreement with the United States on guidelines intended to improve regulatory cooperation between the two parties and to promote transparency towards third parties in connection with the adoption of technical rules concerning goods covered by the WTO/TBT Agreement (the World Trade Organisation's Agreement on Technical Barriers to Trade).

The French Government's main argument was that the Commission had itself concluded, in the form of guidelines, a binding international agreement, whereas the conclusion of such an act is normally within the exclusive competence of the Council by virtue of Article 300 EC.

The Commission submitted, on the other hand, that the guidelines had no binding force, and that that on its own was enough to confer competence on it to adopt them.

The Court's answer was a qualified one. It rejected the argument of the French Government without altogether agreeing with the Commission. The fact that a measure such as the guidelines at issue in the case is not binding is not sufficient to confer on the Commission the competence to adopt it. The Court said that 'determining the conditions under which such a measure may be adopted requires that the division of powers and the institutional balance established by the Treaty in the field of the common commercial policy be duly taken into account, since in this case the measure seeks to reduce the risk of conflict related to the existence of technical barriers to trade in goods' (paragraph 40).

The lack of binding force is not therefore the exclusive criterion of competence, allowing the Commission to adopt measures such as the guidelines. Account must also be taken of the division of powers and the institutional balance established by the Treaty in the field in question. The Court then stated that the intention of the parties must be 'the decisive criterion for the purpose of determining whether or not the Guidelines are binding' (paragraph 42). Carrying out an analysis of the wording, the Court reached the conclusion that in this case the guidelines clearly have no binding force, and are therefore logically not concerned by Article 300 EC.

It was thus from an analysis *in concreto*, that is to say, of the measure seen in its context, that the Court was able to determine the institution with competence to conclude the agreement at issue.

In Case C-453/00 *Kühne & Heitz* [2004] ECR I-837 the College van Beroep voor het bedrijfsleven (Administrative Court for Trade and Industry, Netherlands) asked the Court, in the context of a dispute concerning the tariff classification of poultrymeat and the determination of the amount of export refunds for the exporter, whether Community law, in particular the principle of Community solidarity in Article 10 EC, requires an administrative body to reopen a decision which has become final in order to ensure the full operation of Community law, as it is to be interpreted in the light of a subsequent preliminary ruling.

From December 1986 to December 1987 Kühne & Heitz NV, a company established in the Netherlands, exported quantities of poultrymeat parts to non-member countries and made various declarations to the Netherlands customs authorities with a view to obtaining export refunds for consignments of poultrymeat. Those goods were declared under a particular subheading of the Common Customs Tariff. On the basis of those declarations, the Productschap voor Pluimvee- en Eieren granted export refunds under that subheading and paid the exporting company the relevant amounts.

After carrying out checks as to the nature of the goods exported, the Productschap reclassified them under a different tariff subheading, following which it ordered the exporting company to repay a certain sum. The company's complaint against the demand for reimbursement was rejected, and it appealed against that rejection to the College van Beroep voor het bedrijfsleven. The latter dismissed the appeal in 1991 without finding it necessary to seek a preliminary ruling from the Court of Justice, on the ground that the goods in question were not covered by the term 'legs' within the meaning of the subheading stated in the exporter's declaration.

Relying on a later judgment of the Court of Justice rejecting the view taken by the Netherlands courts (Case C-151/93 *Voogd Vleesimport- en export* [1994] ECR I-4915), the exporter sought payment of the refunds it had been refused, and the court in which it brought proceedings against the administrative authorities' fresh refusal of its request referred a question in the above terms to the Court of Justice.

The Court began by recalling that, in view of the obligation on all the authorities of the Member States to ensure observance of Community law, and also of the retroactive effect inherent in interpretative judgments, a rule of Community law which has been interpreted on the occasion of a reference for a preliminary ruling must be applied by all State bodies within the sphere of their competence, even to legal relationships which arose or were formed before the Court gave its ruling on the request for interpretation.

With regard to compliance with that obligation notwithstanding the fact that the national administrative decision has become final before the application for that decision to be reviewed in the light of a preliminary ruling by the Court, account must be taken, said the Court, of the demands of the principle of legal certainty, which is one of the general principles of Community law. In the present case, the Court was able to find a way of reconciling those two requirements by noting, first, that Netherlands law gives administrative bodies the power to reopen a final administrative decision, second, that the decision became final only as a result of a judgment of a national court against whose decisions there is no judicial remedy, third, that that judgment was based on an interpretation of Community law which, in the light of a subsequent judgment of the Court, was incorrect and which was adopted without a question being referred to the Court for a preliminary ruling in accordance with the conditions provided for in the third paragraph of Article 234 EC, and, finally, that the person concerned complained to the administrative body immediately after becoming aware of that judgment of the Court.

Having summarised the facts of the case in that way, the Court held that, in such circumstances, the administrative body concerned hearing such a request is, in accordance with the principle of cooperation arising from Article 10 EC, under an

obligation to review the final administrative decision in order to take account of the interpretation of the relevant provision given in the meantime by the Court.

In Case C-239/03 *Commission v France* (judgment of 7 October 2004, not yet published in the ECR) France was accused of failing to 'take all appropriate measures to prevent, abate and combat heavy and prolonged pollution of the Étang de Berre' (paragraph 18).

The serious damage to the aquatic environment of the Étang de Berre, caused principally by hydroelectric discharges from a power station, induced the Commission to bring an action before the Court alleging infringement of the Barcelona Convention of 16 February 1976 and the Athens Protocol of 17 May 1980 for the protection of the Mediterranean Sea against pollution.

The Court had first to decide on its own jurisdiction. Following on from its decision in Case 12/86 *Demirel* [1987] ECR 3719, it observed that 'mixed agreements concluded by the Community, its Member States and non-member countries have the same status in the Community legal order as purely Community agreements in so far as the provisions fall within the scope of Community competence. In ensuring compliance with commitments arising from an agreement concluded by the Community institutions, the Member States fulfil, within the Community system, an obligation in relation to the Community, which has assumed responsibility for the due performance of the agreement' (paragraphs 25 and 26). Applying that reasoning to the present case, the Court observed that those mixed agreements concern a field in large measure covered by Community law, namely protection of the environment. Their implementation therefore has a Community dimension. The fact that there is no specific Community legislation on the subject-matter of the action is not material. On the basis of that reasoning, the Court declared that it had jurisdiction to rule on the application of those international agreements.

The Court then addressed the substance of the case. After analysing the wording of the agreements in question, it observed that 'it is therefore a particularly rigorous obligation that is owed by the Contracting Parties', namely an obligation to 'strictly limit' pollution from land-based sources in the area by 'appropriate measures' (paragraph 50). The existence of other sources of pollution, such as industrialisation of the marsh's shores and the rapid increase in the population of the nearby communes, was not capable of calling into question the existence of land-based pollution attributable to the operation of the power station. The Court then had to examine the appropriateness of the actions of the French public authorities from the point of view of their Community obligation to reduce pollution from land-based sources.

In this context, the Court found that the quantities of fresh water and alluvia discharged by the hydroelectric power station were indeed excessive, despite the measures taken by the public authorities to reduce them. Moreover, the harmful effect of such discharges is well known, and that circumstance in itself attested the inadequacy of the measures taken by the public authorities. The Court therefore considered, following that detailed analysis, that the actions of the public authorities were not appropriate, and consequently held that France had failed to fulfil its obligations.

Case C-60/02 X [2004] ECR I-651 raised the question of the imposition by national courts of penalties for breach of Community law. In November 2000 Rolex, a company

which holds various trade marks for watches, applied in Austria for a judicial investigation to be opened against persons unknown, following the discovery of a consignment of counterfeit watches which persons unknown had attempted to transport from Italy to Poland, thus infringing its trade mark rights. Rolex asked for the goods to be seized and destroyed following that investigation. In July 2001 Tommy Hilfiger, Gucci and Gap likewise requested the opening of judicial investigations concerning imitation goods from China intended to be transported to Slovakia. The Austrian court was faced with the following problem: the opening of a judicial investigation under the Austrian Code of Criminal Procedure requires that the conduct complained of is an offence. However, the court said, under the national law on the protection of trade marks only the import and export of counterfeit goods, and not their mere transit across the national territory, constitute offences. The court therefore put a question to the Court of Justice on the compatibility of that law with Regulation No 3295/94,<sup>1</sup> which in its view covers also mere transit.

The Court first confirmed that view: the regulation applies also to goods in transit from one non-member country to another which are temporarily detained in a Member State by the customs authorities of that State. It further stated that the interpretation of the scope of the regulation does not depend on the type of national proceedings (civil, criminal or administrative) in which that interpretation is relied on. The Court then noted that there was no unanimity as to the interpretation to be given to the Austrian law on trade marks. The Austrian Government and the claimant companies contested the view taken by the national court; in their opinion, mere transit is indeed an offence under Austrian law. That, said the Court, concerned the interpretation of national law, which is a matter for the national court, not the Court of Justice. If the national court were to find that the relevant provisions of national law do not in fact penalise mere transit contrary to the regulation, it would have to interpret its national law within the limits set by Community law, in order to achieve the result intended by the Community rule, and in this case apply to the transit of counterfeit goods across the national territory the civil law remedies applicable under national law to the other offences, provided that they were effective and proportionate and constituted an effective deterrent. The Court noted, however, that a particular problem arises where the principle of compatible interpretation is applied to criminal matters. That principle finds its limits in the general principles of law. In particular, since Regulation No 3295/94 empowers Member States to adopt penalties for the conduct it prohibits, the Court's case-law on directives must be extended to it, according to which directives cannot, of themselves and independently of a national law adopted by a Member State for their implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of their provisions. The Court reached the conclusion that, if the national court were to consider that Austrian law does not prohibit the mere transit of counterfeit goods, the principle of non-retroactivity of penalties, which is a general principle of Community law, would prohibit the imposition of criminal penalties for such conduct, despite the fact that national law was contrary to Community law.

<sup>1</sup> Council Regulation (EC) No 3295/94 of 22 December 1994 laying down measures concerning the entry into the Community and the export and re-export from the Community of goods infringing certain intellectual property rights (OJ 1994 L 341, p. 8), as amended by Council Regulation (EC) No 241/1999 of 25 January 1999 (OJ 1999 L 27, p. 1).

