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COURT OF JUSTICE
OF THE EUROPEAN COMMUNITIES

ANNUAL REPORT 2004

Synopsis of the Work
of the Court of Justice
and the Court
of First Instance
of the European
Communities

Luxembourg 2005

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Table of contents

Page

Foreword, by Mr Vassilios Skouris, President of the Court of Justice 5

Chapter I

The Court of Justice of the European Communities

A — The Court of Justice in 2004: changes and proceedings 9
by Mr Vassilios Skouris, President of the Court of Justice

B — Composition of the Court of Justice 47

1. Members of the Court of Justice 49

2. Changes in the composition of the Court of Justice in 2004 65

3. Order of precedence 67

4. Former Members of the Court of Justice 73

Chapter II

The Court of First Instance of the European Communities

A — Proceedings of the Court of First Instance in 2004 77
by Mr Bo Vesterdorf, President of the Court of First Instance

B — Composition of the Court of First Instance 127

1. Members of the Court of First Instance 129

2. Changes in the composition of the Court of First Instance in 2004 139

3. Order of precedence 141

4. Former Members of the Court of First Instance 145

Chapter III

Meetings and visits

A — Official visits and functions at the Court of Justice and the Court of First Instance in 2004 149

B — Study visits to the Court of Justice and the Court of First Instance in 2004 153

C — Formal sittings in 2004 157

D — Visits and participation in official functions in 2004 159

Chapter IV

Tables and statistics

A — Statistics concerning the judicial activity of the Court of Justice 165

B — Statistics concerning the judicial activity of the Court of First Instance 189

Abridged Organisational Chart 207

Contact details for the Court of Justice 209

Foreword

The year 2004 will certainly be recorded in the history of the European Union as the year of its most significant enlargement. The latter did not fail to affect the organisation and functioning of the Court of Justice. The arrival of 10 new Judges at the Court of Justice and 10 new Judges at the Court of First Instance, together with the increase of approximately 50% in the institution's staff, suffices alone to illustrate the challenge which enlargement has represented for the Court of Justice too. Meticulous preparation and, in particular, the remarkable devotion to duty of its staff have, however, enabled the Court successfully to meet the challenge, limited only by the means at its disposal.

The past year has also allowed an initial assessment of the effect of the changes to the functioning of the Court of Justice and the Court of First Instance resulting from the Treaty of Nice. Those changes were supplemented by a series of internal measures adopted by the Court of Justice in order to improve the effectiveness of its working methods. Finally, the creation of the European Union Civil Service Tribunal also deserves a mention among the events that marked 2004.

This report contains an account of the changes for the institution in the course of this pivotal year and, as is now traditional, a record of the main judicial activity of the Court of Justice and the Court of First Instance, accompanied by statistics.

V. Skouris
President of the Court of Justice

Chapter I

The Court of Justice of the European Communities

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

by Mr Vassilios Skouris, President of the Court of Justice

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[5] 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).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

'economic disadvantages caused by that division' could mean only the economic disadvantages caused in certain areas of Germany by the isolation which the establishment of that physical frontier entailed, such as the breaking of communication links or the loss of markets as a result of the rupture of commercial relations between the two parts of German territory. By contrast, the idea that Article 87(2)(c) EC permitted full compensation for the undeniable lack of economic development suffered by the new Länder disregarded both the nature of that provision as a derogation and its context and aims. The economic disadvantages suffered by the new Länder as a whole were not directly caused by the geographical division of Germany within the meaning of Article 87(2)(c) EC and 'the differences in development between the original and the new Länder are explained by causes other than the geographical rift caused by the division of Germany and in particular by the different politico-economic systems set up in each part of Germany' (paragraphs 49 to 53).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B — Composition of the Court of Justice

(Order of precedence as at 14 October 2004)

First row, from left to right:

C. Gulmann, Judge; A. Borg Barthet, President of Chamber; R. Silva de Lapuerta, President of Chamber; A. Rosas, President of Chamber; P. Jann, President of Chamber; V. Skouris, President of the Court; C.W.A. Timmermans, President of Chamber; L.A. Geelhoed, First Advocate General; K. Lenaerts, President of Chamber; F.G. Jacobs, Advocate General.

Second row, from left to right:

A. Tizzano, Advocate General; N. Colneric, Judge; D. Ruiz-Jarabo Colomer, Advocate General; J.-P. Puissochet, Judge; A.M. La Pergola, Judge; P. Léger, Advocate General; R. Schintgen, Judge, S. von Bahr, Judge; J.N. Cunha Rodrigues, Judge.

Third row, from left to right:

G. Arestis, Judge; P. Kūris, Judge; K. Schiemann, Judge; J. Kokott, Advocate General; C. Stix-Hackl, Advocate General; L.M. Poiares P. Maduro, Advocate General; J. Makarczyk, Judge; E. Juhász, Judge.

Fourth row, from left to right:

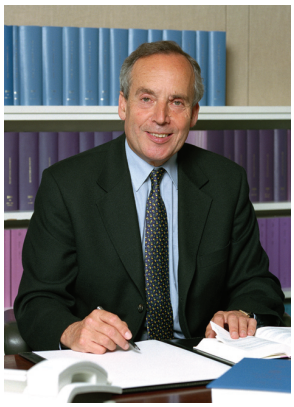
A. Ó Caoimh, Judge; U. Lõhmus, Judge; J. Malenovský, Judge; M. Ilešič, Judge; J. Klučka, Judge; E. Levits, Judge; R. Grass, Registrar.

