

## A — The Court of Justice in 2005: changes and proceedings

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This part of the Annual Report gives an overview of the activity of the Court of Justice of the European Communities in 2005. It describes, first, how the Court developed during that year, with the emphasis on the institutional changes which have affected the operation of the Court and also on the changes in its internal organisation and working methods (section 1). It includes, second, a statistical analysis of developments regarding the Court's workload and the average duration of proceedings (section 2). It presents, third, as each year, the main developments in the case-law, arranged by subject matter (section 3).

**1.** The main development in 2005 for the Court as an institution was that the European Union Civil Service Tribunal began operating (section 1.1). Also deserving of attention are the amendments to the Protocol on the Statute of the Court of Justice and to the Rules of Procedure (section 1.2).

**1.1.** The creation of the European Union Civil Service Tribunal by Council decision of 2 November 2004 and the entry of its seven members into office were important moments for the institution. They follow on from the changes made by the Treaty of Nice to the European Union's judicial structure. The Civil Service Tribunal is the first specialised panel set up pursuant to the second paragraph of Article 220 EC and Article 225a EC.

Staff cases have constituted a significant part of the workload of the Court of First Instance, to which the new tribunal is attached. For the Court of Justice, appeals brought against decisions of the Court of First Instance in staff cases have, proportionally, represented a less heavy load. The creation of the new tribunal is therefore principally designed to lighten the workload of the Court of First Instance, which was increased following the transfer to it in 2004, pursuant to the Treaty of Nice, of jurisdiction to hear certain categories of direct actions which previously fell within the Court of Justice's jurisdiction.

The third part of this report contains a detailed account by the President of the Civil Service Tribunal of the first steps taken by it in 2005.

**1.2.** As regards amendments to instruments governing procedural matters, it should be noted, first, that creation of the Civil Service Tribunal made it necessary to insert into the Protocol on the Statute of the Court of Justice certain specific provisions relating to the procedure for review by the Court of Justice of decisions given by the Court of First Instance on appeal. Thus, by Council decision of 3 October 2005, Article 62a and Article 62b were inserted into the Protocol on the Statute of the Court of Justice; in particular, these articles lay down general rules relating to the urgent nature of that procedure, to the written and oral phases of the procedure and to the possibility of its having suspensory effect.

Also, the thought given by the Court to the conduct of proceedings and to its working methods had prompted it in 2004 to propose certain amendments to its Rules of Procedure, with a view to shortening the duration of proceedings. Following a discussion within the Council, those amendments were adopted on 12 July 2005 and entered into force on 1 October 2005. They relate, first, to Article 37(7) of the Rules of Procedure which now ena-

bles the Court to determine the criteria for deeming a procedural document sent by electronic means to be the original of that document. Second, they concern Article 104(1) of the Rules of Procedure which henceforth enables the Court not to translate, into all the official languages, orders for reference in their entirety where they are particularly long. In such a case, the translation of the order for reference in its entirety is replaced by the translation of a summary into the official language of the States to which the summaries are sent. Third, the amendment of Articles 44a, 104(4) and 120 of the Rules of Procedure, reducing the time limit for submitting an application requesting a hearing from one month to three weeks, should also be noted.

Finally, another set of amendments to the Rules of Procedure proposed by the Court in 2005 was approved by the Council on 18 October 2005 and entered into force on 1 December 2005. These amendments include, in particular, the abolition of 'Chambers of inquiry', a formation which had become obsolete (amendment of Articles 9(2), 44(5), 45(3), 46, 60, 74(1) and 76(3)), the amendment of Articles 11b(1) and 11c(1), which seek to ensure that judges' participation in the Grand Chamber and other formations of the Court is shared more equitably, and, lastly, the designation of two substitute judges in cases which are assigned to the Grand Chamber between the beginning of a year in which there is a partial replacement of judges and the moment when that replacement takes place.

**2.** The cumulative impact of the measures adopted to improve the effectiveness of the Court's working methods and of the arrival of 10 new judges following enlargement remains very evident in the statistics concerning the Court's judicial activity in 2005. A reduction of approximately 12 % in the number of cases pending and a very substantial decrease in the duration of proceedings before the Court may be noted.

The Court completed 512 cases in 2005 (net figure, that is to say, taking account of the joinder of cases). Of those cases, 362 were dealt with by judgments and 150 gave rise to orders. The number of judgments delivered in 2005 corresponds roughly with the number delivered in 2004 (375 judgments); the number of orders made went down.

The Court had 474 new cases brought before it (531 in 2004, gross figures). The number of cases pending at the end of 2005 was 740 (gross figure), compared with 840 at the close of 2004 and 974 at the close of 2003. In other words, the Court has managed to reduce the number of cases pending by approximately 24 %, in just two years.

The reduction of the duration of proceedings, already observed in 2004, is even clearer in 2005 for references for a preliminary ruling: the average time taken to deal with a reference went down from 23.5 months to 20.4 months. The average time taken to deal with direct actions and appeals was 21 months. It should be noted that in 2003 the average time taken was 25 months for references for a preliminary ruling and direct actions and 28 months for appeals.

In the course of the past year the Court has made judicious use 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). Use of the expedited or accelerated procedure was requested in six cases, but the requirement of exceptional urgency laid

down by the Rules of Procedure was not satisfied. Following a practice established in 2004, requests for the use of the expedited or accelerated procedure are granted or refused by reasoned order of the President of the Court.

The Court continued to use the simplified procedure laid down in Article 104(3) of the Rules of Procedure for answering certain questions referred to it for a preliminary ruling. It made 12 orders on the basis of that provision, bringing a total of 29 cases to a close.

In addition, the Court made fairly frequent use of the possibility offered to it by Article 20 of the Statute of determining cases without an Opinion of the Advocate General where they do not raise any new point of law. About 35 % of the judgments delivered in 2005 were delivered without an Opinion (compared with 30 % in 2004).

As regards the distribution of cases between the various formations of the Court, it may be noted that the Grand Chamber and the full Court dealt with nearly 13 %, and Chambers of five judges with 54 %, of the cases brought to a close in 2005, while Chambers of three judges dealt with 33 % of the cases. Apart from a marginal increase in cases dealt with by the Grand Chamber, the respective percentage of cases dealt with by each type of formation of the Court remained unchanged from 2004.

For further information regarding the statistics for the 2005 judicial year, the reader is referred to Chapter V of this report.

**3.** This section presents the main developments in the case-law, arranged by subject as follows:

- law of the institutions
- prohibition of all discrimination on grounds of nationality, and citizenship of the Union
- free movement of goods
- agriculture
- freedom of movement for workers
- freedom of establishment and freedom to provide services
- free movement of capital
- competition rules
- harmonisation of laws
- social law
- company law
- environment.

It should be pointed out that a judgment, classified under a given subject, may broach issues of great interest in relation to another subject.

**3.1.** Six of the judgments dealing with **constitutional** or **institutional** issues are worthy of note: two of them concerned framework decisions under Title VI of the Treaty on European

Union ('third pillar'), while the four others concerned (i) the effects of a partnership agreement between the Community and a non-Member State, (ii) the division of implementing powers as between the Council and the Commission, (iii) the conditions governing the admissibility of an application for annulment and (iv) the powers of the Court in an action against a Member State which has not complied with a judgment establishing a breach of obligations on the part of that Member State.

In Case C-105/03 *Pupino* (judgment of 16 June 2005, not yet published in the ECR), the Court was requested by the judge in charge of preliminary enquiries at the Tribunale di Firenze (District Court, Florence, Italy) to give a preliminary ruling on Title VI of the Treaty on European Union. A criminal case had been brought before the Tribunale di Firenze concerning a school teacher, Mrs Pupino, who was accused of mistreating minors, who, at the material time, were under five years of age.

At the preliminary enquiry stage, the judge making the reference had gathered evidence from the victims, who were minors. Under Italian procedural law, material gathered during the preliminary enquiry stage is considered evidence in the technical sense only when it is subjected to cross-examination during the second stage of the proceedings, the trial. However, Articles 392(1) and 398(5) of the Italian Code of Criminal Procedure ('CCP') provide for an exception where minors under 16 years of age have been the victim of certain crimes (which are restrictively set out in the legislation), such as sexual abuse. In such cases, in order to protect the victims the witness statements taken during the first stage of the proceedings constitute evidence without it being necessary to subject them to the adversarial principle. On that basis the Public Prosecutor's Office requested that this exception should apply to Mrs Pupino's case so that the minors, in view of their psychological trauma, would not have to face the accused.

The articles of the CCP laying down the exception in the matter of evidence were adopted after Framework Decision 2001/220/JHA <sup>(1)</sup>, which provides for recognition of the rights of victims (Article 2), for the possibility for victims to be heard (Article 3) and also for the protection of victims, in particular from the effects of giving evidence in public (Article 8).

The referring court decided to stay the proceedings and to ask the Court for a preliminary ruling on the scope of Articles 2, 3 and 8 of the framework decision, in order to examine the possibility of extending the exception from the CCP to the present case and of interpreting Italian law in the light of the Community framework decision.

Following an initial analysis of its jurisdiction to give a preliminary ruling under Article 35(2) EU, the Court considered the objection of inadmissibility raised by the French and Italian Governments, which alleged that the Court's answer would not be useful in resolving the dispute in the main proceedings. The French Government argued that the national court was seeking to apply the framework decision directly, whereas framework decisions do not have direct effect, in accordance with Article 34(2)(b) EU. The Court observed in this regard that there is a presumption of relevance attaching to questions referred for a preliminary ruling, which may be rebutted only in exceptional cases, where the interpretation

<sup>(1)</sup> Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings (OJ L 82, 22.3.2001, p. 1, 'the Framework Decision').

sought bears no relation to the actual facts of the main action or to its purpose, or 'where the problem is hypothetical and the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted'.

The Court rejected the objection of inadmissibility, holding that the wording of Article 34(2)(b) EU confers a binding character on framework decisions, which entails an obligation for national authorities to interpret national law in conformity, as in the case of directives, under the third paragraph of Article 249 EC. Therefore, when applying national law, 'the national court that is called upon to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues'. The obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law is, however, limited 'by general principles of law, particularly those of legal certainty and non-retroactivity'. Likewise, 'the principle of conforming interpretation cannot serve as the basis for an interpretation of national law *contra legem*'. That principle does, however, require that, where necessary, the national court consider the whole of national law in order to assess how far it can be applied in such a way as not to produce a result contrary to that envisaged by the framework decision.'

Therefore, although framework decisions are intergovernmental in character inasmuch as they are part of the third pillar and although they do not have direct effect, the national law incorporating them can be interpreted in the light of their wording and purpose. That is in keeping with the intention of the Member States to create an 'ever closer union', which has recourse to legal instruments with effects similar to those provided for by the EC Treaty which are concerned with further integration (paragraph 36).

The Court concluded that the provisions of the Framework Decision had to be interpreted as meaning that the competent national court had to be able to authorise young children, who claimed to have been victims of mistreatment, to give their testimony in accordance with arrangements allowing those children to be guaranteed an appropriate level of protection, for example outside the trial and before it took place.

In Case C-176/03 *Commission v Council* (judgment of 13 September 2005, not yet published in the ECR) an action for annulment of Framework Decision 2003/80/JHA <sup>(2)</sup> was brought before the Court.

Framework Decision 2003/80/JHA was adopted on the basis of Title VI of the Treaty on European Union, in particular Articles 29 EU, 31(e) EU and 34(2)(b) EU, as worded prior to the entry into force of the Treaty of Nice, in order to respond with concerted action to the disturbing increase in offences posing a threat to the environment. Articles 2 and 3 provide that the Member States are to prescribe criminal penalties for seven types of environmental offences committed either intentionally or negligently. Article 4 provides for the classification as offences of forms of participating in, and of instigating, offending conduct. Under Article 5 of the framework decision, the criminal penalties laid down must be 'effective, proportionate and dissuasive'. Article 5(1) of the framework decision provides

<sup>(2)</sup> Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law (OJ L 29, 5.2.2003, p. 55).

that serious offences are to be punished with penalties involving deprivation of liberty which can give rise to extradition. Article 6 governs the liability, for an act or omission, of legal persons in respect of the offences set out in Articles 2 to 4, whilst Article 7 makes them subject to 'effective, proportionate and dissuasive' penalties. Article 7 sets out five specific criminal penalties where legal persons are found liable for those offences.

Before the contested framework decision was adopted, the Commission had presented a proposal for a directive of the European Parliament and of the Council on the basis of Article 175(1) EC on the protection of the environment through criminal law. The European Parliament had expressed its view on both pieces of legislation and had called on the Council (i) to use the framework decision as a measure complementing the directive that would take effect in relation to the protection of the environment through criminal law solely in respect of judicial cooperation and (ii) to refrain from adopting the framework decision before adoption of the proposed directive. The Council did not adopt the proposed directive but instead adopted the framework decision, mentioning the proposal for a directive in the fifth and seventh recitals and stating that a majority of its members had taken the view that the proposal went beyond the powers attributed to the Community, since its objective was to require the Member States to provide for criminal sanctions. The Commission had expressed its disagreement on this point.

Before the Court, in support of its application for annulment of the framework decision, the Commission challenged the choice of the abovementioned provisions of the Treaty on European Union as the legal basis for Articles 1 to 7 of the framework decision. It pointed out that, under Article 2 EC, the Community is competent to require the Member States to impose penalties at national level — including criminal penalties if appropriate — where that proves necessary in order to attain a Community objective.

The Council replied that the division of powers in criminal matters as between the Member States and the European Community is clearly established and that the Court has never obliged the Member States to adopt criminal penalties.

The Court began by observing that it is its task to ensure that acts which, according to the Council, fall within the scope of Title VI of the Treaty on European Union do not encroach upon the powers conferred by the EC Treaty on the Community.

In relation to the specific problem before it, the Court noted that protection of the environment constitutes one of the objectives of the Community, fundamental in nature and extending across Community policies and activities. The Court also noted that Articles 174 to 176 EC provide the appropriate instruments for achieving that objective, pointing out that the measures referred to in the three indents of the first subparagraph of Article 175(2) EC all imply the involvement of the Community institutions in areas such as fiscal policy, energy policy or town and country planning policy, in which, apart from Community policy on the environment, either the Community has no legislative powers or unanimity within the Council is required.

The Court then applied its settled case-law, according to which the choice of the legal basis for a Community measure must rest on objective factors which are amenable to judicial review, including in particular the aim and the content of the measure, and noted

that the objective of the framework decision was the protection of the environment and that Articles 2 to 7 thereof entailed partial harmonisation of the criminal laws of the Member States, a sphere in which, as a general rule, the Community does not have competence. The Court held that the last-mentioned finding does not, however, prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules that it lays down on environmental protection are fully effective. Since those conditions were specifically met in the present case, Articles 1 to 7 of the framework decision could have been properly adopted on the basis of Article 175 EC and therefore the entire framework decision, being indivisible, infringed Article 47 EU as it encroached on the powers which Article 175 EC confers on the Community. The framework decision had to be annulled.

In a similar vein to Case C-438/00 *Deutscher Handballbund* [2003] ECR I-4135, Case C-265/03 *Simutenkov* (judgment of 12 April 2005, not yet published in the ECR) gave the Court an opportunity to rule, for the first time, on the effects of a partnership agreement between the European Community and a non-Member State.

Igor Simutenkov was a Russian national who had a residence permit and a work permit in Spain. Employed as a professional football player under an employment contract entered into with Club Deportivo Tenerife, he held a federation licence as a non-Community player issued by the Spanish Football Federation.

According to the Federation's rules, clubs may field in competitions at national level only a limited number of players from countries which do not belong to the European Economic Area. Mr Simutenkov requested that his licence be replaced by a licence as a Community player, basing his application on the EC–Russian Federation Partnership Agreement, which, in relation to working conditions, prohibits discrimination of a Russian national based on nationality. The Federation rejected Mr Simutenkov's application. The Spanish court dealing with the case referred a question to the Court for a preliminary ruling in order to ascertain whether the rules of the Spanish Football Federation were compatible with the agreement.