### 3.2. European citizenship and its implications were involved in two cases.

In Case C-224/02 *Pusa* [2004] ECR I-5763 the Korkein oikeus (Supreme Court, Finland) referred a question on the interpretation of Article 18 EC for a preliminary ruling. That question arose in proceedings between Mr Pusa, a Finnish national in receipt of an invalidity pension in Finland, and Osuuspankkien Keskinäinen Vakuutusyhtiö concerning calculation of the amount in which that company should be authorised to carry out an attachment on the pension Mr Pusa received in Finland, for the purpose of recovering a debt owed by him. The Finnish law on enforcement provides that part of remuneration is excluded from attachment, that part being calculated from the amount which remains after compulsory deduction at source of income tax in Finland. The problem in this case lay in the fact that the person concerned, who was resident in Spain, was subject to income tax there and thus, in accordance with the provisions of a double taxation agreement, not subject to any deduction at source in Finland. The part of his pension subject to attachment was therefore calculated on the basis of the – necessarily higher – gross amount of the pension, which would not have been the case if he had continued to reside in Finland.

The Finnish Supreme Court asked the Court of Justice essentially whether such a situation is compatible in particular with the freedom of movement and residence guaranteed to citizens of the European Union by the EC Treaty.

Recalling that Union citizenship is destined to be the fundamental status of nationals of the Member States and that a citizen of the Union must be granted in all Member States the same treatment in law as that accorded to the nationals of those Member States who find themselves in the same situation, the Court considered, first, that if the Finnish law on enforcement if the law on enforcement must be interpreted to mean that it does not in any way allow the tax paid by the person concerned in Spain to be taken into account, that difference of treatment will certainly and inevitably result in his being placed at a disadvantage by virtue of exercising his right to move and reside freely in the Member States, as guaranteed under Article 18 EC. The Court stated, second, that to preclude all consideration of the tax payable in the Member State of residence, when such tax has become payable and to that extent affects the actual means available to the debtor, cannot be justified in the light of the legitimate objectives pursued by such a law of preserving the creditor's right to recover the debt due to him and preserving the debtor's right to a minimum subsistence income.

Consequently, in answer to the question referred to it by the Finnish Supreme Court, the Court held that 'Community law in principle precludes legislation of a Member State under which the attachable part of a pension paid at regular intervals in that State to a debtor is calculated by deducting from that pension the income tax prepayment levied in that State, while the tax which the holder of such a pension must pay on it subsequently in the Member State where he resides is not taken into account at all for the purposes of calculating the attachable portion of that pension' (paragraph 48). However, the Court considered that 'on the other hand, Community law does not preclude such national legislation if it provides for tax to be taken into account, where taking the tax into account is made subject to the condition that the debtor prove that he has in fact paid or is required to pay within a given period a specified amount as income tax in the Member State where he resides'. The Court said that that is only the case 'to the extent that, first,

the right of the debtor concerned to have tax taken into account is clear from that legislation; secondly, the detailed rules for taking tax into account are such as to guarantee to the interested party the right to obtain an annual adjustment of the attachable portion of his pension to the same extent as if such a tax had been deducted at source in the Member State which enacted that legislation; and, thirdly, those detailed rules do not have the effect of making it impossible or excessively difficult to exercise that right' (paragraph 48).

In Case C-200/02 *Zhu and Chen* (judgment of 19 October 2004, not yet published in the ECR) Mr and Mrs Chen, Chinese nationals and parents of a first child born in China, wished to have a second child but came up against the birth control policy – the 'one child policy' – of the People's Republic of China. They therefore decided that Mrs Chen would give birth abroad. Their second child was thus born in September 2000 in Belfast, Northern Ireland. The choice of the place of birth was no accident: Irish law allows any person born in the island of Ireland, even outside the political boundaries of Ireland (Éire), to acquire Irish nationality. The child therefore acquired that nationality. Because, however, she did not meet the requirements laid down by the relevant United Kingdom legislation, she did not acquire United Kingdom nationality. After the birth, Mrs Chen moved to Cardiff, Wales, with her child, and applied there for a long-term residence permit for herself and her child, which was refused. The appellate authority referred a question to the Court on the lawfulness of that refusal, pointing out that the mother and child provide for their needs, they do not rely on public funds, there is no realistic possibility of their becoming so reliant, and they are insured against ill health.

The circumstance that the facts of the case concerned a young child gave the Court an occasion to state a preliminary point. It said that the capacity to be the holder of rights guaranteed by the EC Treaty and by secondary law on the free movement of persons does not require that the person concerned has attained the age prescribed for the acquisition of legal capacity to exercise those rights personally. Moreover, the enjoyment of those rights cannot be made conditional on the attainment of a minimum age.

As regards the child's right of residence, the Court recalled that Article 18 EC has direct effect. Purely as a national of a Member State, and therefore a citizen of the Union, she can rely on the right of residence laid down by that provision. Regard must be had, however, to the limitations and conditions to which that right is subject, in particular Article 1(1) of Directive 90/364,<sup>2</sup> which allows Member States to require that the persons concerned have sickness insurance and sufficient resources. The Court found that that was so in the present case. It further stated that the fact that the sufficient resources of the child were provided by her mother and she had none herself was immaterial: a requirement as the origin of the resources cannot be added to the requirement of sufficient resources. Finally, as regards the fact that Mrs Chen went to Ireland with the sole aim of giving her child the nationality of a Member State, in order then to secure a right of residence in the United Kingdom for herself and her child, the Court recalled that it is for each Member State to define the conditions for the acquisition and loss of nationality. A Member State may not restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for the recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty.

<sup>2</sup> Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26).

As regards the mother's right of residence, the Court observed that Directive 90/364 recognises a right of residence for 'dependent' relatives in the ascending line of the holder of the right of residence, which assumes that material support for the family member is provided by the holder of the right of residence. In the present case, said the Court, the position was exactly the opposite. Mrs Chen could not thus be regarded as a 'dependent' relative of her child in the ascending line. On the other hand, where a child is granted a right of residence by Article 18 EC and Directive 90/364, the parent who is the carer of the child cannot be refused the right to reside with the child in the host Member State, as otherwise the child's right of residence would be deprived of any useful effect.

**3.3.** In the field of the **free movement of goods**, the Court had to decide inter alia on national rules concerning the composition of foodstuffs and food supplements and on national rules on the packaging of drinks.

In Case C-95/01 *Greenham and Abel* [2004] ECR I-1333 the Tribunal de grande instance de Paris (Regional Court, Paris, France), which was hearing criminal proceedings against the joint directors of a company distributing foodstuffs, asked the Court pursuant to Article 234 EC whether a Member State may prohibit the marketing on its territory without prior authorisation of foodstuffs lawfully manufactured and marketed in another Member State, on the ground that they contain nutrients whose addition is not authorised for human consumption by the national rules and vitamins in quantities exceeding the recommended daily intake or the safety limits laid down at national level.

After noting that national rules such as those at issue in the main proceedings constitute a measure having equivalent effect to a quantitative restriction, the Court stated that they could nevertheless be justified, under certain conditions, under Article 30 EC. First, such rules must make provision for a procedure enabling economic operators to have a nutrient included on the national list of authorised substances. The procedure must be one which is readily accessible and can be completed within a reasonable time, and is open, if necessary, to challenge before the courts. Second, an application to have a nutrient included on the national list of authorised substances may be refused by the competent national authorities only if the substance poses a genuine risk to public health. Such a risk must be assessed, stated the Court, on the basis of the most reliable scientific data available and the most recent results of international research. Finally, since such rules derogate from the principle of the free movement of goods within the Community, they must be confined to what is actually necessary to ensure the safeguarding of public health and must be proportionate to the aim thus pursued.

In a judgment of the same date in Case C-24/00 *Commission v France* [2004] ECR I-1277, it was precisely because France had failed either to provide for a procedure for including nutrients on the list of authorised substances which was accessible, transparent, and could be completed within a reasonable time or to justify refusals on the basis of a detailed assessment of the genuine risk to public health that the Court held that that State had failed to fulfil its obligations under Article 28 EC.

In Case C-387/99 *Commission v Germany* [2004] ECR I-3751 and Case C-150/00 *Commission v Austria* [2004] ECR I-3887, it was because it had been alerted by a number of complaints against the administrative practice in Germany and Austria of

automatically classifying as medicinal products preparations based on certain vitamins and/or minerals lawfully marketed as food supplements in the Member State from which they are imported, where those substances are present in amounts exceeding the recommended daily intake (Case C-150/00) or exceed it by three times (Case C-387/99), that the Commission brought two actions before the Court of Justice against those Member States for infringement of the principle of the free movement of goods laid down in Article 28 EC.

In support of those actions, the Commission argued essentially that the classification of each vitamin or mineral as a medicinal product must be carried out case by case, having regard to the pharmacological properties which it was recognised as having in the present state of scientific knowledge. The harmfulness of vitamins and minerals varied. It argued that a single general and abstract approach for all those substances thus went beyond what was necessary for achieving the objective of the protection of health laid down in Article 30 EC, so that that approach was not proportionate. The barrier to the free movement of goods resulting from the contested practices could not therefore be justified, even though it pursued a legitimate aim.

The Court, upholding the Commission's argument, held that, to determine whether vitamin preparations or preparations containing minerals should be classified as medicinal products within the meaning of Directive 65/65 on proprietary medicinal products, the national authorities, acting under the control of the court, must work on a case-by-case basis, having regard to the characteristics of those preparations, in particular their composition, their pharmacological properties, the manner in which they are used, the extent of their distribution, their familiarity to consumers and the risks which their use may entail. Classification as a medicinal product of a vitamin preparation or a preparation containing minerals which is based solely on the recommended daily amount of the nutrient it contains does not fully satisfy the requirement for a classification on the basis of the pharmacological properties of each preparation. Even though it is true that the concentration of vitamins or minerals above which a preparation is classified as a medicinal product varies according to the vitamin or mineral in question, it does not necessarily follow that all preparations containing more than once – or three times – the recommended daily intake of one of those substances come within the definition of a medicinal product for the purposes of Directive 65/65.<sup>3</sup>

In those circumstances, the Court then said, it was clear that the contested practices create a barrier to trade, since such preparations lawfully marketed or produced in other Member States as food supplements cannot be marketed in Germany or Austria until they have been subject to the marketing authorisation procedure for medicinal products. That barrier cannot be justified on the basis of Article 30 EC. While that provision allows Member States a certain discretion relating to the protection of public health, the means used must be proportionate to the objective pursued, which it must not be possible to attain by measures less restrictive of intra-Community trade. In this respect, stated the Court, the systematic nature of the contested practices does not make it possible to

<sup>3</sup> Council Directive 65/65/EEC of 26 January 1965 on the approximation of provisions laid down by law, regulation or administrative action relating to proprietary medicinal products (OJ, English Special Edition 1965-1966, p. 20).

identify and assess a real risk to public health, which requires a detailed assessment on a case-by-case basis of the effects which the addition of the vitamins and minerals in question could entail. A preparation which would not pose a real risk to public health thus also requires a marketing authorisation as a medicinal product. In the light of those considerations, the Court held that Germany and Austria had failed to fulfil their obligations under Article 28 EC.