1. Members of the Court of Justice

(in order of their entry into office)

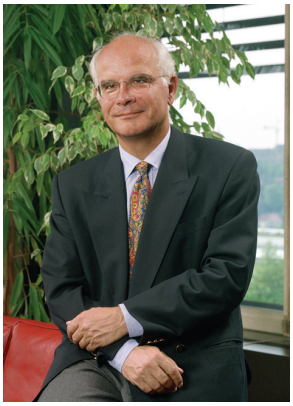
Vassilios Skouris

Born 1948; graduated in law from the Free University, Berlin (1970); awarded doctorate in constitutional and administrative law at Hamburg University (1973); Assistant Professor at Hamburg University (1972-77); Professor of Public Law at Bielefeld University (1978); Professor of Public Law at the University of Thessaloniki (1982); Minister of Internal Affairs (1989 and 1996); Member of the Administrative Board of the University of Crete (1983-87); Director of the Centre for International and European Economic Law, Thessaloniki (from 1997); President of the Greek Association for European Law (1992-94); Member of the Greek National Research Committee (1993-95); Member of the Higher Selection Board for Greek Civil Servants (1994-96); Member of the Academic Council of the Academy of European Law, Trier (from 1995); Member of the Administrative Board of the Greek National Judges' College (1995-96); Member of the Scientific Committee of the Ministry of Foreign Affairs (1997-99); President of the Greek Economic and Social Council in 1998; Judge at the Court of Justice since 8 June 1999; President of the Court of Justice since 7 October 2003.



Francis Geoffrey Jacobs

Born 1939; Barrister; Queen's Counsel; Official in the Secretariat of the European Commission of Human Rights; Legal Secretary to Advocate General J.-P. Warner; Professor of European Law, University of London; Director, Centre of European Law, King's College London; Author of several works on European law; Advocate General at the Court of Justice since 7 October 1988.



Claus Christian Gulmann

Born 1942; Official at the Ministry of Justice; Legal Secretary to Judge Max Sørensen; Professor of Public International Law and Dean of the Law School of the University of Copenhagen; in private practice; Chairman and member of arbitral tribunals; Member of Administrative Appeal Tribunal; Advocate General at the Court of Justice from 7 October 1991 to 6 October 1994; Judge at the Court of Justice since 7 October 1994.

David Alexander Ogilvy Edward

Born 1934; Advocate (Scotland); Queen's Counsel (Scotland); Clerk, and subsequently Treasurer, of the Faculty of Advocates; President of the Consultative Committee of the Bars and Law Societies of the European Community; Salvesen Professor of European Institutions and Director of the Europa Institute, University of Edinburgh; Special Adviser to the House of Lords Select Committee on the European Communities; Honorary Bencher, Gray's Inn, London; Judge at the Court of First Instance from 25 September 1989 to 9 March 1992; Judge at the Court of Justice from 10 March 1992 to 7 January 2004.

Antonio Mario La Pergola

Born 1931; Professor of Constitutional Law and General and Comparative Public Law at the Universities of Padua, Bologna and Rome; Member of the High Council of the Judiciary (1976-78); Member of the Constitutional Court and President of the Constitutional Court (1986-87); Minister for Community Policy (1987-89); elected to the European Parliament (1989-94); Judge at the Court of Justice from 7 October 1994 to 31 December 1994; Advocate General at the Court of Justice from 1 January 1995 to 14 December 1999; Judge at the Court of Justice since 15 December 1999.

Jean-Pierre Puissochet

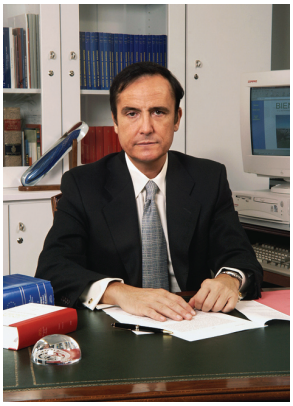
Born 1936; State Counsellor (France); Director, subsequently Director-General, of the Legal Service of the Council of the European Communities (1968-73); Director-General of the Agence nationale pour l'emploi (1973-75); Director of General Administration, Ministry of Industry (1977-79); Director of Legal Affairs at the OECD (1979-85); Director of the Institut international d'administration publique (1985-87); Jurisconsult, Director of Legal Affairs at the Ministry of Foreign Affairs (1987-94); Judge at the Court of Justice since 7 October 1994.

Philippe Léger

Born 1938; A member of the judiciary serving at the Ministry of Justice (1966-70); Head of, and subsequently Technical Adviser at, the Private Office of the Minister for Living Standards in 1976; Technical Adviser at the Private Office of the Minister for Justice (1976-78); Deputy Director of Criminal Affairs and Reprieves at the Ministry of Justice (1978-83); Senior Member of the Court of Appeal, Paris (1983-86); Deputy Director of the Private Office of the Minister for Justice (1986); President of the Regional Court at Bobigny (1986-93); Head of the Private Office of the Minister for Justice, and Advocate General at the Court of Appeal, Paris (1993-94); Associate Professor at René Descartes University (Paris V) (1988-93); Advocate General at the Court of Justice since 7 October 1994.