Having established that the principle of non-discrimination laid down by Article 23(1) of the EC–Russia Partnership Agreement could be relied on by an individual before the national courts, the Court considered the scope of that principle.

It noted, first, that the agreement in question establishes, for the benefit of Russian workers lawfully employed in the territory of a Member State, a right to equal treatment in working conditions of the same scope as that which, in similar terms, nationals of Member States are recognised as having under the EC Treaty. That right precludes any limitation based on nationality, such as that in issue, as the Court established in similar circumstances in its judgments in *Bosman* and *Deutscher Handballbund*.

The Court went on to note that the limitation based on nationality did not relate to specific matches between teams representing their respective countries but applied to official

matches between clubs and thus to the essence of the activity performed by professional players. Such a limitation was therefore not justified on sporting grounds.

Therefore, Article 23(1) of the EC–Russian Federation Partnership Agreement precluded the application to a professional sportsman of Russian nationality, who was lawfully employed by a club established in a Member State, of a rule drawn up by a sports federation of that State which provided that clubs could field in competitions organised at national level only a limited number of players from countries which were not parties to the Agreement on the European Economic Area.

In Case C-257/01 *Commission v Council* (judgment of 18 January 2005, not yet published in the ECR), the Court adjudicated on an application for annulment brought by the Commission against two Council regulations reserving to the Council implementing powers in respect of certain detailed provisions and practical procedures, first, for examining visas (Regulation (EC) No 789/2001) <sup>(3)</sup> and, second, for carrying out border checks and surveillance (Regulation (EC) No 790/2001) <sup>(4)</sup>.

In relation to the division of powers between the Council and the Commission with regard to the issue of visas and border control, the Treaty of Amsterdam provided, in Articles 62 and 67, for a transitional period of five years following its entry into force, for the Council to define the Commission's implementing powers in certain areas of the third pillar. At the time of the integration of the third pillar, and in particular of the Schengen *acquis*, into the Community framework, Council Decision 1999/468/EC ('the second comitology decision') was adopted as the legal basis for the delineation of the implementing powers conferred on the Commission. The Common Manual as regards border checks ('CM') and the Common Consular Instructions as regards visa applications ('CCI'), which lay down the practical procedures for application of the Convention implementing the Schengen Agreement <sup>(5)</sup> ('CISA'), and the annexes thereto, were integrated into the Community framework. It was in order to provide a framework for amendments to the CM and the CCI, and the annexes thereto, that the Council adopted the regulations at issue in the present case.

The two contested regulations are identical in structure, the objective being to reserve power to the Council, first, in respect of implementing measures with regard to border checks and visas and, second, for the purpose of amending and updating the CM, the CCI and the annexes to them. The eighth recital in the preamble to Regulation (EC) No 789/2001 and the fifth recital in the preamble to Regulation (EC) No 790/2001 provide that, because of the enhanced role of the Member States in respect of visa policy and border

<sup>(3)</sup> Council Regulation (EC) No 789/2001 of 24 April 2001 reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for examining visa applications (OJ L 116, 26.4.2001, p. 2).

<sup>(4)</sup> Council Regulation (EC) No 790/2001 of 24 April 2001 reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for carrying out border checks and surveillance (OJ L 116, 26.4.2001, p. 5).

<sup>(5)</sup> Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ L 239, 22.9.2000, p. 19).

policy, the Council reserves the 'right to adopt, amend and update the detailed provisions and practical procedures'. Those provisions are listed in Article 1 of each regulation. Article 2 of each of the regulations establishes a procedure by which the Member States are to communicate to the Council such amendments as they wish to make to certain parts of the annexes to the CM and the CCI.

The Commission sought annulment of the regulations on the ground that they infringed Article 202 EC and Article 1 of the second comitology decision, which establish the principle that it is the Commission which exercises implementing powers. In that connection, it submitted that the Council had provided a 'generic statement of reasons' in the preambles to the regulations at issue, whilst it was required to state specifically the nature and the content of the implementing powers which it was reserving to itself. In such a case there was an obligation to state detailed reasons by virtue of Article 253 EC and the case-law of the Court (Case 16/88 *Commission v Council* [1989] ECR 3457, paragraph 10). Moreover, matters such as external borders and immigration had been brought within the Community framework and consequently were now covered by the procedure in Article 202 EC. However, Article 2 of each of the regulations conferred power on the Member States to amend certain provisions of the CCI, the CM and the annexes to them. The Council responded that the areas which had recently been brought within the Community framework were sensitive areas in which the Member States wished to retain their powers. Moreover, Article 1 of each regulation clearly and exhaustively defined the areas in which the Council alone had implementing powers. Finally, with regard to the updating of the information in the CM, the CCI and the annexes thereto, only the Member States were in a position to provide the information needed to update those documents, which was why power was reserved.

The Court, which did not follow the Opinion of the Advocate General, approved the Council's reasoning and dismissed the Commission's application for annulment.

In the first place, the Court observed that, under Article 202 EC and Article 1 of the second comitology decision, the Commission has power to adopt measures implementing a basic instrument. By contrast, the Council 'must properly explain, by reference to the nature and content of the basic instrument to be implemented or amended, [any] exception ... to [that] rule'. In this respect, the preambles to Regulations (EC) Nos 789/2001 and 790/2001 referred specifically to the enhanced role of the Member States in respect of visas and border surveillance and to the sensitivity of those areas, in particular as regards political relations with non-Member States. The Council could thus 'reasonably consider itself to be concerned with a specific case and ... duly stated the reasons, in accordance with Article 253 EC, for its decision to reserve to itself, on a transitional basis, power to implement a series of provisions exhaustively listed in the CCI and the CM'.

In relation to Article 2 of each of the regulations, the Court confirmed, in the second place, that since the CM and the CCI had been adopted at a time when the area concerned was a matter for intergovernmental cooperation, 'their integration into the framework of the European Union with effect from the entry into force of the Treaty of Amsterdam did not, of itself, result in the Member States being immediately stripped of the powers which they were entitled to exercise under those instruments in order to ensure their proper implementation'.

Consequently, the Court concluded that 'in that quite specific and transitional situation, prior to the evolution of the Schengen *acquis* within the legal and institutional framework of the European Union, no objection could be made to the Council having established a procedure for the transmission by the Member States of amendments which they are authorised to make, unilaterally or in collaboration with the other Member States, to certain provisions of the CCI or the CM, the contents of which depend exclusively on information which they alone possess,' since it had not been established that that it was appropriate to use a uniform updating procedure in order to secure effective or correct implementation.

In Case C-141/02 P *Commission v T-Mobile Austria GmbH* [2005] ECR I-1283, the Court heard an appeal brought by the Commission against the judgment of the Court of First Instance in Case T-54/99 *max.mobil Telekommunikation Service v Commission* [2002] ECR II-313, by which the Court of First Instance had declared admissible the application brought by the company max.mobil Telekommunikation Service GmbH, which had since become T-Mobile Austria GmbH, for annulment of a Commission letter by which the Commission refused to institute infringement proceedings against the Republic of Austria. The max.mobil company had lodged a complaint with the Commission seeking, among other things, a finding that the Republic of Austria had infringed the combined provisions of Articles 86 and 90(1) of the EC Treaty (now Articles 82 EC and 86(1) EC). That complaint related essentially to the lack of any distinction between the fee charged to max.mobil and that charged to one of its competitors and to the fee payment advantages enjoyed by the competitor.

After the Commission had informed max.mobil by letter that it was rejecting its complaint in part, max.mobil brought an action against that letter. The Commission then raised an objection of inadmissibility in relation to that action on the basis of Article 114(1) of the Rules of Procedure of the Court of First Instance. Although the Court of First Instance upheld the admissibility of the action brought by max.mobil, it dismissed the case on the merits. The Commission nonetheless decided to appeal against the judgment of the Court of First Instance seeking to have it set aside in so far as it declared admissible the action brought by max.mobil. The max.mobil company, however, took the view that, as the Commission had been successful, the second paragraph of Article 49 of the EC Statute of the Court of Justice applied and precluded the admissibility of the Commission's appeal.

The Court rejected the objection of inadmissibility raised by max.mobil against the Commission's appeal. It recalled, in that respect, that decisions which dispose of a procedural issue concerning a plea of inadmissibility, within the terms of the first paragraph of Article 49 of the EC Statute of the Court of Justice, adversely affect one of the parties when they uphold or reject that plea of inadmissibility and thus held admissible an appeal by the Commission against the part of a judgment of the Court of First Instance expressly rejecting the plea of inadmissibility raised by the Commission against an action challenging its rejection of a complaint addressed to it: that is the case even where the Court of First Instance ultimately dismissed the action as unfounded. The Court also considered the Court of First Instance to have erred in declaring max.mobil's action admissible and held that consequently its judgment had to be set aside. The case gave the Court an opportunity to be more specific about the scope of its decision in Case C-107/95 P *Bundesverband der Bilanzbuchhalter v Commission* [1997] ECR I-947, according to which the Commission is empowered to determine, using the powers conferred on it by Article 90(3) of the Treaty (now Article 86(3) EC), that a given State measure is incompatible with the rules of the Treaty

and to indicate what measures the State to which a decision is addressed must adopt in order to comply with its obligations under Community law. It observed that it followed from that judgment that individuals may, in certain circumstances, be entitled to bring an action for annulment against a decision which the Commission addresses to a Member State on the basis of Article 90(3) of the Treaty if the conditions laid down in the fourth paragraph of Article 173 of the EC Treaty (now, following amendment, the fourth paragraph of Article 230 EC) are satisfied. The Court held, however, that it follows from the wording of Article 90(3) of the Treaty and from the scheme of that article as a whole that the Commission is not obliged to bring proceedings within the terms of those provisions, as individuals cannot require the Commission to take a position in a specific sense. It held that the fact that max.mobil had a direct and individual interest in annulment of the Commission's decision to refuse to act on its complaint was not such as to confer on it a right to challenge that decision: nor could the applicant claim a right to bring an action pursuant to Regulation No 17, which is not applicable to Article 90 of the Treaty. According to the Court, that finding was not at variance with the principle of sound administration or with any other general principle of Community law. No general principle of Community law requires that an undertaking be recognised as having standing before the Community judicature to challenge a refusal by the Commission to bring proceedings against a Member State on the basis of Article 90(3) of the Treaty.

In Case C-304/02 *Commission v France* (judgment of 12 July 2005, not yet published in the ECR), an action was brought before the Court for failure of the French Republic to fulfil its obligations under Article 228(2) EC, which concerns failures to comply with judgments of the Court. It was alleged that the French Republic had failed to comply with the judgment of 11 June 1991 in Case C-64/88 *Commission v France* [1991] ECR I-2727, in which it had been found that France had failed to fulfil its obligations under regulations concerning fishing and the control of fishing activities. The Commission concluded, following large numbers of inspections in various French ports, first, that there continued to be inadequate controls and, second, that it was widely known that the action taken in respect of infringements was inadequate. Consequently, in its submission, France's failure to fulfil its obligations persisted after the judgment had been delivered, in breach of the common fisheries policy, even though the French Government had made efforts to implement the Community provisions.

The Court began by recalling the importance of complying with Community rules in the area of the common fisheries policy, since compliance with such obligations is to 'ensure the protection of fishing grounds, the conservation of the biological resources of the sea and their exploitation on a sustainable basis in appropriate economic and social conditions'. The Court found, following an examination of the facts submitted to it in the Commission's inspection reports, that the French Republic had not carried out controls of fishing activities in accordance with the Community rules and had not taken all the necessary measures to comply with the judgment in Case C-64/88 *Commission v France*.

As regards the second complaint raised by the Commission maintaining that France was taking insufficient action in respect of infringements of the common fisheries policy, the Court pointed out that, if 'the competent authorities of a Member State were systematically to refrain from taking action against the persons responsible for such infringements, both the conservation and management of fishery resources and the uniform application

of the common fisheries policy would be jeopardised.' Since France had not done what was necessary to take action systematically against offenders, the Court concluded that there was a failure to fulfil obligations on the part of France, which had not taken all the necessary measures to comply with the judgment in Case C-64/88 *Commission v France*.

In relation to the financial penalties which could be imposed on France and in the light of the Advocate General's Opinion of 29 April 2004, the Court raised the issue, first, of its ability to impose a lump sum penalty, although the Commission had requested a penalty payment and, second, of its right to impose both a lump sum penalty and a penalty payment, and it reopened the oral procedure, since there had been no argument in the proceedings on those questions which concerned the interpretation of Article 228(2) EC.

In relation to the possibility of imposing both a penalty payment and a lump sum, the Court observed that Article 228(2) EC has the objective 'of inducing a defaulting Member State to comply with a judgment establishing a breach of obligations and thereby of ensuring that Community law is in fact applied'. The Court considered the measures provided for by that provision (the lump sum and the penalty payment) to pursue the same objective. The purpose of a penalty payment is to induce a Member State to put an end as soon as possible to a breach of obligations which, in the absence of the measure, would tend to persist (persuasive effect), whilst the lump sum 'is based more on assessment of the effects on public and private interests of the failure of the Member State concerned to comply with its obligations, in particular where the breach has persisted for a long period since the judgment which initially established it' (deterrent effect). The Court concluded that where the breach of obligations both has continued for a long period and is inclined to persist, it is possible to have recourse to both types of penalty. Therefore, the conjunction 'or' in Article 228(2) EC, 'may ... have an alternative or a cumulative sense and must therefore be read in the context in which it is used'. The fact that both measures were not imposed in previous cases cannot constitute an obstacle, if imposing both measures appears appropriate, regard being had to the circumstances of the case. Thus, 'it is for the Court, in each case, to assess in light of its circumstances the financial penalties to be imposed', since the Court is not bound by the Commission's suggestions.

Finally, the Court considered its discretion as to the financial penalties that can be imposed. When a penalty payment is to be imposed on a Member State in order to penalise non-compliance with a judgment establishing a breach of obligations, it is for the Court to set the penalty payment so that it is appropriate to the circumstances and proportionate both to the breach that has been established and to the ability to pay of the Member State concerned. For that purpose, the basic criteria which must be taken into account in order to ensure that penalty payments have coercive force and Community law is applied uniformly and effectively are, in principle, the duration of the infringement, its degree of seriousness and the ability of the Member State concerned to pay. In applying those criteria, regard should be had in particular to the effects of failure to comply on private and public interests and to the urgency of getting the Member State concerned to fulfil its obligations.

The Court found that France's breach of obligations had persisted over a long period and imposed a dual financial penalty, EUR 57 761 250 by way of a penalty payment for each period of six months from delivery of the judgment at the end of which the judgment in

Case C-64/88 *Commission v France* had not yet been fully complied with, and EUR 20 000 000 as a lump sum penalty.

**3.2.** In the areas of discrimination on grounds of **nationality** and of **European citizenship**, three cases merit special mention.

In Case C-209/03 *Bidar* [2005] ECR I-2119 the Court examined whether the conditions for granting student support in England and Wales complied with Community law. Student support is financial assistance granted to students by the State in the form of a loan at a preferential rate of interest to cover maintenance costs. The loan is repayable after the student completes his studies, provided he is earning in excess of a certain sum. A national of another Member State is eligible to receive such a loan if he is 'settled' in the United Kingdom and has been resident there throughout the three-year period preceding the start of the course. However, under United Kingdom law a national of another Member State cannot, in his capacity as a student, obtain the status of being settled in the United Kingdom.

Thus, Dany Bidar, a young French national who had completed the last three years of his secondary education in the United Kingdom, living as a dependant of a member of his family without ever having recourse to social assistance, was refused financial assistance to cover his maintenance costs, which he applied for when he started a course in economics at University College London, on the grounds that he was not settled in the United Kingdom for the purposes of United Kingdom law. He brought proceedings before the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), which referred three questions to the Court of Justice for a preliminary ruling.