In two separate cases, Case C-463/01 *Commission v Germany* (judgment of 14 December 2004, not yet published in the ECR) and Case C-309/02 *Radlberger Getränke and S. Spitz* (judgment of 14 December 2004, not yet published in the ECR), the Court was called on to rule on the permissibility with respect to the Community rules of measures adopted in Germany to cope with the environmental problem created by drinks packaging. In that Member State, producers and distributors of drinks in non-reusable packaging are subject in principle to the obligation to charge a deposit and take back packaging. They may, however, comply with this by participating in a global collection system. That option is withdrawn if, for two years in a row, the percentage of drinks marketed in reusable packaging in Germany falls below a certain threshold.

Case C-463/01 concerned an action for failure to fulfil obligations brought by the Commission against Germany. According to the guardian of the treaties, the above rules constitute a barrier to trade. Producers of mineral water, who all have to bottle at source under a Community directive, are subject to a particular burden if they are established in other Member States.

The judgment giving a preliminary ruling in Case C-309/02 concerned the same basic problem. The Austrian undertakings Radlberger and Spitz export soft drinks to Germany and belong to a global system of waste collection, 'Der Grüne Punkt'. Those two undertakings brought proceedings in the Verwaltungsgericht Stuttgart (Administrative Court, Stuttgart), arguing that the German rules on quotas for reusable packaging and the related obligations were contrary to Directive 94/62<sup>4</sup> and the provisions of the Treaty on the free movement of goods. The German court decided to stay the proceedings and make a reference to the Court of Justice for a preliminary ruling.

According to the Court, since Directive 94/62 does not carry out a complete harmonisation of national systems for the reuse of packaging, the German legislation must be capable of assessment in the light of the provisions of the EC Treaty relating to the free movement of goods.

Although applying without distinction, the national legislation does not affect the marketing of drinks produced in Germany and that of drinks from other Member States in the same manner. The changeover from a global system of waste collection to a deposit and return system results generally in additional costs for all producers. However, producers established outside Germany use considerably more non-reusable packaging than German producers. Those measures are therefore such as to hinder the marketing of water from other Member States.

<sup>4</sup> Directive 94/62/EC of the European Parliament and the Council of 20 December 1994 on packaging and packaging waste (OJ 1994 L 365, p. 10).

As regards justification relating to protection of the environment, the Court acknowledged that the introduction of a deposit and return system contributes to improving the recovery of packaging waste and to the reduction of waste in the natural environment. Moreover, the probability of a change of system to a deposit obligation contributes to reducing waste by encouraging undertakings to make use of reusable packaging. The national legislation is thus necessary for attaining the objectives pursued.

However, the legislation, which makes the establishment of a deposit and return system dependent on a reuse rate, must still be proportionate. That is the case, said the Court, only if there is a reasonable transitional period to adapt, which thus ensures that every producer or distributor concerned can actually participate in an operational system.

In Case C-309/02 the Court held that it was for the national court to assess whether that requirement was satisfied.

In Case C-463/01, in the case of mineral water which must be bottled at source, the Court held that the national legislation did not comply with the principle of proportionality, since the transition period allowed by the authorities was only six months.

**3.4.** In the area of **freedom of movement for workers**, four cases submitted to the Court by way of preliminary reference merit special mention. The first, Case C-138/02 *Collins* [2004] ECR I-2703, was a reference in a dispute before a tribunal in the United Kingdom. In that Member State, the grant of a 'jobseeker's allowance' to persons seeking employment is subject to a condition of habitual residence or to the condition that the person is a worker for the purposes of Regulation No 1612/68<sup>5</sup> or a person with a right to reside in the United Kingdom pursuant to Directive 68/360. Brian Francis Collins was born in the United States and has dual American and Irish nationality. Having spent one semester in the United Kingdom in 1978 as part of his university studies and having worked for 10 months in 1980 and 1981 on a part-time and casual basis in bars and the sales sector, he returned to the United Kingdom in 1998 for the purpose of seeking employment. He applied for a jobseeker's allowance but was refused on the grounds that he was not habitually resident in the United Kingdom and was not a worker for the purposes of Regulation No 1612/68 or entitled to reside in that State pursuant to Directive 68/360.<sup>6</sup> Three questions were referred to the Court for a preliminary ruling in this connection, the first two of which concerned respectively the regulation and the directive, while the third, phrased in an open manner, asked whether there might be some provision or principle of Community law capable of assisting the applicant in his claim.

On the question whether Mr Collins was a worker within the terms of Regulation No 1612/68, the Court took the view that, as 17 years had elapsed since he had last been engaged in an occupational activity in the United Kingdom, Mr Collins did not have a sufficiently close connection with the employment market in that Member State. The

<sup>5</sup> Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968(II), p. 475).

<sup>6</sup> Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ, English Special Edition 1968(II), p. 485).

situation of Mr Collins, the Court ruled, was comparable to that of any person seeking his first employment. The Court pointed out in this regard that a distinction had to be drawn between persons looking for work in the host Member State without having previously worked there and those who have already entered the employment market in that Member State. While the former benefit from the principle of equal treatment only as regards access to employment, the latter may, on the basis of Article 7(2) of Regulation No 1612/68, claim the same social and tax advantages as national workers. The Court took the view that Mr Collins was not a worker in the sense in which that term covers persons who have already entered the employment market. However, as Regulation No 1612/68 does not use the concept of 'worker' in a uniform manner, the Court stated that it was for the national tribunal to determine whether it was in fact to that meaning that the United Kingdom legislation was referring.

With regard to Directive 68/360, the Court first pointed out that the Treaty itself confers a right of residence, which may be limited in time, on nationals of Member States who are seeking employment in other Member States. The right to reside in a Member State which Directive 68/360 confers is reserved for nationals who are already employed in that Member State. Mr Collins was not in that position and he could therefore not rely on that directive.

The Court concluded by examining the United Kingdom legislation in the light of the fundamental principle of equal treatment. Nationals of one Member State who are seeking employment in another Member State come in that regard, the Court held, within the scope of application of Article 48 of the EC Treaty and are thus entitled to benefit from the right to equal treatment set out in Article 48(2). However, does that right to equal treatment extend to benefits of a financial nature such as the jobseeker's allowance? In principle the answer must be in the negative in the light of the case-law previously cited of the Court, which states that equality of treatment in regard to social and financial benefits applies only to persons who have already entered the employment market, while others specifically benefit from it only as regards access to employment. The Court considered, however, that, in view of the establishment of citizenship of the Union and the interpretation in the case-law of the right to equal treatment enjoyed by citizens of the Union, it was no longer possible to exclude from the scope of Article 48(2) of the EC Treaty, which is an expression of equal treatment, a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State. In the present case, the residence condition imposed by the United Kingdom legislation was likely to be more easily satisfied by United Kingdom nationals. It could be justified only if it was based on objective considerations that were independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national law. It was, the Court pointed out, legitimate for the national legislature to wish to ensure that there was a genuine link between an applicant for the allowance and the employment market, in particular by establishing that the person concerned was, for a reasonable period, in fact genuinely seeking work. However, if it is to be proportionate, a period of residence required for that purpose may not exceed what is necessary in order to enable the national authorities to be satisfied that the person concerned is genuinely seeking work.

The second case, Case C-456/02 *Trojani* (judgment of 7 September 2004, not yet published in the ECR), involved a destitute French national who had been given

accommodation in a Salvation Army hostel in Brussels where, in return for his board and lodging and a small amount of pocket money, he performed a variety of jobs for about 30 hours per week as part of a personal socio-occupational reintegration programme. The question which arose was whether he could claim a right of residence as a worker, a self-employed worker or a person providing or receiving services within the terms of Articles 39 EC, 43 EC and 49 EC respectively. If not, could he benefit from that right by direct application of Article 18 EC in his capacity merely as a citizen of the Union?

It was in fact in respect of the right of residence that the Tribunal du travail de Bruxelles (Labour Court, Brussels) questioned the Court, even though the case had been brought before it following the refusal by the Centre public d'aide sociale de Bruxelles (CPAS) to grant Mr Trojani the minimum subsistence allowance ('minimex').

On the issue of the right of residence as a worker, the Court first pointed out the Community scope of the concept of 'worker'. The essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration. Neither the sui generis nature of the employment relationship under national law, nor the level of productivity of the person concerned, the origin of the funds from which the remuneration is paid or the limited amount of that remuneration can have any consequence in that regard. The Court found that, in this case, the constituent elements of any paid employment relationship, that is to say, the relationship of subordination and payment of remuneration, were present: the benefits in kind and in cash which the Salvation Army provided for Mr Trojani constituted the consideration for the services which he performed for and under the direction of the hostel. However, it remained to be determined whether those services were real and genuine or whether, on the contrary, they were on such a small scale as to be regarded as purely marginal and ancillary, with the result that the person concerned could not be classified as a worker. In that connection the Court left it to the national court to determine whether those services were real and genuine. It did, however, provide some guidelines: the national court had, in particular, to ascertain whether the services performed were capable of being treated as forming part of the normal labour market, regard being had to the status and practices of the hostel, the content of the social reintegration programme, and the nature and details of performance of the services.

The Court also rejected the argument that the provisions governing the right of establishment might be applicable inasmuch as it had been established in the case that the activities performed were in the nature of employment. The Court likewise ruled out the applicability of the provisions on the freedom to provide services, which exclude any activity carried out on a permanent basis or, at least, without a foreseeable limit to its duration.