Peter Jann

Born 1935; Doctor of Law of the University of Vienna (1957); appointed Judge and assigned to the Federal Ministry of Justice (1961); Judge in press matters at the Straf-Bezirksgericht, Vienna (1963-66); spokesman of the Federal Ministry of Justice (1966-70) and subsequently appointed to the international affairs department of that Ministry; Adviser to the Justice Committee and spokesman at the Parliament (1973-78); appointed as Member of the Constitutional Court (1978); permanent Judge-Rapporteur at that court until the end of 1994; Judge at the Court of Justice since 19 January 1995.



Dámaso Ruiz-Jarabo Colomer

Born 1949; Judge at the Consejo General del Poder Judicial (General Council of the Judiciary); Professor; Head of the Private Office of the President of the Consejo General del Poder Judicial; ad hoc Judge to the European Court of Human Rights; Judge at the Tribunal Supremo (Supreme Court) from 1996; Advocate General at the Court of Justice since 19 January 1995.

Romain Schintgen

Born 1939; General Administrator at the Ministry of Labour; President of the Economic and Social Council; Director of the Société nationale de crédit et d'investissement and of the Société européenne des satellites; Government Representative on the European Social Fund Committee, the Advisory Committee on Freedom of Movement for Workers and the Administrative Board of the European Foundation for the Improvement of Living and Working Conditions; Judge at the Court of First Instance from 25 September 1989 to 11 July 1996; Judge at the Court of Justice since 12 July 1996.

Fidelma O'Kelly Macken

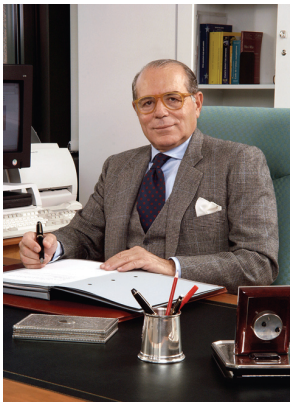
Born 1945; Called to the Bar of Ireland (1972); Legal Advisor, Patent and Trade Mark Agents (1973-79); Barrister (1979-95) and Senior Counsel (1995-98) of the Bar of Ireland; member of the Bar of England and Wales; Judge of the High Court in Ireland (1998); Lecturer in Legal Systems and Methods and 'Averil Deverell' Lecturer in Commercial Law, Trinity College, Dublin; Bencher of the Honourable Society of King's Inns; Judge at the Court of Justice from 6 October 1999 to 13 October 2004.

Ninon Colneric

Born 1948; studied in Tübingen, Munich and Geneva; following a period of academic research in London, awarded a doctorate in law by the university of Munich; Judge at the Arbeitsgericht Oldenburg; authorised, by the University of Bremen, to teach labour law, sociology of law and social law; Professor *ad interim* at the faculty of law of the universities of Frankfurt and Bremen; President of the Landesarbeitsgericht Schleswig-Holstein (1989); collaboration, as expert, on the European Expertise Service (EU) project for the reform of the labour law of Kirghizstan (1994-95); Honorary Professor at the University of Bremen in labour law, specifically in European labour law; Judge at the Court of Justice since 15 July 2000.

Stig von Bahr

Born 1939; has worked with the Parliamentary Ombudsman and in the Swedish Cabinet Office and ministries inter alia as assistant under-secretary in the Ministry of Finance; appointed Judge in the Kammarrätten (Administrative Court of Appeal), Gothenburg, in 1981 and Justice of the Regeringsrätten (Supreme Administrative Court) in 1985; has collaborated on a large number of official reports, mainly on the subject of tax legislation and accounting; has been inter alia Chairman of the Committee on Inflation-Adjusted Taxation of Income, Chairman of the Accounting Committee and Special Rapporteur for the Committee on Rules for Taxation of Private Company Owners; has also been Chairman of the Accounting Standards Board and Member of the Board of the National Courts Administration and the Board of the Financial Supervisory Authority; has published a large number of articles, mainly on the subject of tax legislation; Judge at the Court of Justice since 7 October 2000.



Antonio Tizzano

Born 1940; various teaching assignments at Italian universities; Legal Counsel to Italy's Permanent Representation to the European Communities (1984-92); Member of the Bar at the Court of Cassation and other higher courts; Member of the Italian delegation in international negotiations and at intergovernmental conferences including those on the Single European Act and the Maastricht Treaty; various editorial positions; Member of the Independant Group of Experts appointed to examine the finances of the European Commission (1999); Professor of European Law, Director of the Institute of International and European Law (University of Rome); Advocate General at the Court of Justice since 7 October 2000.

José Narciso da Cunha Rodrigues

Born 1940; various offices within the judiciary (1964-77); Government assignments to carry out and coordinate studies on reform of the judicial system; Government Agent to the European Commission of Human Rights and the European Court of Human Rights (1980-84); Expert on the Human Rights Steering Committee of the Council of Europe (1980-85); Member of the Review Commission of the Criminal Code and the Code of Criminal Procedure; Attorney General (1984-2000); Member of the Supervisory Committee of the European Union Anti-Fraud Office (OLAF) (1999-2000); Judge at the Court of Justice since 7 October 2000.

Christiaan Willem Anton Timmermans

Born 1941; Legal Secretary at the Court of Justice of the European Communities (1966-69); official of the European Commission (1969-77); Doctor of Laws (University of Leiden); Professor of European Law at the University of Groningen (1977-89); Deputy Justice at Arnhem Court of Appeal; various editorial positions; Deputy Director-General at the Legal Service of the European Commission (1989-2000); Professor of European Law at the University of Amsterdam; Judge at the Court of Justice since 7 October 2000.