The first of those questions sought to determine whether, as Community law currently stands, assistance such as that at issue in the present case falls outside the scope of the Treaty, in particular Article 12 EC. It should be noted that the Court held in Case 39/86 *Lair* [1988] ECR 3161 and Case 197/86 *Brown* [1988] ECR 3205 that assistance given to students for maintenance and for training falls in principle outside the scope of the Treaty for the purposes of Article 12 EC. In the present case, the Court held that Article 12 EC must be read in conjunction with the provisions on citizenship of the Union and noted that a citizen of the European Union lawfully resident in the territory of the host Member State can rely on Article 12 EC in all situations which fall within the scope *ratione materiae* of Community law, in particular those involving the exercise of the right to move and reside within the territory of the Member States, as conferred by Article 18 EC. In the case of students who move to another Member State to study there, there is nothing in the text of the Treaty to suggest that they lose the rights which the Treaty confers on citizens of the Union. The Court added that a national of a Member State who, as in the present case, lives in another Member State where he pursues and completes his secondary education, without it being objected that he does not have sufficient resources or sickness insurance, enjoys a right of residence on the basis of Article 18 EC and Directive 90/364<sup>(6)</sup>. With regard to *Lair* and *Brown*, the Court stated that since judgment had been given in those cases the Maastricht Treaty had introduced citizenship of the Union

<sup>(6)</sup> Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ L 180, 13.7.1990, p. 26).

and inserted a chapter devoted to education and training into the Treaty. In the light of those factors, it had to be held that assistance such as that at issue falls within the scope of application of the Treaty for the purposes of the prohibition of discrimination laid down in Article 12 EC.

The Court then considered whether, where the requirements for granting assistance are linked to the fact of being settled or to residence and are likely to place at a disadvantage primarily nationals of other Member States, the difference in treatment between them and nationals of the Member State concerned can be justified. It observed that, although the Member States must, in the organisation and application of their social assistance systems, show a certain degree of financial solidarity with nationals of other Member States, it is permissible for them to ensure that the granting of that type of assistance does not become an unreasonable burden. In the case of assistance covering the maintenance costs of students, it is thus legitimate to seek to ensure a certain degree of integration by checking that the student in question has resided in the host Member State for a certain length of time. However, a link with the employment market, as in the case of allowances for persons seeking employment which were at issue in Case C-224/98 *D'Hoop* [2002] ECR I-6191 and Case C-138/02 *Collins* [2004] ECR I-2703, cannot be required.

In principle, a requirement that an applicant should be settled in the host Member State may therefore be allowed. However, in so far as it precludes any possibility for a student who is a national of another Member State to obtain the status of settled person, and hence to receive the assistance even if he has established a genuine link with the society of the host Member State, the legislation in question is incompatible with Article 12 EC.

In Case C-147/03 *Commission v Austria* (judgment of 7 July 2005, not yet published in the ECR), the Commission of the European Communities sought a declaration from the Court that Austria had failed to fulfil its obligations under Articles 12 EC, 149 EC and 150 EC because the conditions of access to Austrian higher education imposed on holders of secondary education diplomas awarded in the other Member States were different from those applicable to holders of Austrian diplomas. The Austrian Law on University Studies provides that, in addition to satisfying the general requirements for access to higher or university studies, holders of qualifications awarded in other Member States must prove that they meet the specific requirements governing access to the chosen course which are laid down by the State which issued those qualifications and give entitlement to direct admission to those studies, such as success in an entrance examination or obtaining a sufficient grade to be included in the *numerus clausus*.

The Court observed that the opportunities offered by the Treaty in relation to free movement are not fully effective if a person is penalised merely for using them. That is particularly important in the field of education, where one of the specific aims pursued is to encourage the mobility of students and teachers.

The Court held that the differential treatment introduced both to the detriment of students who have obtained their secondary education diplomas in a Member State other than Austria and between those same students according to the Member State in which they obtained their diploma, although applied without distinction to all students, whatever their nationality, is liable to affect nationals of other Member States more than Aus-

trian nationals. It therefore gives rise to indirect discrimination against them, which is prohibited by the Treaty.

The Court then rejected the arguments relied upon by Austria to justify the contested legislation. First of all it invoked the need to safeguard the homogeneity of the Austrian education system, by avoiding the structural, staffing and financial problems that would be caused by a possible mass influx of students who had not been admitted to higher education in more restrictive Member States. Austria was referring in particular to German students who did not meet the conditions required for access to certain university courses in Germany.

On that point, the Court considered that excessive demand for access to specific courses could be met by the adoption of specific non-discriminatory measures such as the establishment of an entry examination or the requirement of a minimum grade. It added that that problem was not exclusive to Austria; other Member States, such as Belgium, had faced or were facing it too. The Court observed that Belgium had introduced similar restrictions to those in the present case and that it had been the subject of an infringement action which was held to be well founded (Case C-65/03 *Commission v Belgium* [2004] ECR I-6427). The Court held that in any event Austria had not shown in specific terms that the Austrian education system was at risk.

The Austrian Government also put forward the justification that it was necessary to prevent abuse of Community law, drawing attention to the legitimate interest that a Member State might have in preventing certain of its nationals, by means of facilities created under the Treaty, from improperly evading the application of their national legislation as regards training for a trade or profession. That argument was rejected outright. The Court held that, for a student from the European Union who has obtained his secondary education diploma in a Member State, access to higher or university education in another Member State under the same conditions as holders of diplomas awarded in that other Member State constitutes the very essence of the principle of freedom of movement for students guaranteed by the Treaty, and cannot therefore of itself constitute an abuse of that right.

Case C-403/03 *Schempp* (judgment of 12 July 2005, not yet published in the ECR), which concerned the deductibility for tax purposes of maintenance paid to a recipient resident in another Member State, provided the Court with the opportunity to clarify the limits of the material scope of the Treaty with regard to citizenship of the Union. In Germany, income tax legislation provides that maintenance payments to a divorced spouse are deductible. That advantage is also granted where recipients have their principal or habitual residence in another Member State, provided that taxation of the recipient's maintenance payments is proved by a certificate from the tax authorities of that other Member State. Egon Schempp, a German national resident in Germany, was refused the deduction of maintenance payments made to his former spouse resident in Austria, as Austrian tax law excludes taxation of maintenance payments.

When a question was referred to it from the Bundesfinanzhof (Federal Finance Court) for a preliminary ruling on whether the German system complied with Articles 12 EC and 18 EC, the Court considered first of all whether such a situation falls within the scope of Community law. The governments which had submitted observations contended that Mr Schempp had not

made use of his right of free movement, and the only external factor was the fact that Mr Schempp was paying maintenance in another Member State. The Court observed that citizenship of the Union is not intended to extend the material scope of the Treaty to internal situations which have no link with Community law. However, the situation of a national of a Member State who has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation. Here, the exercise by Mr Schempp's former spouse of a right conferred under the Community legal order to move freely to and reside in another Member State had an effect on his right to deduct in Germany, so there was no question of it being an internal situation with no connection with Community law.

The Court then considered, with regard to the principle of non-discrimination, whether Mr Schempp's situation could be compared with that of a person who was paying maintenance to a former spouse resident in Germany and was entitled to deduct the maintenance payments made to her, and it found that that was not the case. It observed that the unfavourable treatment of which Mr Schempp complained derived from the difference between the German and Austrian tax systems with regard to the taxing of maintenance payments. It is settled case-law that Article 12 EC is not concerned with any disparities in treatment, for persons and undertakings subject to the jurisdiction of the Community, which may result from divergences existing between the various Member States, so long as they affect all persons subject to them in accordance with objective criteria and without regard to their nationality.

As regards the application of Article 18 EC, the Court found that the German legislation did not in any way obstruct Mr Schempp's right to move to and reside in other Member States. The transfer of his former spouse's residence to Austria did entail tax consequences for him. However, the Court observed that the Treaty offers no guarantee to a citizen of the Union that transferring his activities to a Member State other than that in which he previously resided will be neutral as regards taxation. Given the disparities in the tax legislation of the Member States, such a transfer may be to the citizen's advantage in terms of indirect taxation or not, according to circumstances. That principle applies *a fortiori* to a situation where the person concerned has not himself made use of his right of movement, but claims to be the victim of a difference in treatment following the transfer of his former spouse's residence to another Member State.

**3.3.** With regard to **the free movement of goods**, mention should be made of Case C-320/03 *Commission v Austria* (judgment of 15 November 2005, not yet published in the ECR), concerning a regulation adopted by the First Minister of the Tyrol on 27 May 2003 limiting transport on the A 12 motorway in the Inn valley (sectoral prohibition on road transport). That regulation prohibits lorries of more than 7.5 tonnes carrying certain goods, such as waste, stone, soil, motor vehicles, timber and cereals, from being driven on a 46 km section of the A 12 motorway in the Inn valley. The aim of the contested regulation is to improve air quality so as to ensure lasting protection of human, animal and plant health.

The Court of Justice, hearing an infringement action brought by the Commission, found that by adopting the contested regulation the Republic of Austria had failed to fulfil its obligations under Articles 28 EC and 29 EC.

The sectoral prohibition on road transport obstructed the free movement of goods, in particular their free transit, and was therefore to be regarded as constituting a measure

having equivalent effect to quantitative restrictions which was incompatible with the Community law obligations under the abovementioned articles and which could not moreover be justified by overriding requirements relating to protection of the environment because it was disproportionate.

The Court held that before adopting a measure so radical as that ban the Austrian authorities were under a duty to examine carefully the possibility of using measures less restrictive of freedom of movement, and discount them only if their inadequacy, in relation to the objective pursued, was clearly established. More particularly, given the declared objective of transferring transportation of the goods concerned from road to rail, those authorities were required to ensure that there was sufficient and appropriate rail capacity to allow such a transfer before deciding to implement a measure such as that laid down by the Tyrolean regulation. The Court observed that it had not been conclusively established in the present instance that the Austrian authorities, in preparing the contested regulation, sufficiently studied the question whether the aim of reducing pollutant emissions could be achieved by other means less restrictive of the freedom of movement and whether there actually was a realistic alternative for the transportation of the affected goods by other means of transport or via other road routes. Moreover, the Court considered that a transition period of only two months between the date on which the contested regulation was adopted and the date fixed by the Austrian authorities for implementation of the sectoral traffic ban was clearly insufficient reasonably to allow the operators concerned to adapt to the new circumstances.

**3.4.** Of the three judgments considered in the field of **agriculture**, the first concerns the Community rules relating to organic production, the second concerns the Community rules relating to protected geographical names and indications and the third concerns the transposition in the wine sector of commitments entered into by the Community with Hungary in an agreement of 1993.

Case C-135/03 *Commission v Spain* (judgment of 14 July 2005, not yet published in the ECR) concerns obligations on Member States under Regulation (EEC) No 2092/91 <sup>(7)</sup>, as subsequently amended several times.

That regulation provides that a product is to be regarded as bearing indications referring to the organic production method where, in the labelling, advertising material or commercial documents it is described by the indications in use in each Member State suggesting to the purchaser that it has been obtained according to organic production methods. In its 1991 version, the regulation contains a list giving one or two terms in each of the 11 languages that were the official languages of the Community at that time. In Spanish, the only term listed is 'ecológico', together with its derivative 'eco'.

An amendment to the regulation introduced in 2004 by Regulation (EC) No 392/2004 <sup>(8)</sup> provides that the terms set out in the list, or their usual derivatives or diminutives (such as 'bio', 'eco', etc.), alone or combined with other terms, are to be regarded as indications

<sup>(7)</sup> Council Regulation (EEC) No 2092/91 of 24 June 1991 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs (OJ L 198, 22.7.1991, p. 1).

<sup>(8)</sup> Council Regulation (EC) No 392/2004 of 24 February 2004 amending Regulation (EEC) No 2092/91 on organic production of agricultural products and indications referring thereto in agricultural products and foodstuffs (OJ L 65, 3.3.2004, p. 1).

referring to the organic production method throughout the Community and in any Community language.

The Spanish rules reserve the terms 'ecológico', 'eco' and their derivatives for the organic production method, but authorise the use of the terms 'biológico', 'bio' and their derivatives for products which do not satisfy those requirements. The Commission took the view that those rules were contrary to the Community regulation and, in 2003, brought infringement proceedings before the Court of Justice.

The Court began with the observation that the list of indications referring to the organic production method given in Article 2 of Regulation (EEC) No 2092/91, as amended, is by no means exhaustive and that therefore the Member States may, where current usage changes in their territory, add expressions other than those set out in that list to their national legislation to refer to the organic production method.

In the case of Spanish in particular, the Court held that the Spanish Government could not be criticised for failing to prevent producers of products which were not organically produced from using other expressions such as 'biológico' or 'bio' since, in the version in force prior to 2004, only the term 'ecológico', including the derivative 'eco', was mentioned in the list contained in Article 2 of the regulation. Nor did it follow from the wording of that article that because the derivative 'bio' was mentioned in Article 2 as a usual derivative it had to be accorded specific protection in all Member States and in all languages, including those in respect of which, on the list in that article, terms were mentioned which did not correspond to the French expression 'biologique'. As the question whether a Member State has failed to fulfil its obligations under Community law must be assessed by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion, the Court could only find that there had been no such failure. In the present case, the assessment had to be made in relation to the version of the Community regulation at issue that applied prior to 2004.

In any event, the Commission had not established that the terms 'biológico' or 'bio' suggest to Spanish consumers in general that the products concerned have been produced using the organic method of production.

The Court therefore dismissed the Commission's action.

In Joined Cases C-465/02 and C-466/02 *Germany and Denmark v Commission* (judgment of 25 October 2005, not yet published in the ECR), the Court decided an action for annulment of Regulation (EC) No 1829/2002 <sup>(9)</sup> ('the contested regulation').

The Commission included the Greek cheese 'feta' as a designation of origin in the Community register of protected designations of origin and protected geographical indications on 12 June 1996 under Regulation (EC) No 1107/96 <sup>(10)</sup>. However, in Joined Cases C-289/96,

<sup>(9)</sup> Commission Regulation (EC) No 1829/2002 of 14 October 2002 amending the Annex to Regulation (EC) No 1107/96 with regard to the name 'feta' (OJ L 277, 15.10.2002, p. 10).

<sup>(10)</sup> Commission Regulation (EC) No 1107/96 of 12 June 1996 on the registration of geographical indications and designations of origin under the procedure laid down in Article 17 of Council Regulation (EEC) No 2081/92 (OJ L 148, 21.6.1996, p. 1).

C-293/96 and C-299/96 *Denmark and Others v Commission* [1999] ECR I-1541 the Court annulled that registration on the grounds that the Commission had not taken account of the fact that that name had been used for a considerable time in certain Member States other than the Hellenic Republic. It was for that reason that the Commission re-examined the designation 'feta' in the light of questionnaires sent to Member States on the manufacture and consumption of cheeses known as 'feta' and on how well known that name was amongst consumers in each of the States. Following the procedure laid down by Regulation (EEC) No 2081/92 <sup>(1)</sup>, the Commission adopted the contested regulation, thereby including 'feta' again as a designation of origin in the Community register of protected designations.

The German and Danish Governments subsequently brought an action challenging the new regulation, raising three pleas in law. The first plea was based on failure to send documents to the German Government in German. That plea was rejected by the Court because such an irregularity was insufficient to lead to annulment of a regulation. The second plea was based on a challenge to the definition of the geographic area as the region of origin of 'feta'. The third plea was divided into two parts: the first alleging that the name 'feta' had become a generic name and the second based on the inadequate reasoning supplied by the Commission, which, in granting designation of origin protection to 'feta', based its decision on the finding that the name 'feta' had not been established as generic.