With regard to the right of residence of citizens of the Union under Article 18 EC, the Court pointed out that this provision is directly effective but stated immediately that the right to rely on it is not unconditional: it may be subject to limitations and conditions, including Article 1 of Directive 90/364,<sup>7</sup> which allows Member States to refuse a right of residence to citizens of the Union who do not have sufficient resources. Those limitations and

<sup>7</sup> Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26).

conditions must, however, be applied in compliance with Community law and, in particular, in accordance with the principle of proportionality. In the present case, the Court found that it was the lack of resources which led Mr Trojani to seek the minimex, a fact which justified application of Directive 90/364 and ruled out reliance on Article 18 EC.

The Court did, however, note that Mr Trojani had a residence permit. It accordingly pointed out, on its own initiative, that, with regard to a social assistance benefit such as the minimex, Mr Trojani could invoke Article 12 EC in order to secure treatment equal to that accorded to Belgian nationals.

The third case, Case C-386/02 *Baldinger* (judgment of 16 September 2004, not yet published in the ECR), concerned application of the Austrian Law on Compensation for Prisoners of War, adopted in 2000, which provides for the grant of a monthly financial benefit to former prisoners of war but which is also subject to the condition that the recipient is an Austrian national. The question referred to the Court for a preliminary ruling asked whether such legislation was compatible with the provisions governing the free movement of workers. In this case, the allowance in question had been refused to a former Austrian national who had been a prisoner of war in the USSR from 1945 to 1947, but who had acquired Swedish nationality in 1967, at the same time forfeiting his Austrian nationality.

The Court successively examined the legislation in question in the light of Regulation No 1408/71,<sup>8</sup> Regulation No 1612/68<sup>9</sup> and Article 39(2) EC.

With regard to Regulation No 1408/71, the Court stated that an allowance of this kind was excluded from its scope as it was covered by Article 4(4), which provides that the regulation does not apply to 'benefit schemes for victims of war or its consequences'. The Court found that the allowance in question was provided to former prisoners of war who proved that they had undergone a long period of captivity, in testimony of national gratitude for the hardships which they had endured and was thus paid as a *quid pro quo* for the service which they had rendered to their country.

The Court reasoned along identical lines in regard to Regulation No 1612/68: an allowance of the kind in issue in the case was excluded from the scope of that regulation as it also did not come within the category of advantages granted to national workers principally because of their status as workers or national residents and, as a result, did not fulfil the essential characteristics of the 'social advantages' referred to in Article 7(2) of Regulation No 1612/68.

The Court finally reached the same conclusion with regard to Article 39(2) EC, which covers conditions of employment, remuneration and other working conditions. That provision, the Court ruled, could not cover compensatory allowances linked to service

<sup>8</sup> Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1).

<sup>9</sup> Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968(II), p. 475).

rendered in wartime by citizens to their own country and the essential aim of which was to provide those citizens with a benefit because of the hardships which they had endured for that country.

The fourth case, Case C-400/02 *Merida* (judgment of 16 September 2004, not yet published in the ECR), was a reference in a dispute brought before a German court. In Germany, the collective agreement applicable to civilians employed by foreign armed forces stationed in Germany provides, inter alia, for the payment by the German State of 'interim assistance' to those workers in the case where their contract of employment has been terminated. Mr Merida, a French resident who worked until 1999 for the French forces stationed in Baden-Baden, received that allowance with effect from that time. However, the method by which it was calculated induced him to bring an action against the German State. That allowance was calculated on the basis of remuneration from which, however, German wage tax had been notionally deducted, even where, as in Mr Merida's case, the remuneration was subject to tax in the country of residence, in casu France, under a double taxation agreement between the two countries. The German Bundesarbeitsgericht (Federal Labour Court) asked the Court whether the method of calculation in question was compatible with Article 39 EC.

Apart from Article 39 EC, the Court, in order to reply to the question submitted, referred to the prohibition of discrimination set out in Article 7(4) of Regulation No 1612/68.<sup>10</sup> After pointing out that, unless it was objectively justified and proportionate to its aim, a provision of national law was indirectly discriminatory if it was intrinsically liable to affect migrant workers more than national workers and if there was a consequent risk that it would place the former at a particular disadvantage, the Court went on to hold that, in the case before it, the notional deduction of German wage tax in order to determine the basis of assessment of the interim allowance placed frontier workers such as Mr Merida at a disadvantage. While application of that method of assessment ensured that German residents would, for the first year following the end of their contract of employment, receive an income equivalent to that of an active worker, that was not the case with regard to French residents, whose allowance, in the same way as their remuneration, was subject to tax in France.

With a view, however, to justifying the manner in which the disputed method of assessment was applied to frontier workers, the German Government put forward grounds of simplified administration and limitation of financial charges. The Court unequivocally dismissed those objections, which could not in any event justify non-compliance with the obligations under the EC Treaty.

**3.5.** The **freedom to provide services** was in issue in Case C-36/02 *Omega* (judgment of 14 October 2004, not yet published in the ECR). *Omega*, a company established under German law, operated an installation in Bonn (Germany) for the practice of a sport – 'laser sport' – inspired by the film *Star Wars* and using modern laser technology. That installation featured machine-gun-type laser targeting devices and sensory tags installed either in the firing corridors or on the jackets worn by players. As it took the view that games for entertainment featuring simulated killing were contrary to human dignity and

<sup>10</sup> Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968(II), p. 475).

thus constituted a danger to public order, the police authorities issued a prohibition order against the company enjoining it to cease operating equipment intended for firing on human targets. Following dismissal of its administrative complaint and appeals brought against that administrative measure of the police authorities, Omega brought an appeal on a point of law ('Revision') before the Bundesverwaltungsgericht (Federal Administrative Court).

In support of its appeal Omega submitted, inter alia, that the contested order infringed the freedom to provide services under Article 49 EC as the installation in question had to use equipment and technology supplied by a British company. The Bundesverwaltungsgericht acknowledged in this regard that, while the commercial exploitation of a 'killing game' did indeed, as the lower court had ruled, constitute an affront to human dignity contrary to the Grundgesetz (German Basic Law), its prohibition did, none the less, infringe the freedom to provide services guaranteed under Article 49 EC. It accordingly decided to ask the Court, by way of a reference under Article 234 EC, whether, inter alia, the prohibition of a commercial activity that was at variance with the fundamental values enshrined in the national constitution was compatible with Article 49 EC.

The Court held in this regard that, by prohibiting Omega from operating its game installation in accordance with the model developed by a British company and lawfully marketed by that company in the United Kingdom, in particular under the franchising system, the contested order affected the freedom to provide services which Article 49 EC guarantees both to providers and to the persons receiving those services established in another Member State. However, it continued, as both the Community and its Member States are required to respect fundamental rights, the protection of those rights was a legitimate interest which could, in principle, justify a derogation from the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the freedom to provide services. Measures which restricted the freedom to provide services could, however, be justified on public policy grounds only if they were necessary for the protection of the interests which they were intended to guarantee and only in so far as those objectives could not be attained by less restrictive measures. None the less, it stressed, the need for, and proportionality of, the provisions adopted could not be excluded merely because one Member State had chosen a system of protection different from that adopted by another State. In other words, therefore, Germany could prohibit that which the United Kingdom authorised if it could be established that the measure imposing the prohibition was both necessary and proportionate, which, as the Court observed, was indeed the situation in the case under examination. In the first place, the prohibition of the commercial exploitation of games involving the simulation of acts of violence against persons, in particular the representation of acts of homicide, corresponded to the level of protection of human dignity which the national constitution sought to guarantee within the territory of the Federal Republic of Germany. Second, by prohibiting only the variant of the laser game the object of which was to fire on human targets, the contested order did not go beyond what was necessary in order to attain the objective pursued. For those reasons, the Court concluded, that order could not be regarded as a measure unjustifiably undermining the freedom to provide services.

**3.6.** In the area of the **free movement of capital**, mention should be made of Case C-319/02 *Manninen* (judgment of 7 September 2004, not yet published in the ECR),

which concerned the Finnish legislation on the taxation of dividends. Under that legislation a person holding shares in a domestic company receives, in addition to the dividend, a tax credit in proportion to the corporation tax paid by the undertaking. The tax credit is offset against tax on the dividend, so that in practice the shareholder has no further tax to pay on his dividend. By contrast, the right to benefit from a tax credit is excluded in the case where the company is established in another Member State.

Such a system, the end result of which is that dividends are no longer taxed in the hands of the shareholder, left the Court in no doubt that it involved a restriction on the free movement of capital within the meaning of Article 56 EC inasmuch as it applied solely in favour of dividends paid by companies established in Finland, even though, as the Court pointed out, direct taxation falls within the competence of the Member States. That system disadvantaged persons receiving dividends from companies established in other Member States by deterring them from investing in such companies and thereby had a restrictive effect as regards those companies in that it constituted an obstacle to their raising capital in Finland. As regards possible justification for that restriction, the Court rejected the argument based on Article 58(1)(a) EC, which authorises different treatment of taxpayers who are not in the same situation with regard to the place where their capital is invested. That derogation, the Court pointed out, had to be interpreted strictly and was itself limited by Article 58(3) EC, which is directed at arbitrary discrimination and disguised restrictions. In order for a difference in treatment to be capable of being classified as unequal treatment which is permitted under Article 58(1) EC rather than as arbitrary discrimination which is prohibited by Article 58(3) EC, that difference in treatment must also concern situations which are not objectively comparable or be justified by overriding reasons in the general interest, such as the need to safeguard the cohesion of the tax system. In addition, it must comply with the principle of proportionality.

The Court began by discounting the argument that the situations were not comparable. In view of the purpose of the Finnish tax legislation, namely to prevent double taxation – corporation tax and income tax – of the profits distributed by the company in which the investment is made, shareholders who are fully taxable in Finland find themselves in a comparable situation, whether they receive dividends from a national company or from a company established in another Member State inasmuch as, in the two cases, the dividends are, apart from the tax credit, liable to be subjected to double taxation.

In support of the legislation in issue, the governments which submitted observations – *in casu* the Finnish Government and the French and United Kingdom Governments – also pleaded the need to ensure the cohesion of the national tax system. Since it was accepted in principle by the Court in its judgments in Case C-204/90 *Bachmann* [1992] ECR I-249 and Case C-300/90 *Commission v Belgium* [1992] ECR I-305 as a potential justification for restrictions on the fundamental freedoms guaranteed by the Treaty, that notion has been invoked on numerous occasions but hitherto without success. The judgment in *Manninen* provided the Court with a fresh opportunity to point out that, for an argument based on such justification to succeed, a direct link had to be established between the tax advantage concerned and the offsetting of that advantage by a particular tax deduction. Such an argument also had to be examined in the light of the objective pursued by the tax legislation in question. In this case, the legislation was designed to prevent double taxation; while there was indeed a link between the tax advantage (tax credit) and the offsetting tax deduction (corporation tax paid by the company established

in Finland), that legislation was not necessary in order to preserve the cohesion of the tax system. Granting to a shareholder in a company established in another Member State a tax credit calculated by reference to the corporation tax paid by that company in that Member State would, the Court held, constitute a less restrictive measure while at the same time not threatening the cohesion of the tax system.