Leendert A. Geelhoed

Born 1942; Research Assistant, University of Utrecht (1970-71); Legal Secretary at the Court of Justice of the European Communities (1971-74); Senior Adviser, Ministry of Justice (1975-82); Member of the Advisory Council on Government Policy (1983-90); various teaching assignments; Secretary-General, Ministry of Economic Affairs (1990-97); Secretary-General, Ministry of General Affairs (1997-2000); Advocate General at the Court of Justice since 7 October 2000.

Christine Stix-Hackl

Born 1957; Doctor of Laws (University of Vienna), postgraduate studies in European Law at the College of Europe, Bruges; member of the Austrian Diplomatic Service (from 1982); expert on European Union matters in the office of the Legal Adviser to the Ministry of Foreign Affairs (1985-88); Legal Service of the European Commission (1989); Head of the 'Legal Service – EU' in the Ministry of Foreign Affairs (1992-2000, Minister Plenipotentiary); participated in the negotiations on the European Economic Area and on the accession of the Republic of Austria to the European Union; Agent of the Republic of Austria at the Court of Justice of the European Communities from 1995; Austrian Consul-General in Zurich (2000); teaching assignments and publications; Advocate-General at the Court of Justice since 7 October 2000.

Allan Rosas

Born 1948; Doctor of Laws (1977) of the University of Turku (Finland); Professor of Law at the University of Turku (1978-81) and at the Åbo Akademi University (Turku/Åbo) (1981-96); Director of the latter's Institute for Human Rights (1985-95); various international and national academic positions of responsibility and memberships of learned societies; coordinated several international and national research projects and programmes, including in the fields of EU law, international law, humanitarian and human rights law, constitutional law and comparative public administration; represented the Finnish Government as member of, or adviser to, Finnish delegations at various international conferences and meetings; expert functions in relation to Finnish legal life, including in governmental law commissions and committees of the Finnish Parliament, as well as the UN, UNESCO, OSCE (CSCE) and the Council of Europe; from 1995 Principal Legal Adviser at the Legal Service of the European Commission, in charge of external relations; from March 2001, Deputy Director-General of the European Commission Legal Service; Judge at the Court of Justice since 17 January 2002.

Rosario Silva de Lapuerta

Born 1954; Bachelor of Laws (Universidad Complutense, Madrid); Abogado del Estado in Malaga; Abogado del Estado at the Legal Service of the Ministry of Transport, Tourism and Communication and, subsequently, at the Legal Service of the Ministry of Foreign Affairs; Head Abogado del Estado of the State Legal Service for Cases before the Court of Justice of the European Communities and Deputy Director-General of the Community and International Legal Assistance Department (Ministry of Justice); Member of the Commission think tank on the future of the Community judicial system; Head of the Spanish delegation in the 'Friends of the Presidency' Group with regard to the reform of the Community judicial system in the Treaty of Nice and of the Council ad hoc working party on the Court of Justice; Professor of Community law at the Diplomatic School, Madrid; Co-director of the journal *Noticias de la Unión Europea*; Judge at the Court of Justice since 7 October 2003.

Koen Lenaerts

Born 1954; lic.iuris, Ph.D. in Law (Katholieke Universiteit Leuven); Master of Laws, Master in Public Administration (Harvard University); Lecturer (1979-83), subsequently Professor of European Law, Katholieke Universiteit Leuven (since 1983); Legal Secretary at the Court of Justice (1984-85); Professor at the College of Europe, Bruges (1984-89); Member of the Brussels Bar (1986-89); Visiting Professor at the Harvard Law School (1989); Judge at the Court of First Instance of the European Communities from 25 September 1989 to 6 October 2003; Judge at the Court of Justice since 7 October 2003.

Juliane Kokott

Born 1957; Law studies (Universities of Bonn and Geneva); LL.M. (American University/Washington DC); Doctor of Laws (Heidelberg University, 1985; Harvard University,1990); visiting professor at the University of California, Berkeley (1991); Professor of German and foreign public law, international law and European law at the Universities of Augsburg (1992), Heidelberg (1993) and Düsseldorf (1994); deputy judge for the Federal Government at the Court of Conciliation and Arbitration of the Organisation for Security and Cooperation in Europe (OSCE); Deputy Chair of the Federal Government's Advisory Council on Global Change (WBGU, 1996); Professor of International Law, International Business Law and European Law at the University of St Gallen (1999); Director of the Institute for European and International Business Law at the University of St Gallen (2000); Deputy Director of the Master of Business Law programme at the University of St Gallen (2001); Advocate General at the Court of Justice since 7 October 2003.

Luís Miguel Poiares Pessoa Maduro

Born 1967; degree in law (University of Lisbon, 1990); assistant lecturer (European University Institute, 1991); Doctor of Laws (European University Institute, Florence, 1996); visiting professor (College of Europe, Natolin; Ortega y Gasset Institute, Madrid; Catholic University, Portugal; Institute of European Studies, Macao); Professor (Universidade Nova, Lisbon, 1997); Fulbright Visiting Research Fellow (Harvard University, 1998); co-director of the Academy of International Trade Law; co-editor (Hart Series on European Law and Integration, *European Law Journal*) and member of the editorial board of several law journals; Advocate General at the Court of Justice since 7 October 2003.