The German and Danish Governments claimed that there had been infringement of Article 2(3) of the basic regulation ((EEC) No 2081/92), in that the term 'feta' came from the Italian 'fetta' meaning 'slice' and that that name had become generic. Since the word was a non-geographical term the Commission should have established that it had acquired a geographic meaning which did not extend to the whole of the territory of a Member State. Feta did not owe its quality or its characteristics essentially or exclusively to a geographical environment. Moreover, no objective reason had been put forward to explain why the geographical area indicated for registration purposes excluded certain areas of Greece. Lastly, the Danish Government stated that feta came from throughout the Balkans and not just from Greece.

The Court recalled the conditions under which products or foodstuffs can be protected by a designation of origin under Article 2(3) of the basic regulation. A traditional non-geographical name must in particular designate a product or a foodstuff 'originating in a region or a specific place'. That provision, moreover, in referring to the second indent of Article 2(2)(a) of the same regulation, requires that 'the quality or characteristics of the agricultural product or foodstuff be essentially or exclusively due to a particular geographical environment with its inherent natural and human factors, and that the production, processing and preparation of that product take place in the defined geographical area'. 'The area of origin referred to must, therefore, present homogeneous natural factors which distinguish it from the areas adjoining it'.

The Court examined, in the light of the specified criteria, whether the region defined in the contested regulation complies with the requirements of Article 2(3) of the basic regulation. Since the geographical area adopted as the area of origin and of production of feta covers essentially mainland Greece, which has a geomorphology and natural features which distinguish

<sup>(1)</sup> Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ L 208, 24.7.1992, p. 1).

it from the adjoining areas, the Court concluded that 'the area in question in the present case was not determined in an artificial manner' and rejected the applicants' plea.

With regard to the plea alleging that 'feta' had become a generic name, the German Government submitted that there was the likelihood of consumer confusion because Member States other than Greece manufactured and consumed 'feta'. The Danish Government for its part submitted that the contested regulation infringed Article 3(1) and Article 17(2) of the basic regulation, since, when a name is generic in nature or has subsequently become so, it remains so permanently and irrevocably. The Danish Government added that Danish production and marketing of feta complied with traditional practices.

The Court reiterated the conditions laid down in Article 3(1) of the basic regulation for assessing whether a name has become generic. It accordingly stated that 'the fact that a product has been lawfully marketed under a name in some Member States may constitute a factor which must be taken into account in the assessment of whether that name has become generic within the meaning of Article 3(1)' of the basic regulation. However, taking into account the production situation in Greece and production in other Member States, the Court concluded that the production of 'feta' has remained concentrated in Greece. Moreover, the Court analysed the consumption of 'feta' in the various Member States and concluded that '85 % of Community consumption of "feta", per capita and per year, takes place in Greece'. Lastly, the Court found that 'feta' sold in Member States other than Greece is marketed as a cheese associated with the Hellenic Republic, even if in reality it has been produced in another Member State. The Court therefore rejected the argument that 'feta' had become a generic name.

As regards the German Government's argument that the statement of reasons in the contested regulation was insufficient, the Court observed that 'the statement of reasons required by Article 253 EC must be appropriate to the nature of the measure in question and must show clearly and unequivocally the reasoning of the institution which enacted the measure, so as to inform the persons concerned of the justification for the measure adopted and to enable the Court to exercise its powers of review'. The institution which adopts the act is not required, however, to define its position on matters which are plainly of secondary importance or to anticipate potential objections. Therefore, the Commission's statement, contained in the contested regulation, of the reasons which led it to the conclusion that the name 'feta' was not generic within the meaning of Article 3 of the basic regulation constituted a sufficient statement of reasons for the purposes of Article 253 EC.

The Court therefore dismissed the actions, thereby holding the regulation adding the denomination 'feta' to the register of protected designations of origin to be lawful.

In Case C-347/03 *Regione autonoma Friuli-Venezia Giulia and ERSA* (judgment of 12 May 2005, not yet published in the ECR), a reference was made to the Court for a preliminary ruling on the validity and interpretation of Decision 93/724/EC<sup>(12)</sup> concerning the conclusion of the EC–Hungary Agreement on wines and of Regulation (EC) No 753/2002<sup>(13)</sup>.

<sup>(12)</sup> Council Decision 93/724/EC of 23 November 1993 concerning the conclusion of an Agreement between the European Community and Republic of Hungary on the reciprocal protection and control of wine names (OJ L 337, 31.12.1993, p. 93).

<sup>(13)</sup> Commission Regulation (EC) No 753/2002 of 29 April 2002 laying down certain rules for applying Council Regulation (EC) No 1493/1999 as regards the description, designation, presentation and protection of certain wine sector products (OJ L 118, 4.5.2002, p.1).

'Tocai friulano' or 'Tocai italico' is a vine variety traditionally grown in the region of Friuli-Venezia Giulia (Italy) and used in the production of white wines marketed inter alia under geographical indications such as 'Collio' or 'Collio goriziano'. In 1993 the European Community and the Republic of Hungary concluded the EC–Hungary Agreement on wines, which prohibits the use of the term 'Tocai' to describe the abovementioned Italian wines after a transitional period expiring on 31 March 2007, in order to protect the Hungarian geographical indication 'Tokaj'. The Regione Autonoma Friuli-Venezia Giulia (the autonomous region of Friuli-Venezia Giulia) and the Agenzia regionale per lo sviluppo rurale (ERSA) (the Regional Agency for Rural Development) ('the applicants') brought proceedings before the Tribunale Amministrativo Regionale per il Lazio (the Regional Administrative Court, Lazio) seeking annulment of national legislation which reflects that prohibition. The applicants argued essentially that the Community had no competence to enter into that agreement with Hungary, that the prohibition at issue conflicted with other provisions in the agreement, that the agreement was based on a misrepresentation of reality so that the relevant provision was null and void as a matter of international law, that the prohibition had been superseded by the Agreement on Trade-Related Aspects of Intellectual Property Rights, set out in Annex 1C to the Agreement establishing the World Trade Organisation ('the TRIPs Agreement'), and that the prohibition was inconsistent with the right to property protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR').

The Tribunale Amministrativo Regionale per il Lazio decided to stay the proceedings and to refer a number of questions to the Court for a preliminary ruling.

The national court asked first of all, in essence, whether the appropriate legal basis for the adoption of Decision 93/724/EC, and for the conclusion of the EC–Hungary Agreement on wines by the Community alone, was the EC–Hungary Association Agreement, concluded prior to the agreement on wines, or Article 133 EC. The Court stated that an act falls within Article 133 EC if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade in the products concerned. In the present instance, the EC–Hungary Agreement on wines is among the agreements provided for in Article 63 of Regulation (EEC) No 822/87<sup>(14)</sup> on the common organisation of the market in wine and its principal objective is to promote trade between the contracting parties by facilitating on a reciprocal basis, on the one hand, the marketing of wines originating in Hungary by guaranteeing those wines the same protection as that provided for in respect of quality wines produced in a specified region that are of Community origin and, on the other, the marketing in that country of wines originating in the Community. The Community therefore had sole competence to conclude the agreement because it fell within its exclusive competence.

The next question referred to the Court was whether, in the event that the EC–Hungary Agreement on wines is lawful, the prohibition of the use in Italy after 31 March 2007 of the name 'Tocai' is invalid and of no effect because it is inconsistent with the rules governing homonyms laid down in Article 4(5) of the agreement, which allow, under certain conditions, the coexistence of two homonyms. In that regard, the Court observed that the rules

<sup>(14)</sup> Council Regulation (EEC) No 822/87 of 16 March 1987 on the common organisation of the market in wine (OJ L 84, 27.3.1987, p. 1).

governing homonyms laid down in Article 4(5) of the EC–Hungary Agreement on wines concern geographical indications protected by virtue of that agreement. Since the names ‘Tocai friulano’ and ‘Tocai italico’, unlike the names ‘Tokaj’ and ‘Tokaji’ of the Hungarian wines, are the name of a vine or vine variety recognised in Italy as being suitable for the production of certain quality wines produced in a specified region, they cannot be described as geographical indications within the meaning of that agreement. Thus, the prohibition of use of the name ‘Tocai’ in Italy after the expiry of the transitional period provided for in the EC–Hungary Agreement on wines is not contrary to the rules governing homonyms laid down in Article 4(5) of that agreement.

Another question referred to the Court was whether Articles 22 to 24 of the TRIPs Agreement are to be interpreted as meaning that, in the case of homonymity, each of the names may continue to be used in the future under certain conditions. The Court referred to the content of the provisions of the TRIPs Agreement and again stated that, unlike the Hungarian name, the Italian names do not constitute a geographical indication within the meaning of the EC–Hungary Agreement on wines. Thus it answered the question referred by ruling that Articles 22 to 24 of the TRIPs Agreement are to be interpreted as meaning that, in a case such as that in the main proceedings, those provisions do not require that a name may continue to be used in the future notwithstanding the twofold circumstance that it has been used in the past by the producers concerned either in good faith or for at least 10 years prior to 15 April 1994 and that it clearly identifies the country, region or area of origin of the protected wine in such a way as not to mislead the consumer.

At the request of the referring court, the Court of Justice also considered whether the right to property set out in the ECHR and in the Charter of Fundamental Rights includes intellectual property and thus the right for the operators concerned to use the name ‘Tocai’ after the transitional period despite the prohibition contained in the EC–Hungary Agreement on wines. The Court held that the right to property does not preclude the prohibition, at the end of that transitional period, on use by the operators concerned in an Italian autonomous region of the word ‘Tocai’ in the term ‘Tocai friulano’ or ‘Tocai italico’ for the description and presentation of certain Italian quality wines produced in a specified region. That prohibition, in so far as it does not exclude any reasonable method of marketing the Italian wines concerned, does not constitute a deprivation of possessions as referred to in the first paragraph of Article 1 of Protocol No 1 to the ECHR. Moreover, even if the restriction constitutes a restriction of the fundamental right to property, it may be justified in so far as, by prohibiting the use of that name, which is a homonym of the geographical indication ‘Tokaj’ of Hungarian wines, it pursues an aim of general interest in promoting trade between the contracting parties by facilitating on a reciprocal basis the marketing of wines described or presented using a geographical indication.

**3.5.** In the area of **freedom of movement for workers**, attention should be drawn to Case C-258/04 *Ioannidis* (judgment of 15 September 2005, not yet published in the ECR), in which the Court was required to examine the case of a Greek national who arrived in Belgium in 1994 after completing his secondary education in Greece and having obtained recognition of the equivalence of his certificate of secondary education. After a three-year course of study in Liège, he obtained a graduate diploma in physiotherapy and then registered as a job-seeker. He went to France to follow a paid training course from October 2000 to June 2001 and then returned to Belgium, where he submitted an application for a ‘tideover allowance’, an unemployment benefit provided for under Belgian legislation for

young people seeking their first job. His application was refused because he did not fulfil the relevant requirements at that time, which were that he should have completed his secondary education in Belgium or else have pursued education or training of the same level and equivalent thereto in another Member State and been the dependent child of migrant workers for the purposes of Article 39 EC who were residing in Belgium.

The proceedings arising out of the action brought by Mr Ioannidis against that refusal led the Cour du travail de Liège (Higher Labour Court, Liège) to refer a question to the Court of Justice regarding the compatibility of the Belgian system with Community law.

The Court observed, first of all, that nationals of a Member State seeking employment in another Member State fall within the scope of Article 39 EC and therefore enjoy the right to equal treatment laid down in paragraph 2 of that provision.

The remainder of the Court's answer drew on case-law set out in recent judgments delivered by the Court, in particular those in Case C-224/98 *D'Hoop* [2002] ECR I-6191 and Case C-138/02 *Collins* [2004] ECR I-2703.

It observed that in *Collins* it held that, in view of the establishment of citizenship of the Union and the interpretation of the right to equal treatment enjoyed by citizens of the Union, it is no longer possible to exclude from the scope of Article 39(2) EC a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State. In addition, the Court has already found in *D'Hoop* that the tideover allowances provided for by the Belgian legislation are social benefits, the aim of which is to facilitate, for young people, the transition from education to the employment market. Mr Ioannidis was therefore justified in relying on Article 39 EC to claim that he could not be discriminated against on the basis of nationality as far as the grant of a tideover allowance was concerned. The condition that secondary education must have been completed in Belgium can be met more easily by Belgian nationals and can therefore place, above all, nationals of other Member States at a disadvantage.

As for possible justification of that difference in treatment, the Court again referred to *D'Hoop*, in which it held that although it is legitimate for the national legislature to wish to ensure that there is a real link between the applicant for a tideover allowance and the geographic employment market concerned, a single condition concerning the place where the diploma of completion of secondary education was obtained is too general and exclusive in nature and goes beyond what is necessary to attain the objective pursued. Lastly, as regards the fact that the Belgian legislation nonetheless affords a right to a tideover allowance to an applicant if he has obtained an equivalent diploma in another Member State and if he is the dependent child of migrant workers who are residing in Belgium, the Court considered, by converse implication, that a person who pursues higher education in a Member State and obtains a diploma there, having previously completed secondary education in another Member State, may well be in a position to establish a real link with the employment market of the first State, even if he is not the dependent child of migrant workers residing in that State. The Court noted that, in any event, dependent children of migrant workers who are residing in Belgium derive their right to a tideover allowance from Article 7(2) of Regulation (EEC) No 1612/68<sup>(15)</sup>, regardless of whether there is a real link with the employment market.

<sup>(15)</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).

**3.6.** The requirements of Community law with regard to **freedom of establishment** and **freedom to provide services** were central to five cases that are worthy of mention. The first two of these cases relate to public-service concessions, the third to the interplay between the freedoms and national tax legislation, the fourth to the requirements of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and the fifth to telecommunications.

In Case C-231/03 *Coname* (judgment of 21 July 2005, not yet published in the ECR), the Court was requested to give a preliminary ruling on the interpretation of Articles 43 EC, 49 EC, 81 EC and 86 EC and of the prohibition of discrimination, the principle of transparency and the principle of equal treatment.

The facts of this case were that Coname (Consorzio Aziende Metano) had concluded with the Comune di Cingia de' Botti (municipality of Cingia de' Botti) a contract for the award of the service covering the maintenance, operation and monitoring of the methane gas network for the period from 1 January 1999 to 31 December 2000. Subsequently, the municipal council entrusted, by direct award, to the company Padania the service covering the management, distribution and maintenance of methane gas distribution installations for the period from 1 January 2000 to 31 December 2005. Coname challenged the award on the grounds that it should have been made following an invitation to tender. The Tribunale Administrativo Regionale per la Lombardia (Lombardy Regional Administrative Court) decided to stay the proceedings brought and to refer a question to the Court for a preliminary ruling. The question concerns whether Articles 43 EC, 49 EC and 81 EC preclude the direct award, without an invitation to tender, of the management of the public gas distribution service to a company with predominantly public capital in which that municipality holds a 0.97 % share.

The Court pointed out, first, that the directives on public contracts do not govern the award of a concession, which must therefore be examined in the light of the fundamental freedoms provided for by the Treaty. The Court also found that Article 81 EC could not apply since that provision concerns only agreements between undertakings.

In so far as a concession may also be of interest to an undertaking established in a Member State other than the Member State of the contracting municipality, the award, in the absence of any transparency, of that concession to an undertaking established in the latter Member State amounts to a difference in treatment to the detriment of the undertaking established in the other Member State. In the absence of any transparency, an undertaking located in another Member State has no real opportunity of expressing its interest in obtaining the concession. That amounts to indirect discrimination on the basis of nationality, prohibited under Articles 43 EC and 49 EC. It is for the national courts to satisfy themselves that the disputed award complies with transparency requirements which, without necessarily implying an obligation to hold an invitation to tender, are such as to ensure that an undertaking located in the territory of another Member State can have access to appropriate information regarding the concession before it is awarded, so that, if that undertaking had so wished, it would have been in a position to express its interest in obtaining that concession.