It was in those circumstances appropriate, the Court went on, to take account, in the calculation of the tax credit to be granted to a shareholder who had received dividends from a company established in another Member State, of the tax actually paid by that company in that other Member State. Possible difficulties in determining the tax actually paid could not, in that regard, justify an obstacle to the free movement of capital such as that which arose from the Finnish legislation.

**3.7.** With regard to the **rules on competition**, nine cases, including four joined cases, merit consideration.

In Joined Cases C-264/01, C-306/01, C-354/01 and C-355-01 *AOK Bundesverband and Others* [2004] ECR I-2493, several questions on the interpretation of Articles 81 EC, 82 EC and 86 EC were referred to the Court for preliminary ruling by the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) and the Bundesgerichtshof (Federal Court of Justice) in disputes between associations of sickness and health insurance funds and pharmaceutical companies concerning the fixed maximum amounts payable by sickness funds towards the cost of medicinal products and treatment materials which had been established by the German legislature with a view to addressing the deficit in the statutory health insurance scheme.

The Oberlandesgericht Düsseldorf and the Bundesgerichtshof essentially asked the Court whether the competition rules laid down by the EC Treaty precluded groups of sickness funds, such as the fund associations, from determining fixed maximum amounts corresponding to the upper limit of the price of medicinal products whose cost is borne by sickness funds. The Bundesgerichtshof also asked whether, if that question was to be answered in the affirmative, there was a right against those groups to an injunction remedying the situation and to compensation for the loss suffered by reason of the introduction of the fixed maximum amounts.

The Court adopted the solution set out in its '*Poucet and Pistre*' case-law, to the effect that the concept of an undertaking, within the context of Community competition law, does not cover bodies entrusted with the management of statutory health insurance and old-age insurance schemes which pursue an exclusively social objective and do not engage in economic activity. The Court took the view in *Poucet and Pistre* that this was the position with regard to sickness funds, which, even though the legislature had given them a degree of latitude in setting contribution rates in order to promote sound management, were compelled by law to offer to their members essentially identical obligatory benefits which do not depend on the amount of the contributions. The Court accordingly ruled in the present cases that 'in determining the fixed maximum amounts, the fund associations merely perform a task for management of the German social security system which is imposed upon them by legislation and they do not act as undertakings engaging in economic activity' (paragraph 64). Articles 81 EC and 82 EC were therefore not applicable to such measures.

In Case C-418/01 *IMS Health* [2004] ECR I-5039, the questions put to the Court in a preliminary reference by the Landgericht (Regional Court) Frankfurt am Main (Germany) concerned the interpretation of Article 82 EC in the context of a dispute between two companies specialising in market studies in the pharmaceutical products and health care sectors centring on the claim by one of them that it was entitled to use a brick structure developed by the other for the provision of data on regional sales of pharmaceutical products in Germany.

As it took the view that one company could not exercise its right to obtain an injunction prohibiting all unlawful use of its work if it acted in an abusive manner, within the meaning of Article 82 EC, by refusing to grant a licence to another company on reasonable terms, the Landgericht Frankfurt am Main accordingly referred to the Court three questions on the interpretation of that Treaty provision.

The Court first took the view that 'for the purposes of examining whether the refusal by an undertaking in a dominant position to grant a licence for a brick structure protected by an intellectual property right which it owns is abusive, the degree of participation by users in the development of that structure and the outlay, particularly in terms of cost, on the part of potential users in order to purchase studies on regional sales of pharmaceutical products presented on the basis of an alternative structure are factors which must be taken into consideration in order to determine whether the protected structure is indispensable to the marketing of studies of that kind' (paragraph 30). Applying its '*Magill*' case-law, the Court also took the view that 'the refusal by an undertaking which holds a dominant position and owns an intellectual property right in a brick structure indispensable to the presentation of regional sales data on pharmaceutical products in a Member State to grant a licence to use that structure to another undertaking which also wishes to provide such data in the same Member State, constitutes an abuse of a dominant position within the meaning of Article 82 EC where the following conditions are fulfilled: – the undertaking which requested the licence intends to offer, on the market for the supply of the data in question, new products or services not offered by the owner of the intellectual property right and for which there is a potential consumer demand; – the refusal is not justified by objective considerations; – the refusal is such as to reserve to the owner of the intellectual property right the market for the supply of data on sales of pharmaceutical products in the Member State concerned by eliminating all competition on that market' (paragraph 52).

The other four cases which deserve mention in regard to the rules on competition concern State aid.

In Case C-372/97 *Italy v Commission* [2004] ECR I-3679, the Court delivered its ruling on an application brought by the Italian Republic seeking partial annulment of Commission Decision 98/182/EC of 30 July 1997, which had found that aid granted between 1981 and 1995 by the Friuli-Venezia Giulia Region to road haulage companies in that region was in part incompatible with the common market and ordered its partial recovery. The Friuli-Venezia Giulia Region successively adopted two laws, which were essentially identical, one replacing the other, concerning action to promote and develop transport of concern to the Region and the carriage of goods by road for hire or reward. Those laws provided for three measures in favour of undertakings operating in that sector and established in the Region: these consisted

of financing of interest on loans contracted for the purpose of developing infrastructure and purchasing equipment, financing for the cost of leasing vehicles, trailers and semi-trailers, together with the installations for the maintenance and repair of vehicles and for the handling of goods, and, finally, financing, for groups and other forms of association, of up to 50% of investment to be used for the construction or purchase of installations and equipment.

In its appraisal of the disputed aid in the light of Article 87(1) EC, the Commission decision drew a distinction between aid granted to undertakings which were engaged in international transport, on the one hand, and, on the other, aid to undertakings exclusively engaged in transport operations at local, regional or national level. In the latter case, the decision drew a further distinction according to whether the aid had been granted before or after 1 July 1990, the date on which Regulation No 4059/89, which opened up that second market to Community competition, entered into force. However, as the contested decision had in the interim been partially annulled by the Court of First Instance following application by a number of the recipient companies (judgment of 15 June 2000 in Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta and Others v Commission* [2000] ECR II-2319), and the application for annulment in the present case to some extent no longer served any purpose, in view of the fact that the Commission had accepted the interpretation of the Court of First Instance regarding the aid granted after 1 July 1990 to undertakings engaged exclusively in local, regional or national transport, the Court was ultimately required to assess that decision only to the extent to which it declared illegal the contested aid granted to undertakings engaged in international road transport operations.

The Italian Republic raised several pleas in law or arguments designed to minimise the significance of the aid thus granted, whether with regard to the paucity of its amount or to the mainly local nature of the operations engaged in by most of the recipients of the aid. From this it inferred that the aid had minimal impact on intra-Community trade and competition, with a view to establishing that the aid did not come under the prohibition laid down in Article 87(1) EC. The Court rejected all of those submissions, reaffirming a number of principles derived from its case-law. Whereas the Italian Republic argued that the Commission had not demonstrated the existence of a real, concrete risk of distortion of competition, the Court thus pointed out that, where aid has been granted by a Member State without having been notified to the Commission beforehand at the planning stage, the decision finding that aid to be incompatible with the common market did not have to demonstrate the real effect which the aid might have on competition or trade between Member States. The Court also reaffirmed that the fact that the aid was relatively small in amount or that the recipient undertaking was relatively small in size did not as such exclude the possibility that intra-Community trade might be affected. Along the same lines, the Court also recalled that the condition for the application of Article 87(1) EC, namely that the aid must be capable of affecting trade between Member States, did not depend on the local or regional character of the transport services supplied or on the scale of the field of activity concerned. The Court further ruled once more that the fact that a Member State sought to approximate, by unilateral measures, the conditions of competition in a particular sector of the economy to those prevailing in other Member States could not deprive the measures in question of their character as State aid. That said, even if in certain cases the very circumstances in which State aid had been granted

were sufficient to show that the aid was capable of affecting trade between Member States and of distorting or threatening to distort competition, the Commission had at the very least to set out those circumstances in the statement of reasons for its decision. The Court pointed out further that, during the examination of the impact of aid on competition and intra-Community trade, the Commission had to weigh the beneficial effects of the aid against its adverse effects on trading conditions and on the maintenance of undistorted competition, with judicial review of the manner in which that discretion was exercised being confined to establishing whether the rules of procedure and the rules relating to the duty to give reasons had been complied with and to verifying the accuracy of the facts relied on and that there was no error of law, manifest error of assessment in regard to the facts or misuse of powers. The Italian Republic further argued that, as the aid in dispute had an insignificant effect on the position of the recipient undertakings, recovery of that aid would infringe the principle of proportionality. The Court once again ruled that the recovery of State aid unlawfully granted could not in principle be regarded as disproportionate to the objectives of the Treaty in regard to State aid or as a failure by the Commission to act within the bounds of its discretion inasmuch as such a measure does no more than to restore the previous situation. In reply to a final argument by the Italian Republic, the Court concluded by reaffirming that, while a recipient of unlawful aid could rely on exceptional circumstances on the basis of which it had legitimately assumed the aid to be lawful and thus decline to refund that aid, a Member State whose authorities had granted aid contrary to the procedural rules laid down in Article 88 EC could not plead that legitimate expectation in order to circumvent its obligation to take the steps necessary to implement a Commission decision instructing it to recover the aid. The Court thus dismissed that part of the action brought by the Italian Republic which still served a purpose.

A second case, Case C-298/00 P *Italy v Commission* [2004] ECR I-4087, also arose from the dispute concerning State aid granted by the Friuli-Venezia Giulia Region to road haulage companies between 1981 and 1995. More precisely, the case derived from an appeal brought by the Italian Republic, which, having intervened in the proceedings at first instance in support of the form of order sought by the applicants, challenged the abovementioned judgment of the Court of First Instance in *Alzetta and Others v Commission*, by which that Court partially dismissed the applications brought by a number of recipient undertakings for annulment in part of Commission Decision 98/182/EC of 30 July 1997. The Commission itself also lodged a cross-appeal in which it submitted that the application brought by those undertakings before the Court of First Instance was inadmissible on the ground that, even though recovery of the aid was called for in the decision, that decision was addressed to the Italian Republic and concerned a statutory scheme of State aid: it was for those reasons not of individual concern to the recipient undertakings and the Court of First Instance ought for that reason to have examined the issue of admissibility of its own motion.