Konrad Hermann Theodor Schiemann

Born 1937; Law degrees at Cambridge University; Barrister 1964-80. Queen's Counsel 1980-86. Justice of the High Court of England and Wales 1986-95; Lord Justice of Appeal 1995-2003; Bencher from 1985 and Treasurer in 2003 of the Honourable Society of the Inner Temple; Judge at the Court of Justice since 8 January 2004.

Jerzy Makarczyk

Born 1938; Doctor of Laws (1966); Professor of Public International Law (1974); Senior Visiting Fellow at the University of Oxford (1985); Professor at the International Christian University, Tokyo (1988); author of several works on public international law, European Community law and human rights law; member of several learned societies in the field of international law, European law and human rights law; Negotiator for the Polish Government for the withdrawal of Russian troops from Poland; Under-Secretary of State, then Secretary of State for Foreign Affairs (1989-92); Chairman of the Polish delegation to the General Assembly of the United Nations; Judge at the European Court of Human Rights (1992-2002); President of the Institut de droit international (2003); Advisor to the President of the Republic of Poland on foreign policy and human rights (2002-04); Judge at the Court of Justice since 11 May 2004.

Pranas Kūris

Born 1938; graduated in law from the University of Vilnius (1961); Doctorate in legal science, University of Moscow (1965); Doctor in legal science (Dr. hab), University of Moscow (1973); Research Assistant at the Institut des hautes études internationales (Director: Professor C. Rousseau), University of Paris (1967-68); Member of the Lithuanian Academy of Sciences (1996); Doctor honoris causa of the Law University of Lithuania (2001); various teaching and administrative duties at the University of Vilnius (1961-90); Lecturer, Assistant Professor, Professor of Public International Law, Dean of the Faculty of Law; several governmental posts in the Lithuanian Diplomatic Service and Lithuanian Ministry of Justice; Minister for Justice (1990-91), Member of the State Council (1991), Ambassador of the Republic of Lithuania to Belgium, Luxembourg and the Netherlands (1992-94); Judge at the (old) European Court of Human Rights (June 1994 to November 1998); Judge at the Supreme Court of Lithuania and subsequently President of the Supreme Court (December 1994 to October 1998); Judge at the European Court of Human Rights (from November 1998); participated in several international conferences; member of the delegation of the Republic of Lithuania for negotiations with the USSR (1990-92); author of numerous publications (approximately 200); Judge at the Court of Justice since 11 May 2004.

Endre Juhász

Born 1944; graduated in law from the University of Szeged, Hungary (1967); Hungarian Bar Entrance Examinations (1970); post-graduate studies in comparative law, University of Strasbourg, France (1969, 1970, 1971, 1972); Official in the Legal Department of the Ministry of Foreign Trade (1966-74), Director for Legislative Matters (1973-74); First Commercial Secretary at the Hungarian Embassy, Brussels, responsible for European Community issues (1974-79); Director at the Ministry of Foreign Trade (1979-83); First Commercial Secretary, then Commercial Counsellor to the Hungarian Embassy in Washington DC, USA (1983-89); Director-General of the Ministry of Trade and Ministry of International Economic Relations (1989-91); Chief negotiator for the Association Agreement between Hungary and the European Communities and their Member States (1990-91); Secretary-General of the Ministry of International Economic Relations, Head of the Office of European Affairs (1992); State Secretary at the Ministry of International Economic Relations (1993-94); State Secretary, President of the Office of European Affairs, Ministry of Industry and Trade (1994); Ambassador Extraordinary and Plenipotentiary, Chief of Mission of the Republic of Hungary to the European Union (January 1995 to May 2003); Chief negotiator for the accession of the Republic of Hungary to the European Union (July 1998 to April 2003); Minister without portfolio for the coordination of matters of European integration (from May 2003); Judge at the Court of Justice since 11 May 2004.

George Arestis

Born 1945; graduated in law from the University of Athens (1968); M.A. in Comparative Politics and Government, University of Kent at Canterbury (1970); practice as a lawyer in Cyprus (1972-82); appointed District Court Judge (1982); Promoted to the post of President of the District Court (1995); Administrative President of the District Court of Nicosia (1997-2003); Judge at the Supreme Court of Cyprus (2003); Judge at the Court of Justice since 11 May 2004.

Anthony Borg Barthet U.O.M.

Born 1947; Doctorate in Law at the Royal University of Malta in 1973; entered the Maltese Civil Service as Notary to the Government in 1975; Counsel for the Republic in 1978, Senior Counsel for the Republic in 1979, Assistant Attorney General in 1988 and appointed Attorney General by the President of Malta in 1989; part-time lecturer in civil law at the University of Malta (1985-89); Member of the Council of the University of Malta (1998-2004); Member of the Commission for the Administration of Justice (1994-2004); Member of the Board of Governors of the Malta Arbitration Centre (1998-2004); Judge at the Court of Justice since 11 May 2004.