The Court analysed whether, in the present case, objective circumstances nevertheless existed that could justify the difference in treatment. It stated that the fact that the mu-

municipality of Cingia de' Botti had a 0.97 % holding in the share capital of Padania did not constitute one of those objective circumstances. The holding was so small as to preclude any control by the municipality over Padania.

Finally, the Court observed that it was apparent from the file that Padania was a company open in part to private capital, which precluded it from being regarded as a structure for the 'in-house' management of a public service on behalf of the municipalities which formed part of it.

A case in the same line of case-law that should be noted is *Parking Brixen* (judgment of 13 October 2005 in Case C-458/03, not yet published in the ECR), concerning a problem similar to that in *Coname*.

In Case C-446/03 *Marks & Spencer* (judgment of 13 December 2005, not yet published in the ECR), the Court was requested to give a preliminary ruling on the interpretation of Articles 43 EC and 48 EC.

Marks & Spencer, a company resident in the United Kingdom, is the principal trading company of a retail group specialising in the sale of off-the-peg clothing, food, homeware and financial services. It had subsidiaries in the United Kingdom and in a number of other Member States, including Germany, Belgium and France. In 2001 it ceased trading in continental Europe because of losses incurred from the mid-1990s. On 31 December 2001 the French subsidiary was sold to a third party, while the German and Belgian subsidiaries ceased operating.

In 2000 and 2001, Marks & Spencer submitted claims to the United Kingdom tax authorities for group tax relief in respect of the losses incurred by the German, Belgian and French subsidiaries. United Kingdom tax legislation (the Income and Corporation Taxes Act 1988; 'ICTA') allows the parent company of a group, under certain circumstances, to effect an offset between its profits and losses incurred by its subsidiaries. However, those claims were rejected on the ground that the rules governing group relief do not apply to subsidiaries not resident or trading in the United Kingdom. Marks & Spencer appealed against that refusal to the Special Commissioners of Income Tax, who dismissed the appeal. Marks & Spencer then brought an appeal before the High Court of Justice of England and Wales, Chancery Division, which decided to stay proceedings and to refer questions to the Court of Justice for a preliminary ruling. The national court was uncertain whether the United Kingdom provisions, which prevent a UK-resident parent company from deducting from its taxable profits losses incurred in other Member States by its subsidiaries established there although they allow it to deduct losses incurred by a resident subsidiary, were compatible with Articles 43 EC and 48 EC on freedom of establishment.

The Court recalled first of all that, although direct taxation falls within the competence of Member States, national authorities must nonetheless exercise that competence consistently with Community law.

The Court held that the United Kingdom legislation constitutes a restriction on freedom of establishment, in breach of Articles 43 EC and 48 EC, in that it applies different treatment for tax purposes to losses incurred by a resident subsidiary and losses incurred by a non-

resident subsidiary. This would deter parent companies from setting up subsidiaries in other Member States.

However, the Court acknowledged that such a restriction may be permitted if it pursues a legitimate objective compatible with the Treaty and is justified by imperative reasons in the public interest. It is necessary, in such a case, that its application be appropriate to ensuring the attainment of the objective thus pursued and not go beyond what is necessary to attain it.

Thus, the Court set out the relevant objective criteria relied upon by Member States and analysed whether the United Kingdom legislation justifies the differing treatment applied by it. The criteria put forward were, first, protection of a balanced allocation of the power to impose taxation between the various Member States concerned, so that profits and losses are treated symmetrically in the same tax system, second, the fact that the legislation provides for avoidance of the risk of double use of losses which would exist if the losses were taken into account in the Member State of the parent company and in the Member State of the subsidiaries and, finally, escaping the risk of tax avoidance which would exist if the losses were not taken into account in the subsidiaries' Member States, as within a group of companies losses might be transferred to the companies established in the Member States which apply the highest rates of taxation and in which the tax value of the losses is the highest.

The Court held in the light of those criteria that the United Kingdom legislation pursues legitimate objectives which are compatible with the EC Treaty and constitute overriding reasons in the public interest.

However, the Court held that the United Kingdom legislation does not comply with the principle of proportionality and goes beyond what is necessary to attain the objectives pursued where, first, the non-resident subsidiary has exhausted the possibilities available in its State of residence of having the losses taken into account for the accounting period concerned by the claim for relief and also for previous accounting periods and, second, there is no possibility for the foreign subsidiary's losses to be taken into account in its State of residence for future periods either by the subsidiary itself or by a third party, in particular where the subsidiary has been sold to that third party.

Consequently, the Court held that where, in one Member State, the resident parent company demonstrates to the tax authorities that those conditions are fulfilled, it is contrary to the freedom of establishment to preclude the possibility for the parent company to deduct from its taxable profits in that Member State the losses incurred by its non-resident subsidiary.

The Court's judgment in Case C-341/02 *Commission v Germany* [2005] ECR I-2733 relates to the rules which may, in the light of Directive 96/71/EC<sup>(16)</sup> concerning the posting of workers in the framework of the provision of services, be enacted by Member States with regard to the employment of workers posted from another Member State.

<sup>(16)</sup> Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ L 18, 21.1.1997, p. 1).

In 2002 the Commission brought an action against Germany for failure to fulfil obligations, questioning the compatibility with Directive 96/71/EC of the method applied by Germany for the purpose of comparing the minimum wage fixed by national German provisions with the remuneration actually paid by an employer established in another Member State.

In its action, the Commission criticised Germany for not recognising, as constituent elements of the minimum wage, all of the allowances and supplements paid by employers established in other Member States to their employees in the construction industry posted to Germany, with the exception of the bonus granted to workers in that industry. According to the Commission, the failure to take these allowances and supplements into account resulted — by reason of the different methods of calculating remuneration in other Member States — in higher wage costs for employers established in other Member States, who were thus prevented from offering their services in Germany. While the Commission acknowledged that the Member State to the territory of which a worker is posted is allowed to determine, under Directive 96/71/EC, the minimum rate of pay, the fact nonetheless remains that that Member State cannot, in comparing that rate and the wages paid by employers established in other Member States, impose its own payment structure.

The German Government contested that argument, contending that hours worked outside the normal working hours, which involve requirements of a particularly high degree in terms of quality of results or which involve special constraints or dangers, have a greater economic value than normal working hours and that the bonuses relating to such hours must not be taken into account in the calculation of the minimum wage. If those amounts were taken into account for the purposes of that calculation, the worker would be deprived of the economic countervalue corresponding to those hours of work and the relationship between the remuneration payable by the employer and the service to be provided by the worker would thus be altered to the worker's detriment.

The Court began by taking note that the parties were in agreement that, in accordance with Directive 96/71/EC, account need not be taken, as component elements of the minimum wage, of payment for overtime, contributions to supplementary occupational retirement pension schemes, the amounts paid in respect of reimbursement of expenses actually incurred by reason of the posting and, finally, flat-rate sums calculated on a basis other than that of the hourly rate. It is the gross amounts of wages that must be taken into account.

The Court then stated that, in the course of the proceedings for failure to fulfil obligations, Germany had adopted and proposed a number of amendments to its rules, which the Court considered appropriate for removing several of the inconsistencies between German law and the directive. These included, among others, the taking into account of allowances and supplements paid by an employer which, in the calculation of the minimum wage, do not alter the relationship between the service provided by the worker and the consideration which he receives in return, and the taking into account, under certain conditions, of the bonuses in respect of the 13th and 14th salary months. However, those amendments were made after the expiry of the period laid down in the reasoned opinion, that is to say too late to be taken into consideration by the Court. Therefore, the Court had to declare that Germany had failed to fulfil its obligations.

Finally, the Court observed that it is entirely normal that, if an employer requires a worker to carry out additional work or to work under particular conditions, compensation should be provided to the worker for those additional services without its being taken into account for the purpose of calculating the minimum wage. Directive 96/71/EC does not require that such forms of compensation, which, if taken into account in the calculation of the minimum wage, alter the relationship between the service provided and the consideration received in return, be treated as elements of the minimum wage. The Court accordingly dismissed the Commission's action on that point.

In Joined Cases C-544/03 and C-545/03 *Mobistar and Belgacom Mobile* (judgment of 8 September 2005, not yet published in the ECR), a preliminary ruling was sought from the Court on two questions, concerning the interpretation of Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Article 3c of Directive 90/388/EEC<sup>(17)</sup> as amended, with regard to the implementation of full competition in telecommunications markets, by Directive 96/19/EC<sup>(18)</sup>. The reference was made by the Belgian Conseil d'État (Council of State) in actions brought by mobile telephony operators established in Belgium, namely Mobistar SA and Belgacom Mobile SA. In the main proceedings those two operators sought the annulment of taxes adopted by the commune of Fléron (Belgium) on transmission pylons, masts and antennae for GSM and by the commune of Schaerbeek (Belgium) on external antennae. The operators each submitted, among the pleas for annulment put forward by them in support of their respective actions, that the regulations imposing the contested taxes restricted the development of their mobile telephony network and that that was prohibited by Article 3c of Directive 90/388/EEC.

Since the Conseil d'État found in both the actions before it, first, that it was not in a position to rule on the merits of such a plea without applying a measure of Community law which raised a problem of interpretation and, second, that an issue also arose as to whether the contested taxes were compatible with Article 49 EC, it decided to stay the proceedings and to refer the matter to the Court of Justice. By its first question, the national court sought to ascertain whether Article 59 of the EC Treaty (now, after amendment, Article 49 EC) must be interpreted as precluding the introduction, by legislation of a national or local authority, of a tax on mobile and personal communications infrastructure used to carry on activities provided for in licences and authorisations. By its second question, the national court essentially sought to ascertain whether tax measures applying to mobile communications infrastructure are covered by Article 3c of Directive 90/388/EEC.

These joined cases, first, gave the Court occasion to recall that Article 59 of the EC Treaty precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State and that a national tax measure restricting exercise of the freedom to provide services may, in that regard, constitute a prohibited measure, whether it was adopted by the State itself or by a local authority. It explained, however, that meas-

<sup>(17)</sup> Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ L 192, 24.7.1990, p. 10).

<sup>(18)</sup> Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets (OJ L 74, 22.3.1996, p. 13).

ures the only effect of which is to create additional costs in respect of the service in question and which affect in the same way the provision of services between Member States and that within one Member State do not fall within the scope of Article 59 of the EC Treaty.

As regards the first question, the Court held that Article 59 of the EC Treaty (now, after amendment, Article 49 EC) must be interpreted as not precluding the introduction, by legislation of a national or local authority, of a tax on mobile and personal communications infrastructure used to carry on activities provided for in licences and authorisations which applies without distinction to national providers of services and to those of other Member States and affects in the same way the provision of services within one Member State and the provision of services between Member States.

The Court held on the second question that tax measures applying to mobile communications infrastructure are not covered by Article 3c of Directive 90/388/EEC, except where those measures favour, directly or indirectly, operators which have or have had exclusive or special rights to the detriment of new operators and appreciably affect the competitive situation.

**3.7.** Certain implications of the **free movement of capital** were explained in Case C-376/03 *D.* (judgment of 5 July 2005, not yet published in the ECR), where the Court had to consider the Netherlands wealth-tax regime that was applicable until 2000. That regime granted resident taxpayers an allowance for which non-residents established in other Member States qualified only if at least 90 % of their wealth was in the Netherlands. On a reference for a preliminary ruling from the *Gerechtshof te 's-Hertogenbosch* (Regional Court of Appeal, 's Hertogenbosch, Netherlands), the Court of Justice gave a decision on the compatibility of that regime with the Treaty provisions on the free movement of capital.

Finding that the situation of a person liable to wealth tax and that of a person liable to income tax are similar in several respects, the Court drew a parallel with its case-law concerning income tax, in particular the fundamental judgment in Case C-279/93 *Schumacker* [1995] ECR I-225. Thus, the Court held that, as in the case of income tax, the situation of a non-resident, as regards wealth tax, is different from that of a resident in so far as not only the major part of the latter's income but also the major part of his wealth is normally concentrated in the State where he is resident. Consequently, that Member State is best placed to take account of the resident's overall ability to pay by granting him, where appropriate, the allowances prescribed by its legislation. The Court therefore concluded that, as in the case of income tax, a taxpayer who holds only a minor part of his wealth in a Member State other than the State where he is resident is not, as a rule, in a situation comparable to that of residents of that other Member State. Accordingly, the refusal of the authorities concerned to grant him the allowance to which residents are entitled does not constitute discrimination against him that is prohibited by Articles 56 and 58 EC.

The Court also had to rule on another question. Under the double taxation convention between the Netherlands and Belgium, entitlement to the allowance in question was extended to Belgian nationals under the same conditions as for resident taxpayers, whatever the proportion of their total net assets that was represented by their assets in the Netherlands. Was the difference in treatment thus created between Belgian nationals and nationals of other Member States consistent with Articles 56 and 58 EC?

The Court pointed out that the Member States are at liberty, in the framework of bilateral conventions, to determine the connecting factors for the purposes of allocating powers of taxation and that it has accepted that a difference in treatment between nationals of the two contracting States that results from that allocation cannot constitute discrimination contrary to Article 39 EC. It is true that the Court held in Case C-307/97 *Saint-Gobain ZN* [1999] ECR I-6161 that, in the case of a double taxation convention concluded between a Member State and a non-member country, the national treatment principle requires the Member State which is party to the convention to grant to permanent establishments of non-resident companies the benefits provided for by that convention on the same conditions as those which apply to resident companies. However, that was justified by the equivalence of the situation of a non-resident taxable person having a permanent establishment in a Member State and of a taxable person resident in that State. The Court found in the present case that a taxable person resident in Belgium is not in the same situation as a taxable person resident outside Belgium so far as concerns wealth tax on real property situated in the Netherlands. The fact that the reciprocal rights and obligations laid down by the Belgium–Netherlands Convention apply only to persons resident in one of the two contracting Member States is specifically an inherent consequence of bilateral double taxation conventions.

**3.8.** In the area of **competition**, there are three judgments to which attention is drawn, one concerning a merger and two concerning State aid.

In Case C-12/03 P *Commission v Tetra Laval BV* [2005] ECR I-987, the Commission brought an appeal before the Court, seeking the setting aside of the judgment of the Court of First Instance of the European Communities in Case T-5/02 *Tetra Laval v Commission* [2002] ECR II-4381, by which that Court had annulled Decision 2004/124/EC.

By Decision 2004/124/EC, the Commission had declared incompatible with the common market and the functioning of the EEA Agreement the acquisition of Sidel SA by Tetra Laval BV. The latter is a holding company of a group which also includes the company which is the world leader in the carton-packaging sector and is regarded as holding a dominant position in aseptic packaging on that market. The former is a leading company in the sector of production and supply of ‘SBM machines’, which are machines that form empty bottles from a simple plastic tube made of polyethylene terephthalate (PET) or high-density polyethylene (PEHD). The Commission had taken the view that the notified merger would encourage Tetra Laval BV to ‘leverage’ its dominant position on the market for equipment and consumables for carton packaging so as to persuade its customers on that market who were switching to PET in order to package certain sensitive products (milk and liquid dairy products, fruit juices and nectars, fruit-flavoured still drinks and tea and coffee drinks) to choose Sidel’s SBM machines, thereby excluding much smaller competitors and turning Sidel’s leading position on the market for SBM machines for sensitive products into a dominant position. The Commission had also considered that the notified merger would strengthen the dominant position of Tetra Laval BV on the carton-packaging markets and reduce its incentive to adjust its prices and innovate to face the threat which PET posed to its position. Lastly, the Commission had taken the view that the commitments given by Tetra Laval BV were insufficient to resolve the structural competition concerns raised by the notified merger and had argued that it would be virtually impossible to monitor compliance with them.

In an action for annulment brought by Tetra Laval BV against the Commission decision, the Court of First Instance held, however, that the Commission had committed manifest errors of assessment in its findings as to leveraging and the strengthening of the dominant position of Tetra Laval BV in the carton sector and therefore annulled its decision. The Court of Justice dismissed the appeal brought by the Commission against the judgment of the Court of First Instance.