The Court first dismissed the cross-appeal brought by the Commission, ruling that an undertaking which, as in the case of the applicants at first instance, is not only concerned by the decision in question as an undertaking operating in the sector in issue and a potential beneficiary of the disputed aid scheme, but also by virtue of being an actual recipient of individual aid granted under that scheme, the recovery of which has been ordered by the Commission, is in a different position from that of applicants for whom a Commission decision is in the nature of a measure of general application.

On the substance, the Court had in particular to rule on the question of the degree to which the disputed aid was liable to affect intra-Community trade and competition. It also had to determine whether the principles of the protection of legitimate expectations and proportionality precluded recovery of the aid.

With regard to the first matter, the Court pointed out that 'in the course of the Commission's assessment of new aid which, pursuant to Article [88(3) EC], is to be notified to it before being put into effect, the Commission is required to establish, not whether such aid has a real impact on trade between Member States, but whether that aid could affect that trade', stressing that 'if the Commission had to demonstrate in its decision the real effect of aid already granted, such a requirement would have the effect of favouring Member States which grant aid in breach of the obligation to notify laid down in Article [88(3) EC], to the detriment of those which do notify aid at the planning stage' (paragraph 49). The Court also ruled once again that 'the relatively small amount of aid or the relatively small size of the undertaking which receives it do not as such exclude the possibility that intra-Community trade might be affected' and that 'aid of a relatively small amount is liable to affect competition and trade between Member States where there is strong competition in the sector in which the undertakings which receive it operate' (paragraph 54). The Court concluded by confirming its position that 'the fact that a Member State seeks to approximate, by unilateral measures, conditions of competition in a particular sector of the economy to those prevailing in other Member States cannot deprive the measures in question of their character as aid' (paragraph 61).

Dealing with the second branch of the appeal, the Court pointed out that, as the abolition of unlawful aid by means of recovery was the logical consequence of its illegality, 'the recovery of State aid unlawfully granted, for the purpose of restoring the previously existing situation, cannot in principle be regarded as disproportionate to the objectives of the Treaty in regard to State aids' (paragraph 75). The Court also refused to apply in this case the solution which it had adopted in its judgment in *Case 223/85 RSV v Commission* [1987] ECR 4617, paragraph 17, under which 'a delay by the Commission in deciding that an aid is illegal and must be abolished and recovered by a Member State could in certain circumstances establish a legitimate expectation on the part of the recipients of that aid so as to prevent the Commission from requiring that Member State to order the refund of the aid' (paragraph 90). The Court took the view that the circumstances which had justified such a solution in that case did not obtain in the present case. In the same way as the cross-appeal brought by the Commission, the Court therefore also dismissed the appeal brought by the Italian Republic.

In *Case C-277/00 Germany v Commission* [2004] ECR I-3925, the Court ruled on an application by the Federal Republic of Germany for the annulment of Commission Decision 2000/567/EC of 11 April 2000 on the State aid granted to an undertaking established under the former German Democratic Republic which was at the time a market leader in the manufacture of customised circuits and which, following several restructuring stages, became System Microelectronic Innovation GmbH ('SMI'), in which the majority shareholding of 51% was held by the Land of Brandenburg, the remaining share capital having been acquired by an American company, Synergy Semiconductor Corporation ('Synergy'). SMI had already received financial support from the Land of Brandenburg, the Treuhandanstalt (the German public-law body responsible for restructuring the undertakings of the former German Democratic Republic) and the body

which succeeded the Treuhandanstalt in the form of grants for investments or removal activities or in the form of loans. Following difficulties encountered in its activities, however, SMI was forced to file for bankruptcy, which resulted in its name being changed to 'SMI iG', as a company in liquidation, and in the appointment of an administrator, who, in order to ensure continuation of SMI's activities and to save the jobs of 105 employees, established a hive-off vehicle, the company 'SiMI', the services relating to consultancy, marketing, development and design of microelectronic products and services having already been transferred to SiMI's wholly-owned subsidiary 'MD & D'. The Land of Brandenburg and the body which succeeded the Treuhandanstalt granted their financial support to the hive-off vehicle before SiMI and MD & D found a buyer and MD & D ultimately purchased the share capital of SiMI.

As it took the view in the contested decision that the grants and loans thus made to SMI and the hive-off company respectively were incompatible with the common market, the Commission ordered the Federal Republic of Germany to take all necessary measures to recover the disputed aid from its beneficiaries, that is to say, according to the Commission, the companies SMI, SiMI and MD & D, as well as any other firm to which their assets had been or might be transferred in order to evade the consequences of the Commission's decision.

Although the German Government argued that the grants made to SMI by the Treuhandanstalt, in the same way as those from the body which succeeded it, were covered by the derogating framework governing the activities of the Treuhandanstalt with a view to restructuring the undertakings of the former German Democratic Republic and ensuring their transition from a planned economy to a market economy, inasmuch as they had been made in the context of what it regarded as the privatisation of SMI, the Court took the view that 'the term "privatisation" must be construed narrowly in the context of the Treuhandanstalt aid schemes' (paragraph 24) and that, although 'it cannot therefore be ruled out that the acquisition of a minority interest in a public undertaking, combined with a transfer of the effective control of that undertaking, may be regarded as a "privatisation" for the purposes of the Treuhandanstalt aid schemes' (paragraph 25), that was not the position in the present case as the Treuhandanstalt had in many respects retained control over SMI after Synergy had acquired its shares. The Court also adopted the same solution, on the same grounds, in regard to the loans which the Land of Brandenburg had made to SMI.

The German Government also submitted in the alternative that the derogation provided for in Article 87(2)(c) EC, under which 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 insofar as such aid is required in order to compensate for the economic disadvantages caused by that division, was applicable in this case. The Court also rejected that plea on the ground that the German Government had failed to adduce any evidence to show that the disputed aid was required in order to compensate for an economic disadvantage caused by the division of Germany. The Court pointed out in this regard that 'although, following the reunification of Germany, Article 87(2)(c) EC falls to be applied to the new Länder, such application can only be on the same conditions as those applicable in the old Länder during the period preceding the date of that reunification'. In that regard, as the phrase 'division of Germany' referred historically to the establishment in 1948 of the dividing line between the two occupied zones, the

'economic disadvantages caused by that division' could mean only 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 rupture of commercial relations between the two parts of German territory. By contrast, the idea that Article 87(2)(c) EC permitted full compensation for the undeniable lack of economic development suffered by the new Länder disregarded 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 were not directly caused by the geographical division of Germany within the meaning of Article 87(2)(c) EC and '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' (paragraphs 49 to 53).

In conclusion, the German Government challenged the recovery order contained in the contested decision, on the basis, inter alia, of an unlawful extension of the status of aid beneficiary. It was on this latter point that the contested decision was annulled by the Court. The Court took the view that, by ordering MD & D, as the company acquiring SiMI, to repay the State aid granted to the latter, the Commission had failed to have regard to the principles governing the recovery of State aid. The Court pointed out in this connection that 'where an undertaking that has benefited from unlawful State aid is bought at the market price, that is to say at the highest price which a private investor acting under normal competitive conditions was ready to pay for that company in the situation it was in, in particular after having enjoyed State aid, the aid element was assessed at the market price and included in the purchase price. In such circumstances, the buyer cannot be regarded as having benefited from an advantage in relation to other market operators' (paragraph 80). The Court also annulled the contested decision on the ground that it ordered the hive-off company to repay the aid granted to the company the activity of which it was intended to continue. The Court ruled that, although 'it is certainly possible that, in the event that hive-off companies are created in order to continue some of the activities of the undertaking that received the aid, where that undertaking has gone bankrupt, those companies may also, if necessary, be required to repay the aid in question, where it is established that they actually continue to benefit from the competitive advantage linked with the receipt of the aid. This could be the case, inter alia, where those hive-off companies acquire the assets of the company in liquidation without paying the market price in return or where it is established that the creation of such companies evades the obligation to repay that aid', the mere fact that the plant of the beneficiary undertaking was leased for a certain period by such a company did not necessarily mean that the latter enjoyed the competitive advantage linked with the aid granted to the lessor almost three years before the creation of the lessee (paragraphs 86, 88 and 89). As the obligation imposed on MD & D to repay the aid granted to SMI, as well as its extension to 'any other firm to which SMI's, SiMI's or MD & D's assets have been or will be transferred in order to evade the consequences of this decision', had also been annulled by the Court, SMI and SiMI alone remained under an obligation to repay the aid which had been granted to them respectively.

In Case C-345/02 *Pearle and Others* (judgment of 15 July 2004, not yet published in the ECR), which was a preliminary reference from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), the questions for resolution concerned the

interpretation of Articles 87(1) EC and 88(3) EC and had arisen in proceedings concerning the lawfulness of charges imposed on its members by a trade association governed by public law, the Hoofdbedrijfschap Ambachten (Central Industry Board for Skilled Trades) ('the HBA'), which represented traders in optical equipment. The measure in question consisted of a 'compulsory earmarked levy' to finance a collective advertising campaign for opticians' businesses.

By its first three questions the Hoge Raad der Nederlanden in substance asked whether the funding of advertising campaigns by the HBA for the benefit of opticians' businesses could be regarded as State aid within the meaning of Article 87(1) EC and whether, if necessary taking into account the *de minimis* rule, the HBA's bye-laws imposing levies on its members in order to fund those campaigns ought – as components of an aid scheme – to have been notified to the Commission in accordance with Article 88(3) EC. The Hoge Raad was thus seeking clarification as to whether the compulsory earmarked levies imposed on the appellants in the main proceedings were, because they were directly linked to what might be unnotified aid, also vitiated by unlawfulness, with the result that they had in principle to be reimbursed. By its fourth and fifth questions, the Hoge Raad also asked whether, in circumstances such as those of the dispute in the main proceedings, it was contrary to Community law for the courts with jurisdiction to apply the rule of Netherlands case-law on formal legal force which prevented their remaining able to examine the lawfulness of the HBA's decisions imposing charges on the appellants in the main proceedings where the bye-laws on which those decisions were based were introduced in contravention of Article 88(3) EC.