Marko Ilešič

Born 1947; Doctor of Law (University of Ljubljana); specialism in comparative law (Universities of Strasbourg and Coimbra); Member of the Bar; Judge at the Labour Court, Ljubljana (1975-86); President of the Sports Tribunal (1978-86); Arbitrator at the Arbitration Court of the Triglav Insurance Company (1990-98); Chairman of the Stock Exchange Appellate Chamber (from 1995); Arbitrator at the Stock Exchange Arbitration Court (from 1998); Arbitrator at the Chamber of Commerce of Yugoslavia (until 1991) and Slovenia (from 1991); Arbitrator at the International Chamber of Commerce in Paris; Judge at the Board of Appeals of UEFA (from 1988) and FIFA (from 2000); President of the Union of Slovenian Lawyers' Associations; Member of the International Law Association, of the International Maritime Committee and of several other international legal societies; Professor of Civil Law, Commercial Law and Private International Law; Dean of the Faculty of Law at the University of Ljubljana; author of numerous legal publications; Judge at the Court of Justice since 11 May 2004.

Jiří Malenovský

Born 1950; Doctor of Law from the Charles University in Prague (1975); Senior faculty member (1974-90), Vice-Dean (1989-91) and Head of the Department of International and European Law (1990-92) at Masaryk University in Brno; Judge at the Constitutional Court of Czechoslovakia (1992); Envoy to the Council of Europe (1993-98); President of the Committee of Ministers' Deputies of the Council of Europe (1995); Senior Director at the Ministry of Foreign Affairs (1998-2000); President of the Czech and Slovak branch of the International Law Association (1999-2001); Judge at the Constitutional Court (2000-04); Member of the Legislative Council (1998-2000); Member of the Permanent Court of Arbitration at The Hague (2000); Professor of Public International Law at Masaryk University, Brno (2001); Judge at the Court of Justice since 11 May 2004.

Ján Klučka

Born 1951; Doctor of Law from the University of Bratislava (1974); Professor of International Law at Kosice University (since 1975); Judge at the Constitutional Court (1993); Member of the Permanent Court of Arbitration at The Hague (1994); Member of the Venice Commission (1994); Chairman of the Slovakian Association of International Law (2002); Judge at the Court of Justice since 11 May 2004.

Uno Lõhmus

Born 1952; Doctor of Law in 1986; Member of the Bar (1977-98); Visiting Professor of Criminal Law at Tartu University; Judge at the European Court of Human Rights (1994-98); Chief Justice of the Supreme Court of Estonia (1998-2004); Member of the Committee for Legal Expertise of the Constitution; consultant to the working group drafting the Criminal Code; member of the working group for the drafting of the Criminal Procedure Code; author of several works on human rights and constitutional law; Judge at the Court of Justice since 11 May 2004.

Egils Levits

Born 1955; graduated in law and in political science from the University of Hamburg; research assistant at the Faculty of Law, University of Kiel; Advisor to Latvian Parliament on questions of international law, constitutional law and legislative reform; Latvian Ambassador to Germany and Switzerland (1992-93), Austria, Switzerland and Hungary (1994-95); Vice Prime Minister and Minister for Justice, acting Minister for Foreign Affairs (1993-94); Conciliator at the Court of Conciliation and Arbitration within OSCE (from 1997); Member of the Permanent Court of Arbitration (from 2001); elected as Judge to the European Court of Human Rights in 1995, re-elected in 1998 and 2001; numerous publications in the spheres of constitutional and administrative law, law reform and European Community law; Judge at the Court of Justice since 11 May 2004.

Aindrias Ó Caoimh

Born 1950; Bachelor in Civil Law (National University of Ireland, University College Dublin, 1971); Barrister (King's Inns, 1972); Diploma in European Law (University College Dublin, 1977); Barrister (Bar of Ireland, 1972-99); Lecturer in European Law (King's Inns, Dublin); Senior Counsel (1994-99); Representative of the Government of Ireland on many occasions before the Court of Justice of the European Communities; Judge at the High Court (from 1999); Bencher of the Honourable Society of King's Inns (since 1999); Vice-President of the Irish Society of European Law; member of the International Law Association (Irish Branch); Son of Judge Andreas O'Keeffe (Aindrias Ó Caoimh) member of the Court of Justice 1974-85; Judge at the Court of Justice since 13 October 2004.

Roger Grass

Born 1948; Graduate of the Institut d'études politiques, Paris, and awarded higher degree in public law; Deputy Procureur de la République attached to the Tribunal de grande instance, Versailles; Principal Administrator at the Court of Justice; Secretary-General in the office of the Procureur Général attached to the Court of Appeal, Paris; Private Office of the Minister for Justice; Legal Secretary to the President of the Court of Justice; Registrar at the Court of Justice since 10 February 1994.

2. Changes in the composition of the Court of Justice in 2004

In 2004 the composition of the Court of Justice changed as follows:

On 7 January, Mr David Alexander Ogilvy Edward, Judge, left the Court of Justice. He was replaced as Judge by Mr Konrad Hermann Theodor Schiemann.

On 11 May, following the accession of ten new States to the European Union, ten new Judges entered into office: Mr Jerzy Makarczyk, a Polish national, Mr Pranas Kūris, a Lithuanian national, Mr Endre Juhász, a Hungarian national, Mr George Arestis, a Cypriot national, Mr Anthony Borg Barthet, a Maltese national, Mr Marko Ilešič, a Slovene national, Mr Jiří Malenovský, a Czech national, Mr Ján Klučka, a Slovak national, Mr Uno Lõhmus, an Estonian national, and Mr Egils Levits, a Latvian national.

On 13 October, Ms Fidelma O'Kelly Macken, Judge, left the Court of Justice. She was replaced as Judge by Mr Aindrias Ó Caoimh.