First of all, this case provided the Court of Justice with an opportunity to confirm the criteria for judicial review of Commission merger decisions which it had laid down in *Kali & Salz* (Joined Cases C-68/94 and C-30/95 *France and Others v Commission* [1998] ECR I-1375). It observed that the substantive rules on the review of concentrations between companies, contained at that time in Regulation (EEC) No 4064/89<sup>(19)</sup>, and in particular in Article 2 thereof, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature, and that consequently, review by the Community judicature of the exercise of that discretion, which is essential for defining the rules on concentrations, must take account of the discretionary margin implicit in the provisions of an economic nature which form part of the rules on concentrations. The Court, however, made clear that whilst it recognises that the Commission has a margin of discretion with regard to economic matters that does not mean that the Community judicature must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community judicature establish inter alia whether the evidence relied on is factually accurate, reliable and consistent, it must also establish whether that evidence contains all the relevant information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it. Such a review is, in the Court's view, all the more necessary in the case of a prospective analysis required when examining a planned merger with conglomerate effect.

The Court also held that a prospective analysis of the kind necessary in merger control must be carried out with great care since it does not entail the examination of past events — for which often many items of evidence are available which make it possible to understand the causes — or of current events, but rather a prediction of events which are more or less likely to occur in future if a decision prohibiting the planned concentration or laying down the conditions for it is not adopted. Such an analysis, which consists of an examination of how a concentration might alter the factors determining the state of competition on a given market in order to establish whether it would give rise to a serious impediment to effective competition, makes it necessary, in the Court's view, to envisage various chains of cause and effect with a view to ascertaining which of them are the most likely. In the case of an analysis of a 'conglomerate-type' concentration in which, first, the consideration of a lengthy period of time in the future and, secondly, the leveraging necessary to give rise to a significant impediment to effective competition mean that the chains of cause and effect are dimly discernible, uncertain and difficult to establish, the quality of the evidence produced by the Commission in order to establish that it is necessary to adopt a decision declaring the concentration incompatible with the common market is particularly important, since that evidence must support the Commission's conclusion that, if

<sup>(19)</sup> Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ L 395, 30.12.1989, p. 1).

such a decision were not adopted, the economic development envisaged by it would be plausible.

The Court further held that, when the Commission analyses the effects of a conglomerate-type concentration, the likelihood of the adoption of anti-competitive conduct liable to result in leveraging must be examined comprehensively, that is to say, taking account both of the incentives to adopt such conduct and the factors liable to reduce, or even eliminate, those incentives, including the possibility that the conduct is unlawful. It also held, however, that it would run counter to the purpose of prevention of Regulation (EEC) No 4064/89 to require the Commission to examine, for each proposed merger, the extent to which the incentives to adopt anti-competitive conduct would be reduced, or even eliminated, as a result of the unlawfulness of the conduct in question, the likelihood of its detection, the action taken by the competent authorities, both at Community and national level, and the financial penalties which could ensue. Such analysis would make it necessary to carry out an exhaustive and detailed examination of the rules of the various legal systems which might be applicable and of the enforcement policy practised in them and that, if it is to be relevant, it calls for a high probability of the occurrence of the acts envisaged as capable of giving rise to objections on the ground that they are part of anti-competitive conduct. The Court concluded from this that at the stage of assessing a proposed merger, an assessment intended to establish whether an infringement of Article 82 EC is likely and to ascertain that it will be penalised in several legal systems would be too speculative and would not allow the Commission to base its assessment on all of the relevant facts with a view to establishing whether they support an economic scenario in which a development such as leveraging will occur.

The Court also reaffirmed the principle laid down by the Court of First Instance in Case T-102/96 *Gencor v Commission* [1999] ECR II-753 with regard to commitments offered by the undertakings concerned that would render a notified concentration compatible with the common market. It observed that such commitments must enable the Commission to conclude that the concentration at issue will not create or strengthen a dominant position within the meaning of Article 2(2) and (3) of Regulation (EEC) No 4064/89 and inferred from this that the categorisation of a proposed commitment as behavioural or structural is immaterial and that the possibility cannot therefore automatically be ruled out that commitments which are prima facie behavioural, for instance a commitment not to use a trade mark for a certain period or to make part of the production capacity of the entity arising from the concentration available to third-party competitors or, more generally, to grant access to essential facilities on non-discriminatory terms, may also be capable of preventing the emergence or strengthening of a dominant position.

Lastly, having observed that it is clear from Article 2(1) of Regulation (EEC) No 4064/89 that the Commission, when assessing the compatibility of a concentration with the common market, must take account of a number of factors, such as the structure of the relevant markets, actual or potential competition from undertakings, the position of the undertakings concerned and their economic and financial power, possible options available to suppliers and users, any barriers to entry and trends in supply and demand, the Court concluded therefrom that, although constituting an important factor, the mere fact that the acquiring undertaking already holds a clear dominant position on the relevant market does not in itself suffice to justify a finding that a reduction in the potential competition

which that undertaking must face constitutes a strengthening of its position. In the Court's view, the potential competition represented by a producer of substitute products on a segment of the relevant market is only one of the set of factors which must be taken into account when assessing whether there is a risk that a concentration might strengthen a dominant position, and it cannot be ruled out that a reduction in that potential competition might be compensated by other factors, with the result that the competitive position of the already dominant undertaking remains unchanged.

In Joined Cases C-128/03 and C-129/03 *AEM* [2005] ECR I-2861, two questions concerning the interpretation of Article 87 EC and Directive 96/92/EC <sup>(20)</sup>, in particular Articles 7 and 8 thereof, were referred to the Court for a preliminary ruling by the Consiglio di Stato (Council of State, Italy), in proceedings between two hydroelectric and geothermal power stations and the Italian Electricity and Gas Authority concerning an increase in the charge for access to and use of the national electricity transmission system. The applicants in the main proceedings had brought proceedings before the Tribunale Amministrativo Regionale per la Lombardia (Regional Administrative Court, Lombardy) challenging two decisions of that authority, under which electricity attracted an increased charge for use of the system covering the power services, and the preparatory, basic and related measures. When those actions were dismissed, the applicants lodged appeals before the Consiglio di Stato to set aside the decisions of dismissal. They claimed that the increased charge came entirely within the regime of aid for the functioning of certain undertakings or for generation financed by levies on supplies by undertakings in the sector, which amounted to State aid within the meaning of Article 87(1) EC, granted in disregard of the procedure laid down in the EC Treaty. They also submitted that dissimilar charges for access to the transmission system, with a heavier burden on certain undertakings, constituted an infringement of one of the fundamental principles of Directive 96/92/EC as regards universal access without discrimination to that system.

It was against that background that the Consiglio di Stato asked the Court, in essence, first, whether a measure based on the need to offset the undue advantages and to counter the competitive imbalances which have arisen in the first period of liberalisation of the electricity market following implementation of Directive 96/92/EC, whereby a Member State imposes only on certain electricity generating and distributing undertakings using the electricity transmission system an increased charge for access to and use of that system, constitutes State aid within the meaning of Article 87 EC and, second, whether Article 7(5) and Article 8(2) of Directive 96/92/EC, inasmuch as they prohibit all discrimination between users of the national electricity transmission system, preclude a Member State from adopting such a measure for a transitional period.

With regard to the first question, the Court held that a measure which imposes an increased charge for a transitional period for access to and use of the national electricity transmission system only on undertakings generating and distributing electricity from hydroelectric or geothermal installations to offset the advantage created for those undertakings, during the transitional period, by the liberalisation of the market in electricity following the implementation of Directive 96/92/EC constitutes different treatment of undertakings

<sup>(20)</sup> Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (OJ L 27, 30.1.1997, p. 20).

in relation to charges which is attributable to the nature and general scheme of the system of charges in question and which is not therefore per se State aid within the meaning of Article 87 EC. It also stated that aid cannot be considered separately from the effects of its method of financing and that if there is hypothecation of the increased charge for access to and use of the national electricity transmission system to a national scheme of aid, in the sense that the revenue from the increase is necessarily allocated for the financing of the aid, that increase is an integral part of that scheme and must therefore be considered together with the latter.

With regard to the second question, the Court held that the rule of non-discriminatory access to the national electricity transmission system laid down in Directive 96/92/EC does not preclude a Member State from adopting a measure which imposes an increased charge for a transitional period for access to and use of that system only on certain electricity generation and distribution undertakings to offset the advantage created for those undertakings, during the transitional period, by the altered legal framework following the liberalisation of the market in electricity as a result of the implementation of that directive. It added, however, that it was a matter for the referring court to satisfy itself that the increased charge did not go beyond what was necessary to offset that advantage.

In Case C-415/03 *Commission v Greece* [2005] ECR I-3875, the Commission asked the Court to declare that, by failing to take within the prescribed period, in accordance with Article 3 of Decision 2003/372/EC<sup>(21)</sup>, all the measures necessary for repayment of the aid found in that decision to be unlawful and incompatible with the common market, or, in any event, by failing to inform it of the measures taken pursuant to that decision, the Hellenic Republic had failed to fulfil its obligations.

In 1996 the Commission had initiated against the Hellenic Republic the procedure laid down in Article 93(2) of the EC Treaty (now Article 88(2) EC), which led to the adoption of Decision 1999/332/EC<sup>(22)</sup>. Under that decision, the grant of aid was coupled with a revised restructuring plan for the period from 1998 to 2002 and was subject to special conditions.

Following further complaints about the grant of more aid to Olympic Airways, the Commission initiated a new procedure under Article 88(2) EC, on the ground that the company's restructuring plan had not been implemented and that some of the conditions laid down in its earlier decision had not been fulfilled, in particular the requirement to provide the Commission with information pursuant to Article 10 of Council Regulation (EC) No 659/1999<sup>(23)</sup>.

At the end of that procedure, the Commission adopted Decision 2003/372/EC, which was based in particular on the findings that most of the objectives of the Olympic Airways re-

<sup>(21)</sup> Commission Decision 2003/372/EC of 11 December 2002 on aid granted by Greece to Olympic Airways (OJ L 132, 28.5.2003, p. 1).

<sup>(22)</sup> Commission Decision 1999/332/EC of 14 August 1998 on aid granted by Greece to Olympic Airways (OJ L 128, 21.5.1999, p. 1).

<sup>(23)</sup> Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

structuring plan had not been attained, that the conditions imposed by the approval decision had not been fully met and that the approval decision had been wrongly implemented. In addition, the Commission referred to the existence of new operating aid, which consisted, in essence, in the toleration by the Greek State of the non-payment of, or deferment of the payment dates for, social security contributions, value added tax on fuel and spare parts, rent payable to airports, airport charges and a tax imposed on passengers on departure from Greek airports, called 'spatosimo'.

The Commission required the Hellenic Republic to take the necessary measures to recover the aid concerned from the beneficiary and inform the Commission within a period of two months from the date of notification of its decision on the measures taken to comply with it. Since the Greek Government refused to comply and the Commission was not satisfied with the explanations provided by it, the Commission brought the case now under discussion. The Court found that the Commission's application was well founded.

It observed that the only defence available to a Member State in opposing an application by the Commission under Article 88(2) EC for a declaration that it has failed to fulfil its Treaty obligations is to plead that it was absolutely impossible for it properly to implement the decision ordering recovery of the aid in question. The condition that it is absolutely impossible to implement a decision is not fulfilled, in the case of a Commission decision on State aid, where the defendant government merely informs the Commission of the legal, political or practical difficulties involved in implementing the decision, without taking any real step to recover the aid from the undertakings concerned, and without proposing to the Commission any alternative arrangements for implementing the decision which could enable those difficulties to be overcome. Where the implementation of such a decision encounters no more than a number of difficulties at national level, the Commission and the Member State concerned must respect the principle underlying Article 10 EC, which imposes a duty of genuine cooperation on the Member States and the Community institutions to work together in good faith with a view to overcoming difficulties whilst fully observing the Treaty provisions, in particular the provisions on State aid.

The Court moreover confirmed that, in an action concerning the failure to implement a decision on State aid which has not been referred to the Court by the Member State to which it was addressed, the latter is not justified in challenging the lawfulness of that decision.

Lastly, the Court also observed that no provision of Community law requires the Commission, when ordering the recovery of aid declared incompatible with the common market, to fix the exact amount of the aid to be recovered. It is sufficient for the Commission's decision to include information enabling its recipient to work out himself, without overmuch difficulty, that amount.

The Commission may therefore legitimately confine itself to declaring that there is an obligation to repay the aid in question and leave it to the national authorities to calculate the exact amounts to be repaid. Moreover, the operative part of a decision on State aid is indissociably linked to the statement of reasons for it, so that, when it has to be interpreted, account must be taken of the reasons which led to its adoption; therefore, the amounts to be repaid pursuant to the Commission decision can be established by reading the operative part in conjunction with the relevant grounds.

**3.9.** In the diverse area of **harmonisation of laws**, there are two judgments of particular interest relating to public procurement, one judgment relating to telecommunications, one relating to copyright and related rights and one relating to consumer protection.

In Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, two series of questions were referred to the Court by the Oberlandesgericht Naumburg (Higher Regional Court, Naumburg) in the course of an appeal brought by the City of Halle (Germany) and RPL Lochau against the company TREA Leuna concerning the lawfulness, from the point of view of the Community rules, of the award by the City of Halle, without a public tender procedure, of a contract for services concerning the treatment of waste to RPL Lochau, a majority of whose capital is held by the City of Halle and a minority by a private company. The questions concerned, first, the interpretation of Article 1(1) of Directive 89/665/EEC <sup>(24)</sup>, as amended, and second, the interpretation of Article 1(2) and Article 13(1) of Directive 93/38/EEC <sup>(25)</sup>, as amended.

By the first series of questions, the Oberlandesgericht Naumburg essentially asked whether Article 1(1) of Directive 89/665/EEC should be interpreted as meaning that the Member States' obligation to provide for effective and rapid remedies against decisions taken by contracting authorities extends also to decisions taken outside a formal award procedure and decisions prior to a formal call for tenders, in particular the decision as to whether a particular contract falls within the personal or material scope of Directive 92/50/EEC <sup>(26)</sup>, and from what moment during a procurement procedure the Member States are obliged to make a remedy available to a tenderer, candidate or interested party.

By the second series of questions, the national court essentially asked whether, where a contracting authority intends to conclude with a company governed by private law, legally distinct from the authority but in which it has a majority capital holding and exercises a certain control, a contract for pecuniary interest relating to services within the material scope of Directive 92/50/EEC, it is always obliged to apply the public award procedures laid down by that directive, merely because a private company has a holding, even a minority one, in the capital of the company with which it concludes the contract. If that question were to be answered in the negative, the national court also asked what the criteria were by reference to which it should be considered that the contracting authority was not subject to such an obligation.

In respect of the first series of questions, the Court held that Article 1(1) of Directive 89/665/EEC, as amended, must be interpreted as meaning that the obligation on the Member States to provide for effective and rapid remedies against decisions taken by contracting authorities extends also to decisions taken outside a formal award procedure and decisions prior to a formal call for tenders, in particular the decision on whether a particular contract falls within

<sup>(24)</sup> Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ L 395, 30.12.1989, p. 33).

<sup>(25)</sup> Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 199, 9.8.1993, p. 84).

<sup>(26)</sup> Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ L 209, 24.7.1992, p. 1).

the personal and material scope of Directive 92/50/EEC, as amended. The Court also made clear that that possibility of review is available to any person having or having had an interest in obtaining the contract in question who has been or risks being harmed by an alleged infringement, from the time when the contracting authority has expressed its will in a manner capable of producing legal effects, and that the Member States are not therefore authorised to make the possibility of review subject to the fact that the public procurement procedure in question has formally reached a particular stage.