After establishing that, even if the HBA was a public body, it did not, in the circumstances of the case, appear that the advertising campaign was funded by resources made available to the national authorities; on the contrary, the judgment making the reference made it clear that the monies used by the HBA for the purpose of funding the advertising campaign in question were collected from its members who benefited from the campaign by means of compulsory levies earmarked for the organisation of that advertising campaign, the initiative for which, moreover, came from a private association of opticians, the Court ruled that 'on a proper construction of Articles [87(1) EC and 88(3) EC], bye-laws adopted by a trade association governed by public law for the purpose of funding an advertising campaign organised for the benefit of its members and decided on by them, through resources levied from those members and compulsorily earmarked for the funding of that campaign, do not constitute an integral part of an aid measure within the meaning of those provisions and it was not necessary for prior notification of them to be given to the Commission since it has been established that that funding was carried out by means of resources which that trade association, governed by public law, never had the power to dispose of freely' (paragraph 41). It was for that reason no longer necessary to reply to the last two questions.

**3.8.** In the area of **trade marks**, Case C-363/99 *Koninklijke KPN Nederland* [2004] ECR I-1619 merits attention. On 2 April 1997, the company Koninklijke KPN Nederland lodged with the Benelux Trade Mark Office ('the BTMO') an application for registration of the word 'Postkantoor' ('Post Office' in Dutch) as a trade mark in respect of paper, card and articles manufactured from those materials, in addition to a variety of services. The BTMO refused registration on the ground that the sign was exclusively descriptive of the goods and services relating to a post office. The *Gerechtshof te 's Gravenhage* (Regional

Court of Appeal, The Hague), before which KPN brought an action challenging the decision of the BTMO, referred to the Court for a preliminary ruling a series of questions on the interpretation of the First Directive on Trade Marks.<sup>11</sup>

It was necessary, among other things, to determine whether the fact that a trade mark had been registered in a Member State in respect of certain goods or services had any bearing on the examination in another Member State of an application for registration of a similar mark in respect of similar goods or services. The Court answered that question in the negative: that fact could not have any bearing. The competent authority had to examine the characteristics peculiar to the mark with specific reference to the goods and services concerned. The *Gerechtshof* also asked the Court whether the prohibition of descriptive signs under Article 3(1)(c) of the directive extended to signs or indications designating the characteristics of the goods or services concerned in the case where there were more usual indications for designating the same characteristics. The Court pointed out that, in prohibiting descriptive signs, the aforementioned provision pursued an aim which was in the public interest, namely that such signs or indications may be freely used by all, by preventing them from being reserved to one undertaking alone by being registered as trade marks. In those circumstances, if the competent authority reaches the conclusion that the sign currently represents, in the mind of the relevant class of persons, a description of the characteristics of the goods or services concerned or if it is reasonable to assume that that might be the case in the future, it must refuse to register the mark. It is in that regard irrelevant whether there are other, more usual, signs or indications. In issue is also the fact that, under the Benelux trade mark law, the right to a trade mark expressed in one of the national or regional languages of the Benelux territory extends automatically to its translation in those other languages. The Court took the view that this was in effect equivalent to the registration of several different trade marks. The competent authority must therefore, in such a case, ascertain whether the sign in each of those translations may be descriptive. The Court was also required to rule on the relationship between distinctive and descriptive characteristics. The *Gerechtshof* posed the question as to whether, if a trade mark is descriptive in regard to certain goods or services but is not descriptive in regard to other goods or services, it had to be regarded as necessarily having a distinctive character in relation to those other goods or services. This provided the Court with an opportunity to point out that each of the grounds for refusal listed in that provision is independent of the others and calls for a separate examination, although there is a clear overlap between the scope of the respective provisions. Consequently, the fact that a mark does not fall within one of those grounds does not mean that it cannot fall within another. In addition, the question whether a mark has a distinctive character must be assessed by reference to the goods or services described in the application for registration; where registration of a mark is sought in respect of various goods or services, it is necessary to check that, in regard to each of those goods or services, none of the grounds for refusal of registration applies, which may lead to different conclusions depending on the goods or services under consideration. The Court accordingly found that it is not open to the competent authority to conclude that a mark is not devoid of any distinctive character in relation to certain goods or services purely on the ground that it is descriptive of the characteristics of other goods or services, even where registration is sought in respect of those goods or services as a

<sup>11</sup> First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1).

whole. With regard to the fact that the word 'Postkantoor' is composed of elements, each of which is descriptive of characteristics of the goods or services in respect of which registration was sought, the Court pointed out that, in order for a trade mark to be regarded as descriptive, it is not sufficient that each of its components may be found to be descriptive: the word itself must be found to be so. Although, as a general rule, a mere combination of elements, each of which is descriptive, itself remains descriptive, that may, however, not be the case where that combination creates an impression which is sufficiently far removed from that produced by the simple combination of those descriptive elements, if the word is more than the sum of its parts by reason of the unusual nature of the combination in regard to the goods or services in question, or if the word has become part of everyday language and has acquired its own meaning, with the result that it is now independent of its components (provided that, in that case, the word is not itself descriptive). It should be noted that, on a reference from the Benelux-Gerechtshof (Benelux Court of Justice) in a dispute arising from the refusal by the BTMO to register the sign 'BIOMILD' for foodstuffs on the ground of its descriptive nature, the Court provided a similar answer in Case C-265/00 *Campina Melkunie* [2004] ECR I-1699.

**3.9.** The cases to which attention is to be drawn from among the plentiful case-law concerning Community measures to **harmonise the laws** of the Member States are the three *Fixtures Marketing* cases (judgments of 9 November 2004 in Cases C-46/02, C-338/02 and C-444/02, not yet published in the ECR) and *The British Horseracing Board and Others* (judgment of 9 November 2004 in Case C-203/02, not yet published in the ECR), which related to what is called the *sui generis* right under Directive 96/9<sup>12</sup> and the scope of the legal protection afforded by it in the field of sports betting. A number of questions on the interpretation of provisions of that directive were submitted to the Court for a preliminary ruling, in the course of proceedings which had arisen from the use by certain betting companies, in Sweden, Greece, Finland and the United Kingdom, of information that was published but the exploitation, or organisation, of which had been entrusted to other bodies, the applicants in the main proceedings. In three cases the disputed use consisted in the reproduction on pools coupons of data relating to the fixture lists of the English and Scottish football leagues. These data are stored electronically and published inter alia in printed booklets but the handling of the exploitation of the data had been entrusted, by means of licences, to the applicant in the main proceedings. In the fourth case, the dispute concerned the publication on two internet horserace-betting sites of information derived from newspapers and from raw data supplied by certain companies which had been authorised to do so by the applicant. The latter has the task of managing the horse racing industry in the United Kingdom and in this context compiles and maintains the database whose protection it claimed.

The applicants in the main proceedings took the view that undertakings which use their data in this way for the purpose of taking bets infringe the right conferred on them by their national law, as amended as a result of implementation of the directive on the legal protection of databases. As implementing measures, the relevant national provisions had to be interpreted in light of the directive.

<sup>12</sup> Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ 1996 L 77, p. 20).

In those proceedings which had been brought before them, the Vantaan Käräjäoikeus (Vantaa District Court, Finland), the Court of Appeal (England and Wales), the Högsta Domstolen (Supreme Court, Sweden) and the Monomeles Protodikio Athinon (Court of First Instance, Athens, Greece) referred to the Court of Justice for a preliminary ruling a number of questions on the subject-matter and scope of the protection established by the directive, in particular of Article 7(1) of the directive granting the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents the right to prevent extraction and/or reutilisation of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.

Asked by the four national courts as to what is covered by the condition of ‘substantial investment’ under that provision, the Court held that ‘the expression “investment in ... the obtaining ... of the contents” of a database as defined in Article 7(1) of the directive must be understood to refer to the resources used to seek out existing independent materials and collect them in the database’ and that ‘it does not cover the resources used for the creation of materials which make up the contents of a database’ (Cases C-46/02, C-338/02, C-444/02 and C-203/02, paragraph 1 of the operative part). The Court thus held that ‘in the context of drawing up a fixture list for the purpose of organising football league fixtures, therefore, it does not cover the resources used to establish the dates, times and the team pairings for the various matches in the league’. The obtaining of the data which make up those football fixture lists does not require any particular effort on the part of the professional leagues, being indivisibly linked to the creation of those data, and the resources used for verification or presentation of a fixture list also do not entail substantial investment independent of the investment in the creation of its constituent data (Cases C-46/02, C-338/02 and C-444/02). The Court also made it clear in the case concerning horserace betting that ‘the expression “investment in ... the ... verification ... of the contents” of a database in Article 7(1) of the directive must be understood to refer to the resources used, with a view to ensuring the reliability of the information contained in that database, to monitor the accuracy of the materials collected when the database was created and during its operation’ and that ‘the resources used for verification during the stage of creation of materials which are subsequently collected in a database do not fall within that definition’ (Case C-203/02, paragraph 42). The Court thus held there that ‘the resources used to draw up a list of horses in a race and to carry out checks in that connection do not constitute investment in the obtaining and verification of the contents of the database in which that list appears’ (Case C-203/02, paragraph 42).

**3.10.** In the field of **social policy**, two judgments are worthy of specific mention. In the first of these cases (judgment of 30 March 2004 in Case C-147/02 *Alabaster*, [2004] ECR I-3101), the Court was asked by the Court of Appeal about the taking into account of a pay rise when calculating statutory maternity pay.

In the case in point, Mrs Alabaster, an employee in the United Kingdom, commenced maternity leave in January 1996. Shortly before it began, she received a pay increase backdated so as to have effect from December 1995. However, that increase could not be reflected in the calculation of her statutory maternity pay since the applicable national legislation has regard to an earlier period, corresponding to the months of September and October, for calculating normal earnings.

The Court found first of all that Directive 92/85<sup>13</sup> did not provide a useful reply to the questions asked by the national court. However, after considering all the Community legislation it succeeded in establishing the general principles applicable to the case. The Court's reasoning is essentially founded on Article 141 EC and on Directive 75/117.<sup>14</sup>

The benefit paid to a pregnant woman during her maternity leave is to be treated like pay. She cannot of course claim full pay since she is in a special position compared with workers actually at work. That is a standard application of the principle of equal treatment. Nevertheless, since the benefit paid is equivalent to pay (see to this effect Case C-342/93 *Gillespie and Others* [1996] ECR I-475), the principle of non-discrimination results in her being entitled to the increase since, had she not been pregnant, she would have received a pay rise. That requirement is not limited to cases where the pay rise is backdated to the period covered by the reference pay. This is an application of the principle of equal pay for men and women.