3. Order of precedence

from 1 to 7 January 2004

V. Skouris, President of the Court
P. Jann, President of the First Chamber
C.W.A. Timmermans, President of the Second Chamber
C. Gulmann, President of the Fifth Chamber
A. Tizzano, First Advocate General
J.N. Cunha Rodrigues, President of the Fourth Chamber
A. Rosas, President of the Third Chamber
F.G. Jacobs, Advocate General
D.A.O. Edward, Judge
A.M. La Pergola, Judge
J.-P. Puissochet, Judge
P. Léger, Advocate General
D. Ruiz-Jarabo Colomer, Advocate General
R. Schintgen, Judge
F. Macken, Judge
N. Colneric, Judge
S. von Bahr, Judge
L.A. Geelhoed, Advocate General
C. Stix-Hackl, Advocate General
R. Silva de Lapuerta, Judge
K. Lenaerts, Judge
J. Kokott, Advocate General
L.M. Poiares P. Maduro, Advocate General

R. Grass, Registrar

from 8 January to 12 May 2004[1]

V. Skouris, President of the Court
P. Jann, President of the First Chamber
C.W.A. Timmermans, President of the Second Chamber
C. Gulmann, President of the Fifth Chamber
A. Tizzano, First Advocate General
J.N. Cunha Rodrigues, President of the Fourth Chamber
A. Rosas, President of the Third Chamber
F.G. Jacobs, Advocate General
A.M. La Pergola, Judge
J.-P. Puissochet, Judge
P. Léger, Advocate General
D. Ruiz-Jarabo Colomer, Advocate General
R. Schintgen, Judge
F. Macken, Judge
N. Colneric, Judge
S. von Bahr, Judge
L.A. Geelhoed, Advocate General
C. Stix-Hackl, Advocate General
R. Silva de Lapuerta, Judge
K. Lenaerts, Judge
J. Kokott, Advocate General
L.M. Poiares P. Maduro, Advocate General
K. Schiemann, Judge

R. Grass, Registrar

[1] On 11 May 2004 ten new Judges entered into office. The new order of precedence existed from 13 May only.

from 13 May 6 October 2004

V. Skouris, President of the Court
P. Jann, President of the First Chamber
C.W.A. Timmermans, President of the Second Chamber
A. Rosas, President of the Third Chamber
C. Gulmann, President of the Fifth Chamber
J.-P. Puissochet, President of the Sixth Chamber
A. Tizzano, First Advocate General
J.N. Cunha Rodrigues, President of the Fourth Chamber
F.G. Jacobs, Advocate General
A.M. La Pergola, Judge
P. Léger, Advocate General
D. Ruiz-Jarabo Colomer, Advocate General
R. Schintgen, Judge
F. Macken, Judge
N. Colneric, Judge
S. von Bahr, Judge
L.A. Geelhoed, Advocate General
C. Stix-Hackl, Advocate General
R. Silva de Lapuerta, Judge
K. Lenaerts, Judge
J. Kokott, Advocate General
L.M. Poiares P. Maduro, Advocate General
K. Schiemann, Judge
J. Makarczyk, Judge
P. Kūris, Judge
E. Juhász, Judge
G. Arestis, Judge
A. Borg Barthet, Judge
M. Ilešič, Judge
J. Malenovský, Judge
J. Klučka, Judge
U. Lõhmus, Judge
E. Levits, Judge

R. Grass, Registrar

from 7 to 13 October 2004

V. Skouris, President of the Court
P. Jann, President of the First Chamber
C.W.A. Timmermans, President of the Second Chamber
A. Rosas, President of the Third Chamber
L.A. Geelhoed, First Advocate General
R. Silva de Lapuerta, President of the Fifth Chamber
K. Lenaerts, President of the Fourth Chamber
A. Borg Barthet, President of the Sixth Chamber
F.G. Jacobs, Advocate General
C. Gulmann, Judge
A.M. La Pergola, Judge
J.-P. Puissochet, Judge
P. Léger, Advocate General
D. Ruiz-Jarabo Colomer, Advocate General
R. Schintgen, Judge
F. Macken, Judge
N. Colneric, Judge
S. von Bahr, Judge
A. Tizzano, Advocate General
J.N. Cunha Rodrigues, Judge
C. Stix-Hackl, Advocate General
J. Kokott, Advocate General
L.M. Poiares P. Maduro, Advocate General
K. Schiemann, Judge
J. Makarczyk, Judge
P. Kūris, Judge
E. Juhász, Judge
G. Arestis, Judge
M. Ilešič, Judge
J. Malenovský, Judge
J. Klučka, Judge
U. Lõhmus, Judge
E. Levits, Judge

R. Grass, Registrar

from 14 October to 31 December 2004

V. Skouris, President of the Court
P. Jann, President of the First Chamber
C.W.A. Timmermans, President of the Second Chamber
A. Rosas, President of the Third Chamber
L.A. Geelhoed, First Advocate General
R. Silva de Lapuerta, President of the Fifth Chamber
K. Lenaerts, President of the Fourth Chamber
A. Borg Barthet, President of the Sixth Chamber
F.G. Jacobs, Advocate General
C. Gulmann, Judge
A.M. La Pergola, Judge
J.-P. Puissochet, Judge
P. Léger, Advocate General
D. Ruiz-Jarabo Colomer, Advocate General
R. Schintgen, Judge
N. Colneric, Judge
S. von Bahr, Judge
A. Tizzano, Advocate General
J.N. Cunha Rodrigues, Judge
C. Stix-Hackl, Advocate General
J. Kokott, Advocate General
L.M. Poiares P. Maduro, Advocate General
K. Schiemann, Judge
J. Makarczyk, Judge
P. Kūris, Judge
E. Juhász, Judge
G. Arestis, Judge
M. Ilešič, Judge
J. Malenovský, Judge
J. Klučka, Judge
U. Lõhmus, Judge
E. Levits, Judge
A. Ó Caoimh, Judge