In respect of the second series of questions, the Court held that where a contracting authority intends to conclude a contract for pecuniary interest relating to services within the material scope of Directive 92/50/EEC, as amended by Directive 97/52/EC<sup>(27)</sup>, with a company legally distinct from it, in whose capital it has a holding together with one or more private undertakings, the public award procedures laid down by that directive must always be applied.

In Joined Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-1559, two series of questions were referred to the Court by the Belgian Conseil d'État (Council of State). They concerned the interpretation of Directive 92/50/EEC<sup>(28)</sup>, as amended by Directive 97/52/EC<sup>(29)</sup>, and, more particularly, of Article 3(2) thereof, of Directive 93/36/EEC<sup>(30)</sup>, as amended by Directive 97/52/EC, and, more particularly, of Article 5(7) thereof, of Directive 93/37/EEC<sup>(31)</sup>, as amended by Directive 97/52/EC, and, more particularly, of Article 6(6) thereof, and of Directive 93/38/EEC<sup>(32)</sup>, as amended by Directive 98/4/EC<sup>(33)</sup>, and, more particularly, of Article 4(2) thereof, in conjunction with the principle of proportionality, freedom of trade and industry and the right to property. The questions referred also concerned the interpretation of Directive 89/665/EEC<sup>(34)</sup>, and, more particularly, of Articles 2(1)(a) and 5 thereof, and of Directive 92/13/EEC<sup>(35)</sup>, and, more particularly, of Articles 1 and 2 thereof.

(27) European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively (OJ L 328, 28.11.1997, p. 1).

(28) Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ L 209, 24.7.1992, p. 1).

(29) European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively (OJ L 328, 28.11.1997, p. 1).

(30) Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ L 199, 9.8.1993, p. 1).

(31) Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ L 199, 9.8.1993, p. 54).

(32) Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 199, 9.8.1993, p. 84).

(33) Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998 amending Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 101, 1.4.1998, p. 1).

(34) Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ L 395, 30.12.1989, p. 33).

(35) Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 76, 23.3.1992, p. 14).

Those questions were intended to enable the national court to decide two cases between Fabricom SA, a contractor which is regularly required to submit tenders for public contracts, particularly in the water, energy, transport and telecommunications sectors, and the Belgian State concerning the legality of national provisions, especially Articles 26 and 32 of the Royal Decree of 25 March 1999 amending the Royal Decrees of 8 and 10 January 1996. Under certain conditions both those articles, in essence worded in similar terms, preclude a person who has been instructed to carry out preparatory work in connection with a public contract or an undertaking connected to such a person from participating in that contract. In both the cases before the national court the contractor claimed that the articles were, *inter alia*, contrary to the principle of equal treatment of all tenderers, to the principle of the effectiveness of judicial review as guaranteed by Directive 92/13/EEC, to the principle of proportionality, to freedom of trade and industry and to the right to property as laid down in Article 1 of Protocol No 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950.

Being of the view that interpretation of certain provisions of the abovementioned public procurement directives was required in order to decide the cases before it, the Conseil d'État decided to stay proceedings and to refer to the Court three questions in each case, which, in view of their essentially similar content, the Court was able to consider as a total of three questions. Finding that the second of those questions was based on a hypothesis which could not be accepted, the Court answered only the first and third questions. By the first question it raised in both cases before it, the Conseil d'État was seeking essentially to ascertain whether the provisions of Community law to which it referred preclude a rule, such as that laid down in the abovementioned national provisions, which states that any person who has been instructed to carry out research, experiments, studies or development in connection with public works, supplies or services is not allowed to participate in or to submit a tender for a public contract for those works, supplies or services, and is not permitted to prove that, in the circumstances of the case, the experience which he has acquired is not capable of distorting competition. By the third question, the Conseil d'État was seeking essentially to ascertain whether Directive 89/665/EEC, more particularly Articles 2(1)(a) and 5 thereof, and Directive 92/13/EEC, more particularly Articles 1 and 2 thereof, preclude the contracting entity from being able to refuse, until the end of the procedure for the examination of tenders, to allow an undertaking connected with any person who has carried out certain preparatory works from participating in the procedure or from submitting a tender, even though, when questioned on that point by the awarding authority, the undertaking states that it has not thereby obtained an unfair advantage capable of distorting the normal conditions of competition.

With regard to the first question, the Court held that Directives 92/50/EEC, 93/36/EEC and 93/37/EEC, each as amended by Directive 97/52/EC, and Directive 93/38/EEC, as amended by Directive 98/4/EC, and, more particularly, the provision of each of those directives which states that contracting authorities are to ensure equal treatment between tenderers, preclude a national rule whereby a person who has been instructed to carry out research, experiments, studies or development in connection with public works, supplies or services is not permitted to apply to participate in or to submit a tender for those works, supplies or services, and is not given the opportunity to prove that, in the circumstances of the case, the experience which he has acquired was not capable of distorting competition. In the view of the Court, if, taking account of the favourable situation in which a person who

has carried out such preparatory work may find himself, it cannot be maintained that the principle of equal treatment requires that he be treated in the same way as any other tenderer, a rule which does not afford him any possibility to demonstrate that in his particular case that situation would not distort competition goes beyond what is necessary to attain the objective of equal treatment for all tenderers.

With regard to the third question, Directive 89/665/EEC, more particularly Articles 2(1)(a) and 5 thereof, and Directive 92/13/EEC, more particularly Articles 1 and 2 thereof, preclude the contracting authority from being able to refuse, up to the end of the procedure for the examination of tenders, to allow an undertaking connected with any person who has been instructed to carry out research, experiments, studies or development in connection with works, supplies or services to participate in the procedure or submit an offer, even though, when questioned on that point by the awarding authority, that undertaking states that it has not thereby obtained an unfair advantage capable of distorting the normal conditions of competition. In the view of the Court, the possibility that the contracting authority might delay, until the procedure has reached a very advanced stage, taking a decision as to whether such an undertaking may participate in the procedure or submit a tender, when the authority has before it all the information which it needs in order to take that decision, deprives the undertaking of the opportunity to rely on the Community rules on the award of public contracts as against the awarding authority for a period which is solely within that authority's discretion and which, in some circumstances, may be extended until a time when the infringements can no longer be usefully rectified. Such a situation is therefore not only capable of depriving Directives 89/665/EEC and 92/13/EEC of all practical effect as it is susceptible of giving rise to an unjustified postponement of the possibility for those concerned to exercise the rights conferred on them by Community law, it is also contrary to the objective of Directives 89/665/EEC and 92/13/EEC, which seek to protect tenderers vis-à-vis the awarding authority.

Joined Cases C-327/03 and C-328/03 *ISIS Multimedia Net* (judgment of 20 October 2005, not yet published in the ECR) concern the telecommunications sector. Adopted in the context of the liberalisation of the sector, Directive 97/13/EC<sup>(36)</sup> seeks to establish in that area, as regards the granting by Member States of general authorisations and individual licences, a single framework, based on the principles of proportionality, transparency and non-discrimination. To that end, it specifies in particular the restrictions and charges of a fiscal nature that can be imposed on undertakings as part of authorisation procedures, irrespective of whether general authorisations or individual licences are involved. In respect of the latter, Article 11 of the directive limits the fees that can be imposed on undertakings to those intended to cover administrative costs. Article 11(2), however, authorises the imposition of charges where 'scarce resources' are to be used, in order to ensure the optimal use of such resources. Those charges must be non-discriminatory and take into particular account the need to foster the development of innovative services and competition.

The Court was required to rule on the scope of that provision in answer to questions referred by the Bundesverwaltungsgericht (Federal Administrative Court, Germany) in pro-

<sup>(36)</sup> Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services (OJ L 117, 7.5.1997, p. 15).

ceedings between Isis Multimedia Net and Firma 02 and the German State. The undertakings in question, which are new telecommunications providers, applied to the national regulatory authority to be allocated telephone numbers to pass on to their customers. The allocation of those numbers gave rise, under the legislation in force, to charges 15 times higher than the administrative costs generated by the allocation. On the other hand, Deutsche Telekom, the undertaking that was the successor of the historic operator which had previously held a monopoly on the German market, had at its disposal a stock of 400 million telephone numbers which it obtained free of charge.

In order to assess whether the charges thus imposed on the new operators complied with Article 11(2) of Directive 97/13/EC, the Court considered in turn each of the three conditions laid down in the directive. As regards the first condition, regarding optimal management of a scarce resource, the Court held that there is only a limited quantity of telephone numbers and that they therefore constitute a scarce resource. As regards the condition of non-discrimination, the Court could only conclude that Deutsche Telekom and its competitors were not being treated equally: whereas ISIS Multimedia and Firma O2, like all new operators, had to pay the contested charge in order to obtain telephone numbers and gain entry into the market, Deutsche Telekom had a large stock of numbers available to it which enabled it to operate on that market and for which it did not pay any charge. As regards possible justification for such difference in treatment, the Court, without excluding the possibility, disregarded for lack of supporting evidence, the German Government's arguments linked to the universal service tasks taken on by Deutsche Telekom and its obligations to the staff it has taken over. The Court held lastly that, be that as it may, the third condition, concerning the need to foster the development of innovative services and competition, was not met. On the contrary, since it was a burden on the budgets of new operators right from the initial setting-up stage and new operators were therefore not placed on an equal footing with the undertaking in a dominant position, the charge imposed by the German legislation constituted a barrier to entry of new operators into the market and therefore acted as a brake on the development of competition and the fostering of innovative services, contrary to what is required by Article 11(2) of Directive 97/13/EC.

Case C-192/04 *Lagardère Active Broadcast* (judgment of 14 July 2005, not yet published in the ECR) concerned the scope and effect, as regards copyright and related rights, of Directives 92/100/EEC<sup>(37)</sup> and 93/83/EEC<sup>(38)</sup>. The facts of the case were as follows. Lagardère Active Broadcast is a broadcasting company established in France, the successor in title to Europe 1. Its programmes are transmitted from its Paris studios, where they are created, to a satellite, which returns the signals to repeater stations, which then broadcast the programmes to the public. Although most of the repeater stations are in France, one of them, although it broadcasts programmes to France, is however based in Germany (in Saarland), and managed by a German subsidiary of Lagardère. The programmes, broadcast in the French language, can, technically, be received within a limited area in Germany, but they are not the subject of commercial exploitation there. With regard to intellectual property,

<sup>(37)</sup> Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ L 346, 27.11.1992, p. 61).

<sup>(38)</sup> Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ L 248, 6.10.1993, p. 15).

two royalties are paid for the use of protected phonograms to the performers and producers of the phonograms: one in France, by Lagardère, the other in Germany, by the abovementioned subsidiary. Two questions arose in that context, which the Court was ultimately called upon to settle following a reference for a preliminary ruling from the French Cour de Cassation (Court of Cassation). First, can the fee be governed not only by French law but also by German law? Second, is the broadcasting company entitled to deduct from the amount of the royalty payable in France the amount of the royalty paid or claimed in Germany?

Directive 93/83/EEC is relevant as regards the answer to the first question. That directive is intended, as regards copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, 'to avoid the cumulative application of several national laws to one single act of broadcasting'. According to the directive, the royalty should be governed solely by the law of the State from which the signal is transmitted, hence, by French law. That presupposes, however, that that directive is applicable, and therefore that the broadcast at issue in the present case constitutes a 'communication to the public by satellite' within the meaning of the directive. The Court found that not to be the case after considering the characteristics of the broadcast (the coded signals emanating from the satellite can be received only by equipment available to professionals, the signals, unlike programmes, are not intended for reception by the public, there is a terrestrial digital audio circuit enabling signals to be transmitted in the event of malfunction of the satellite). Since there is no 'communication to the public by satellite' within the meaning of Directive 93/83/EEC, that directive does not apply and therefore does not preclude the fee in this case being governed both by France and by Germany.

As regards the possibility of deducting the royalty paid or claimed in Germany from the royalty payable in France, Article 8(2) of Directive 92/100/EEC<sup>(39)</sup>, which requires that remuneration should be equitable, is relevant. The Court stated that rights related to copyright are of a territorial nature. In the present case, as the broadcasting operations are carried out in the territory of two Member States, those rights are based on the legislation of two States. The Court also observed that it is not for it to lay down specific methods for determining what constitutes uniform equitable remuneration. It is for the Member States alone to determine, in their own territory, what are the most relevant criteria for ensuring adherence to the Community concept of equitable remuneration. However, in order to assess whether the remuneration is equitable, it is necessary to take into account the value of the use of a phonogram in trade, and in particular, to take account of all the parameters of the broadcast, such as, in particular, the actual audience, the potential audience and the language version of the broadcast. In the present case, the Court added, broadcasting in Germany does not reduce the value of that use in France. Furthermore, actual commercial exploitation takes place only within French territory. However, an actual or potential audience in Germany is not entirely absent, so a certain, albeit low, economic value attaches to the use of protected phonograms even in that State. Consequently, payment of remuneration may be required in Germany. The fact that the economic value is low affects only the rate of that royalty, not its principle. That royalty constitutes payment for the use of phonograms in Germany; the payment cannot be taken into account in order to calculate equitable remuneration in France and be deducted from it.

<sup>(39)</sup> Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ L 346, 27.11.1992, p. 61).

In Case C-350/03 *Schulte* and C-229/04 *Crailsheimer Volksbank* (judgments of 25 October 2005, not yet published in the ECR) the Court answered questions referred to it by two German courts, the Landgericht Bochum (Regional Court, Bochum) and the Hanseatisches Oberlandesgericht in Bremen (Hanseatic Higher Regional Court, Bremen), concerning the interpretation of the 1985 'doorstep selling' directive (Directive 85/577/EEC) <sup>(40)</sup>. Both national courts had before them disputes between property investors and banks concerning investment schemes for which the pre-contractual negotiations took place in a doorstep-selling situation. Those schemes consisted of a contract for the purchase of a property concluded with a property company and a credit agreement concluded with a bank, which served to finance the purchase. They were offered to the consumers during a visit to their home by an agent of the property company or an independent broker.

The Court found, first, that the directive does not give a consumer the right to cancel an agreement for the purchase of property, even if it forms part of an investment scheme financed by a loan and the pre-contractual negotiations for both the property purchase agreement and the loan agreement to finance the purchase have been conducted in a doorstep-selling situation. Although the directive is intended to protect consumers from the risks inherent in the conclusion of an agreement, in particular when it is concluded during a visit by a trader to the home of the consumer, by giving them a right to cancel under certain conditions, it expressly and unequivocally excludes contracts for the sale of immovable property from its scope.

Moreover, the directive does not preclude national rules which provide that the sole effect of cancellation of a loan agreement is the annulment of that agreement, even where the investment scheme is such that the loan would never have been granted in the absence of the property purchase.

Nor, moreover, does the directive preclude in principle, where a consumer has been informed by the bank of his right to cancel the credit agreement, national legislation which provides for an obligation on the consumer, in the event of cancellation of a secured credit agreement, not only to repay the amounts received under the contract but also to pay to the lender interest at the market rate.

However, the Court held that, in circumstances such as those in this case, where the consumer has not been informed of his right to cancel the credit agreement, it is for the bank to bear the risk inherent in the investment at issue. If he had been informed of that right in time by the bank, the consumer could have changed his mind about concluding the agreement and he may then not have concluded the purchase agreement before a notary. He would thus have been able to avoid exposure to the risks that the property was over-valued at the time of purchase, that the anticipated rental receipts might fail to materialise and that expectations concerning the development of property prices might prove mistaken. It is for the national legislature and courts to guarantee the protection of consumers from the effects of the materialisation of those risks.

**3.10.** In the area of **social law**, three judgments are of particular interest, relating, respectively, to the safeguarding of employees' rights in the event of transfers of undertakings,

<sup>(40)</sup> Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ L 372, 31.12.1985, p. 31).

the protection of pregnant women under the prohibition of discrimination between male and female employees, and the prohibition of discrimination against older workers.