The Court refused, however, to express a view on the precise manner in which that principle was to be implemented since this fell outside its jurisdiction in proceedings for a preliminary ruling.

It also refused to take a view on the standpoint to be adopted in the event of a decrease in pay since that question appeared hypothetical in the case in point. This question therefore remains open.

In the second judgment, namely the judgment of 5 October 2004 in Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others*, not yet published in the ECR, which develops the judgment in Case C-151/02 *Jaeger* [2003] ECR I-8389 concerning time spent by doctors on call, the Court held that the maximum weekly working time for rescue workers in an emergency medical rescue service cannot exceed 48 hours.

In Joined Cases C-397/01 to C-403/01, Mr Pfeiffer and the other claimants were, or had been, employed as emergency workers by the German Red Cross, a private-law body which operates a land-based rescue service using ambulances and emergency medical vehicles. In their various contracts of employment with their employer, it was agreed that a collective agreement was to apply, by virtue of which their average weekly working time was, when account was taken of their obligation to spend an average of at least three hours per day 'on duty', extended from 38.5 hours to 49 hours. During those periods of duty time, the emergency workers concerned had to make themselves available to their employer at the place of employment and remain continuously attentive in order to be able to act immediately should the need arise.

The workers concerned brought an action before the Arbeitsgericht Lörrach (Labour Court, Lörrach) for a declaration that their average weekly working time could not exceed

<sup>13</sup> Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1).

<sup>14</sup> 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).

the 48-hour limit laid down by Directive 93/104<sup>15</sup> and for payment for the hours they worked in excess of that weekly limit. The German court requested guidance from the Court of Justice in this regard. The questions referred by it for a preliminary ruling relate to the interpretation of certain provisions of Directives 89/391<sup>16</sup> and 93/104.

The Court began by stating that the activity of emergency workers carried out in the framework of an emergency medical service falls within the scope of Directives 89/391 and 93/104. None of the exceptions provided for is relevant in this instance. Their activity does not involve services essential for the protection of public health, safety and order in cases, such as a catastrophe, the gravity and scale of which are exceptional and which, by their nature, do not lend themselves to planning as regards working time; nor does their activity involve road transport services, its main aim being to provide initial medical treatment to the sick or injured. That being so, the Court held that an extension of the 48-hour maximum weekly period of working time can be valid only if consent has first been expressly and freely given by each worker individually and that it is therefore not sufficient that the relevant worker's employment contract refers to a collective agreement permitting such an extension.

Applying its decision in *Jaeger*, the Court, treating emergency workers' periods of duty time in the same way as time spent by doctors on call, then held that such periods must be taken into account in their totality in the calculation of maximum daily and weekly working time. It stated that the 48-hour upper limit on average weekly working time, including overtime, constitutes a rule of Community social law of particular importance from which every worker must benefit, since it is a minimum requirement necessary to ensure protection of his safety and health. Therefore, national legislation the effect of which, as regards periods of duty time completed by emergency workers, is to permit, including by means of a collective agreement or works agreement based on such an agreement, the 48-hour maximum period of weekly working time to be exceeded is incompatible with the requirements of Directive 93/104.

Finally the Court found, in standard fashion, that Directive 93/104 fulfils, so far as the maximum period of weekly working time is concerned, the conditions necessary for it to have direct effect since, as regards its content, it is unconditional and sufficiently precise. While it is true that a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual, the Court recalled, however, the principle that national law must be interpreted in conformity with Community law and held that, when hearing a case between individuals, a national court is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive. Applied to the present instance, that principle had to lead the national court to do whatever lay within its jurisdiction to ensure that the maximum period of weekly working time set at 48 hours was not exceeded.

<sup>15</sup> Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18).

<sup>16</sup> Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1).

**3.11.** Finally, the Court also had to act in the field of **economic and monetary policy**. In its judgment of 13 July 2004 in Case C-27/04 *Commission v Council*, not yet published in the ECR, it was called on to address implementation of the Stability Pact. It will be recalled that, in June 1997 in Amsterdam, the European Council, with a view to completing Economic and Monetary Union, adopted a resolution on the Stability and Growth Pact, the objective of which is to prevent excessive deficits from arising and to ensure sound management of public finances in the euro zone. It was in this context that, in 2003, an excessive deficit procedure was initiated against France and against Germany.

On a recommendation from the Commission, the Council found that an excessive deficit existed in both those States. It therefore adopted two recommendations asking them to reduce their deficits and setting a deadline for the adoption of corrective measures (on the basis of Article 104(7) EC). After those periods had expired, the Commission recommended to the Council that it adopt decisions establishing that neither France nor Germany had taken adequate measures to reduce their deficit in response to the Council's recommendations. The Commission thus requested the Council to give the two Member States concerned notice to take measures to reduce their deficit (Article 104(9) EC). However, on 25 November 2003 the Council, unable to achieve the majority required for taking that decision, merely adopted conclusions in which it decided to hold the excessive deficit procedures in abeyance and declared itself ready to take a decision under Article 104(9) EC should it appear that the relevant Member State was not complying with the commitments entered into by it. Faced with what it considered to be a breach of the Treaty rules, in January 2004 the Commission brought an action challenging both the Council's failure to adopt a decision and its conclusions.

So far as concerns, first, the Council's inability to adopt the decision recommended by the Commission, the Court declared this part of the action inadmissible. It held that failure by the Council to adopt acts provided for in Article 104(8) and (9) EC that are recommended by the Commission cannot be regarded as giving rise to acts open to challenge for the purposes of Article 230 EC. Where the Commission recommends to the Council that it adopt decisions under Article 104(8) and (9) EC and the required majority is not achieved within the Council, no decision is taken for the purpose of those provisions. The Court added as an incidental point that '... if the Council does not adopt formal instruments recommended by the Commission pursuant to Article 104(8) and (9) EC, the latter can have recourse to the legal remedy provided for by Article 232 EC, in compliance with the conditions prescribed therein' (paragraph 35).

On the other hand, the action was declared admissible in so far as it was directed against the Council's conclusions. They were indeed intended to have legal effects, at the very least inasmuch as they held the ongoing excessive deficit procedures in abeyance and in reality modified the recommendations previously adopted by the Council under Article 104(7) EC. The Court stated that the Council had rendered any decision to be taken under Article 104(9) EC conditional on an assessment which would no longer have the content of the recommendations adopted under Article 104(7) EC as its frame of reference, but the unilateral commitments of the Member State concerned.

The Court then held that the Council had not complied with procedural rules. Since the decision contained in the conclusions involved modification of the recommendations

adopted by the Council under Article 104(7) EC, it constituted a breach of Article 104(7) and (13) EC, that is to say a breach of the Commission's right of initiative and of the voting rules. The Court stated that '... it follows from the wording and the broad logic of the system established by the Treaty that the Council cannot break free from the rules laid down by Article 104 EC and those which it set for itself in Regulation No 1467/97. Thus, it cannot have recourse to an alternative procedure, for example in order to adopt a measure which would not be the very decision envisaged at a given stage or which would be adopted in conditions different from those required by the applicable provisions.'

In Case C-19/03 *Verbraucher-Zentrale Hamburg* (judgment of 14 September 2004, not yet published in the ECR), the Landgericht München (Regional Court, Munich) submitted a reference for a preliminary ruling on the interpretation of Regulation No 1103/97<sup>17</sup> to the Court of Justice in proceedings between a Germany association responsible for the taking of legal action with regard to breach of consumer protection laws (the *Verbraucher-Zentrale*) and O2, an undertaking which operates a mobile telephone network.

The case involved determining whether the method applied by O2 for converting into euros amounts hitherto expressed in deutschmarks was compatible with that regulation. O2 converted the price per minute of its various tariffs by rounding them to the nearest cent, and in fact rounded the relevant tariff up to the nearest cent.

Article 5 of Regulation No 1103/97 states that 'monetary amounts to be paid or accounted for when a rounding takes place after a conversion into the euro unit ... shall be rounded up or down to the nearest cent'.

The Court had to decide first whether a tariff, such as the per-minute price at which O2 invoiced its customers' telephone calls, is a monetary amount to be paid or accounted for within the meaning of the first sentence of Article 5 of Regulation No 1103/97 or whether it is only the final sum for which the consumer is actually invoiced which may constitute such an amount.

Since Community law does not define those concepts, the Court had recourse to the teleological method of interpretation and thus concerned itself with the aims of the measure in question. Two general principles of law are identifiable in Regulation No 1103/97: the need to protect citizens' legal certainty at the time of transition to the euro and the correlative requirement that the continuity of contracts and other legal instruments should not be affected, these principles sharing a general objective pursued when introducing the new single currency, namely that the transition to the euro should be neutral for citizens and undertakings. As the 12th recital in the preamble to the regulation suggests, that objective requires that 'a high degree of accuracy in conversion operations' be achieved.

Having regard to those objectives, the Court interpreted Regulation No 1103/97 restrictively and ruled that 'a tariff, such as the per-minute price at issue in the main proceedings, does not constitute a monetary amount to be paid or accounted for within

<sup>17</sup> Council Regulation (EC) No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro (OJ 1997 L 162, p. 1).

the meaning of the first sentence of Article 5 of ... Regulation ... No 1103/97 ... and thus is not to be rounded in every case to the nearest cent. ...' (paragraph 1 of the operative part).

Second, the question then arose as to whether Regulation No 1103/97, in particular the first sentence of Article 5, must be taken to preclude the rounding to the nearest cent of amounts other than those which must be paid or accounted for. While the Court held that it is not fundamentally precluded, this is, however, only '... provided that that rounding practice is consistent with the principle of continuity of contracts ... and with the objective ... that the transition to the euro should be neutral; in other words, provided that the rounding practice does not affect contractual obligations entered into by economic agents, including consumers, and that it does not have a real impact on the price actually to be paid' (paragraph 2 of the operative part).

In the case in point, the Court stated that the conversion in question is 'liable to have a real impact on the price actually borne by consumers' (paragraph 54). It did not take this interpretation beyond that point, leaving it to the national court to ascertain whether there had been a 'real impact on prices'.