In Case C-478/03 *Celtec* [2005] ECR I-4389 the House of Lords referred a question to the Court concerning the application of Directive 77/18/EEC<sup>(41)</sup> to the privatisation of vocational training services in Wales.

In the course of administrative reform undertaken in 1989, the United Kingdom Government established Training and Enterprise Councils (TECs), which were to take over from the government-funded local agencies run by civil servants which were responsible for programmes for the training of young people and the unemployed. In order to bring about that gradual privatisation, the TECs were allowed to use Department of Employment premises and were given free access to the information systems and databases. For an initial three-year period, staff from the local agencies were seconded to the TECs, while retaining their status as civil servants. The Department of Employment employees continued to perform the same tasks in the same buildings, under the supervision of the TECs. It was, however, anticipated, as stated in a letter of 16 December 1991 from the Secretary of State to the Chairmen of the TECs' Staffing Group, that the TECs would ultimately become the employers of those staff. At the end of their secondment, employees were given the choice either of returning to the Department of Employment, and being redeployed, or of continuing to carry on the same activity as employees of the TECs. Against that background, the Department of Employment entered into an agreement with the TECs in 1992, which set out their respective obligations upon a civil servant changing his or her status in order to become an employee of a TEC.

The questions referred for a preliminary ruling related to the interpretation of the term 'date of a transfer', within the meaning of Article 3(1) of Directive 77/187/EEC, when the transfer is structured as a complex transaction taking place in a number of stages.

The Court made clear first of all that the privatisation of vocational training activities falls within the scope of Directive 77/187/EEC, and went on to reply to the national court that the transfer of the contracts of employment and employment relationships, pursuant to Article 3(1) of Directive 77/187/EEC, necessarily takes place on the same date as that of the transfer of the undertaking. The date of such transfer is the date on which responsibility as employer for carrying on the business of the unit transferred moves from the transferor to the transferee. That date is a particular point in time which cannot be postponed to another date at the will of the transferor or transferee.

It follows therefore that, under Article 3(1) of Directive 77/187/EEC, contracts of employment or employment relationships existing on the date of the transfer referred to by that provision between the transferor and the workers assigned to the undertaking transferred are deemed to be handed over, on that date, from the transferor to the transferee, regardless of what has been agreed between those parties in that respect.

<sup>(41)</sup> Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJ L 61, 5.3.1977, p. 26).

In Case C-191/03 *McKenna* (judgment of 8 September 2005, not yet published in the ECR), the Court was required once again to consider the question of the rights of pregnant employees within the Community legal system and the principle of non-discrimination between male and female employees.

Ms McKenna found that she was pregnant in January 2000. She was obliged to take sick leave on medical advice, on account of a pregnancy-related illness that lasted for nearly the whole term of her pregnancy. As from 6 July 2000, because she had exhausted her right to full pay during sick leave, her pay was reduced to half-pay. From 3 September to 11 December 2000 Ms McKenna was on maternity leave and received her pay at the full rate. When that leave expired, because Ms McKenna was still unfit for work on medical grounds, her pay was once more reduced by half. Ms McKenna also had her period of incapacity for work on account of her pregnancy set against her rights to sick leave.

The issue at the crux of this case is whether incapacity for work caused by a pregnancy-related illness and occurring during the period of pregnancy may, in accordance with Community law, be treated in the same way as incapacity for work caused by any other illness and be set against the number of days during which, under the sick-leave scheme applicable in the particular instance, employees are entitled to have their pay maintained in full, and then in part.

By the questions it referred, the Irish Labour Court asked, first, whether the national rules at issue fell within the ambit of Article 141(1) and (2) EC and of Directive 75/117/EEC<sup>(42)</sup>, or of Directive 76/207/EEC<sup>(43)</sup>. Secondly, the national court sought to ascertain whether, in the light of the provisions of Community law applicable, such rules must be regarded as discriminatory.

With regard to the provisions of Community law applying here, the Court replied that a sick-leave scheme which treats in the same way female workers suffering from a pregnancy-related illness and other workers suffering from an illness unrelated to pregnancy comes within the scope of Article 141 EC and Directive 75/117/EEC.

A scheme such as that in issue defines the conditions governing maintenance of the worker's pay in the event of absence on grounds of illness. It makes the maintenance of full pay subject to the condition that a maximum annual period of sick leave is not exceeded and, if that period is exceeded, it provides for the maintenance of pay at 50 % of its level for a maximum total period determined over the course of four years. Such a scheme, which results in a reduction in pay and subsequently in an exhaustion of entitlement to pay, operates automatically on the basis of an arithmetical calculation of the days of absence on grounds of illness.

As regards the second aspect of the questions referred, the Court considered that the sick-leave scheme at issue was not discriminatory.

<sup>(42)</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 L 45, 19.2.1975, p. 19).

<sup>(43)</sup> Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ L 39, 14.2.1976, p. 40).

The Court held that Article 141 EC and Directive 75/117/EEC must be construed as meaning that the following do not constitute discrimination on grounds of sex:

- a rule of a sick-leave scheme which provides, in regard to female workers absent prior to maternity leave by reason of an illness related to their pregnancy, as also in regard to male workers absent by reason of any other illness, for a reduction in pay in the case where the absence exceeds a certain duration, provided that the female worker is treated in the same way as a male worker who is absent on grounds of illness and provided that the amount of payment made is not so low as to undermine the objective of protecting pregnant workers;
- a rule of a sick-leave scheme which provides for absences on grounds of illness to be offset against a maximum total number of days of paid sick-leave to which a worker is entitled over a specified period, whether or not the illness is pregnancy-related, provided that the offsetting of the absences on grounds of pregnancy-related illness does not have the effect that, during the absence affected by that offsetting after the maternity leave, the female worker receives pay that is lower than the minimum amount to which she was entitled during the illness which arose while she was pregnant.

Case C-144/04 *Mangold* (judgment of 22 November 2005, not yet published in the ECR) sheds an interesting light on protection against age-related discrimination in the area of social policy. In this case, the Arbeitsgericht München (Labour Court, Munich, Germany) referred a series of questions to the Court for a preliminary ruling in the course of proceedings between an employee and his employer concerning the application of the German Law on part-time working and fixed-term contracts. That law authorises until the end of December 2006, without restrictions relating to reason, duration or renewal, the conclusion of fixed-term contracts of employment where an employee has reached the age of 52, unless there is a close connection with a previous employment contract of indefinite duration concluded with the same employer. The purpose of Directive 2000/78/EC<sup>(44)</sup>, whose interpretation the reference for a preliminary ruling sought, is to lay down a general framework for combating certain forms of discrimination, including discrimination on grounds of age, as regards employment and occupation. Differences of treatment on grounds directly related to age are therefore, as a rule, prohibited. However, Article 6(1) of that directive authorises Member States to provide that such differences of treatment do not constitute discrimination if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, relating in particular to employment policy or the labour market, and if the means of achieving that aim are appropriate and necessary. The directive envisages, for example, on that basis, special conditions on access to employment, employment and occupation, including dismissal conditions, for older workers in order to promote their vocational integration or ensure their protection.

The Court found that the purpose of the German law is plainly to promote the vocational integration of unemployed older workers. In the Court's view, the legitimacy of such a public-interest objective cannot reasonably be thrown in doubt, so it must as a rule be regarded as justifying, 'objectively and reasonably', within the meaning of the abovementioned provision, a

<sup>(44)</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, 2.12.2000, p. 16).

difference of treatment on grounds of age. It is also necessary for the means used to achieve that legitimate objective to be 'appropriate and necessary'. In that respect, it is unarguable in the view of the Court that the Member States enjoy broad discretion in their choice of the measures capable of attaining their objectives in the field of social and employment policy. However, in the case of the German legislation, a situation occurs in which all workers who have reached the age of 52 may, without distinction, until they retire, be offered fixed-term contracts of employment which may be renewed an indefinite number of times, whether or not they were unemployed before the contract was concluded and whatever the duration of any period of unemployment. The risk is that such workers may, during a substantial part of their working life, be excluded from the benefit of stable employment which, however, constitutes a major element in the protection of workers. In the view of the Court, such legislation goes beyond what is appropriate and necessary to attain the objective pursued and cannot therefore be justified under Article 6(1) of Directive 2000/78/EC.

The case also raised another issue. As authorised by Directive 2000/78/EC, the period prescribed for transposing that directive into domestic law had, as regards Germany, been extended until 2 December 2006, so that it had not expired when the contract of employment at issue in the case was concluded. The Court was led to conclude that that fact was immaterial. According to the case-law of the Court, during the period prescribed for transposition of a directive the Member States must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by that directive. Moreover, the Court stresses that it is not Directive 2000/78/EC which lays down the principle of equal treatment in the field of employment and occupation. That is a principle whose source is to be found in various international instruments and in the constitutional traditions common to the Member States, so the principle of non-discrimination on grounds of age must be regarded as a general principle of Community law. Observance of that principle cannot as such be conditional upon the expiry of the period allowed the Member States for the transposition of a directive intended to lay down a general framework for combating discrimination on the grounds of age. Thus, a national court hearing a dispute involving that principle must provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of Community law and ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law, even where the period prescribed for transposition of the directive has not yet expired.

With regard to company law, mention should be made of Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565, relating to criminal proceedings in which several natural persons were prosecuted before Italian courts for offences relating to false accounting committed prior to 2002, the year in which new criminal provisions covering those offences entered into force in Italy.

According to the Italian courts, application of those new provisions, which are more favourable than the previous provisions, would prevent criminal prosecutions being brought against the accused. The provisions set out a significantly shorter limitation period (four and a half years instead of seven and a half years maximum), make the bringing of a prosecution subject to the requirement that a complaint be lodged by a member or creditor who considers that he has been adversely affected by the false accounts, and exclude any penalty in respect of false accounting which has no significant effect or is of minimal importance and does not exceed certain thresholds.

It was in this context that the Tribunale di Milano (Milan District Court) and the Corte d'appello di Lecce (Lecce Appeal Court) asked the Court of Justice whether the offence of false accounting is covered by the First Companies Directive (First Directive 68/151/EEC)<sup>(45)</sup> and whether the new Italian provisions are compatible with the Community-law requirement that penalties provided for under national legislation for breaches of Community provisions must be appropriate (that is to say, effective, proportionate and dissuasive).

The Court found, first of all, that penalties for false accounting are designed to punish serious infringements of the fundamental principle of the Fourth and Seventh Companies Directives (Fourth Directive 78/660/EEC<sup>(46)</sup> and Seventh Directive 83/349/EEC<sup>(47)</sup>), that the annual accounts of companies must provide a true and fair view of a company's assets and liabilities, financial position and profit or loss.

The Court then held that the system of penalties provided for, in the event of failure to disclose the annual accounts, under Article 6 of the First Directive is to be understood as covering not only the case of the absence of any disclosure of annual accounts but also the case of disclosure of annual accounts which have not been drawn up in accordance with the rules prescribed by the Fourth Directive, in other words, the disclosure of false accounts. Article 6 of the First Directive cannot however be treated as applying in the case of non-compliance with the obligations relating to consolidated accounts, laid down in the Seventh Directive, to which the First Directive makes no reference.

Having made that finding, the Court held that the principle of the retroactive application of the more lenient penalty forms part of the general principles of Community law which national courts must respect when applying the national legislation adopted for the purpose of implementing Community law and, more particularly, the directives on company law.

The Court concluded, therefore, that the requirement relating to appropriate penalties in the event of failure to disclose the annual accounts, imposed by Article 6 of the First Directive, cannot be relied on as such against accused persons by the authorities of a Member State, within the context of criminal proceedings, for the purpose of assessing the compatibility with that requirement of criminal law provisions that are more favourable to the accused which have entered into force since the offences were committed, where their incompatibility could have the effect of setting aside application of the system of more lenient penalties provided for by those provisions. A directive cannot, of itself and independently of national legislation adopted by a Member State for its implementation, have the effect of determining or increasing the criminal liability of those accused persons.

<sup>(45)</sup> First Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (OJ, English Special Edition 1968 (I), p. 41).

<sup>(46)</sup> Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (OJ L 222, 14.8.1978, p. 11).

<sup>(47)</sup> Seventh Council Directive 83/349/EEC of 13 June 1983 based on Article 54(3)(g) of the Treaty on consolidated accounts (OJ L 193, 18.7.1983, p. 1).

**3.11.** With regard to the **environment**, Case C-364/03 *Commission v Greece* (judgment of 7 July 2005, not yet published in the ECR) deserves a specific mention. By this judgment, the Court ruled in infringement proceedings brought against the Hellenic Republic by the Commission which alleged that it had not complied with its obligations under Directive 84/360/EEC <sup>(48)</sup>.

Under that directive, the Member States had until 30 June 1987 to transpose its provisions (Article 16) and to adopt the necessary measures to prevent or reduce air pollution from industrial plants within the Community (Article 1). The plants concerned by the directive are listed in Annex I, which refers inter alia to the energy industry, within which thermal power stations fall, but excludes nuclear power stations. Article 13 of the directive provides that States are to implement policies, strategies and appropriate measures ‘for the adaptation of existing plants to the best available technology’, taking into account criteria such as the plant’s technical characteristics, its rate of utilisation and the length of its life, the nature and volume of polluting emissions from it, and the limitation of cost.

In the case at issue, a thermal power station, located in Crete, Greece, was the subject of a complaint regarding environmental pollution, prompting the Commission to take an interest in the power station’s operation and in the question whether the Greek authorities were complying with Directive 84/360/EEC. The Commission concluded that Article 13 of the directive was being infringed, in particular in that emissions of sulphur dioxide and nitrogen oxide from the power station had not diminished between 1992 and 2002 and Greece had not adopted limit values for emissions from industrial plants; it therefore decided to bring an action before the Court.

The Greek Government argued, however, that measures had been taken to extend the power station and to put in place a policy and strategy appropriate for adapting it to the best available technology. It also submitted that the quality of the environment in the area was excellent and that the low level of pollution would present no danger to public health.

The Court first of all noted the obligations which result from Article 13 of the directive and the need to adapt plants to developments in available technology. The Court then stated, not accepting the Greek Government’s submissions, that Article 2(1) of Directive 84/360/EEC gives a definition of atmospheric pollution according to which it consists of ‘the introduction into the atmosphere by man, directly or indirectly, of substances or energy having a harmful effect such as to imperil human health and to damage biological resources and ecosystems’.

The Court thereupon concluded that ‘inasmuch as it is undisputed that emissions of certain substances have harmful effects on human health and on biological resources and ecosystems, the obligation on Member States to adopt the measures necessary to reduce the emissions of those substances is not dependent on the general environmental situation of the region in which the industrial plant in question is located’. A Member State

<sup>(48)</sup> Council Directive 84/360/EEC of 28 June 1984 on the combating of air pollution from industrial plants (OJ L 188, 16.7.1984, p. 20).

which does not determine policies or strategies for progressively adapting, in line with the best available technology, the steam turbine units and the gas turbine units of a power station fails to fulfil its obligations under Article 13 of Directive 84/360/EEC.

While Article 13 of Directive 84/360/EEC does not expressly oblige the Member States to adopt limit values for emissions from industrial plants, the adoption of limit values for the emissions from such plants would nonetheless constitute an extremely useful measure in the context of the implementation of a policy or strategy for the purposes of Article 13.

A reduction in the maximum level of harmful substances in the fuel may be regarded as a measure for adapting industrial plant such as a power station to the best available technology, since such a reduction is capable of bringing about an appreciable lowering in the level of atmospheric pollution originating from plant of that kind. That presupposes, however, that the level of the harmful substances in the fuel concerned corresponds to the lowest content available on the market. The progressive replacement of burners and — provided that they go hand in hand with other actions having a direct impact on the emissions of the power station concerned — supervisory measures and the monitoring of emissions are also capable of constituting measures for adapting a power station to the best available technology.

The Court concluded that the Hellenic Republic had failed to fulfil its obligations under Article 13 of Directive 84/360/EEC.