R. Grass, Registrar

4. Former Members of the Court of Justice

Massimo Pilotti, Judge (1952-1958), President from 1952 to 1958
Petrus Josephus Servatius Serrarens, Judge (1952-1958)
Otto Riese, Judge (1952-1963)
Louis Delvaux, Judge (1952-1967)
Jacques Rueff, Judge (1952-1959 and 1960-1962)
Charles Léon Hammes, Judge (1952-1967), President from 1964 to 1967
Adrianus Van Kleffens, Judge (1952-1958)
Maurice Lagrange, Advocate General (1952-1964)
Karl Roemer, Advocate General (1953-1973)
Rino Rossi, Judge (1958-1964)
Andreas Matthias Donner, Judge (1958-1979), President from 1958 to 1964
Nicola Catalano, Judge (1958-1962)
Alberto Trabucchi, Judge (1962-1972), then Advocate General (1973-1976)
Robert Lecourt, Judge (1962-1976), President from 1967 to 1976
Walter Strauss, Judge (1963-1970)
Riccardo Monaco, Judge (1964-1976)
Joseph Gand, Advocate General (1964-1970)
Josse J. Mertens de Wilmars, Judge (1967-1984), President from 1980 to 1984
Pierre Pescatore, Judge (1967-1985)
Hans Kutscher, Judge (1970-1980), President from 1976 to 1980
Alain Louis Dutheillet de Lamothe, Advocate General (1970-1972)
Henri Mayras, Advocate General (1972-1981)
Cearbhall O'Dalaigh, Judge (1973-1974)
Max Sørensen, Judge (1973-1979)
Alexander J. Mackenzie Stuart, Judge (1973-1988), President from 1984 to 1988
Jean-Pierre Warner, Advocate General (1973-1981)
Gerhard Reischl, Advocate General (1973-1981)
Aindrias O'Keeffe, Judge (1975-1985)
Francesco Capotorti, Judge (1976), then Advocate General (1976-1982)
Giacinto Bosco, Judge (1976-1988)
Adolphe Touffait, Judge (1976-1982)
Thymen Koopmans, Judge (1979-1990)
Ole Due, Judge (1979-1994), President from 1988 to 1994
Ulrich Everling, Judge (1980-1988)
Alexandros Chloros, Judge (1981-1982)
Sir Gordon Slynn, Advocate General (1981-1988), then Judge (1988-1992)
Simone Rozès, Advocate General (1981-1984)
Pieter VerLoren van Themaat, Advocate General (1981-1986)
Fernand Grévisse, Judge (1981-1982 and 1988-1994)
Kai Bahlmann, Judge (1982-1988)
G. Federico Mancini, Advocate General (1982-1988), then Judge (1988-1999)
Yves Galmot, Judge (1982-1988)
Constantinos Kakouris, Judge (1983-1997)
Carl Otto Lenz, Advocate General (1984-1997)
Marco Darmon, Advocate General (1984-1994)

René Joliet, Judge (1984-1995)
Thomas Francis O'Higgins, Judge (1985-1991)
Fernand Schockweiler, Judge (1985-1996)
Jean Mischo, Advocate General (1986-1991 and 1997-2003)
José Carlos De Carvalho Moithinho de Almeida, Judge (1986-2000)
José Luis Da Cruz Vilaça, Advocate General (1986-1988)
Gil Carlos Rodríguez Iglesias, Judge (1986-2003), President from 1994 to 2003
Manuel Diez de Velasco, Judge (1988-1994)
Manfred Zuleeg, Judge (1988-1994)
Walter Van Gerven, Advocate General (1988-1994)
Giuseppe Tesauro, Advocate General (1988-1998)
Paul Joan George Kapteyn, Judge (1990-2000)
John L. Murray, Judge (1991-1999)
David Alexander Ogilvy Edward, Judge (1992-2004)
Georges Cosmas, Advocate General (1994-2000)
Günter Hirsch, Judge (1994-2000)
Michael Bendik Elmer, Advocate General (1994-1997)
Hans Ragnemalm, Judge (1995-2000)
Leif Sevón, Judge (1995-2002)
Nial Fennelly, Advocate General (1995-2000)
Melchior Wathelet, Judge (1995-2003)
Krateros Ioannou, Judge (1997-1999)
Siegbert Alber, Advocate General (1997-2003)
Antonio Saggio, Advocate General (1998-2000)
Fidelma O'Kelly Macken, Judge (1999-2004)

– Presidents

Massimo Pilotti (1952-1958)
Andreas Matthias Donner (1958-1964)
Charles Léon Hammes (1964-1967)
Robert Lecourt (1967-1976)
Hans Kutscher (1976-1980)
Josse J. Mertens de Wilmars (1980-1984)
Alexander John Mackenzie Stuart (1984-1988)
Ole Due (1988-1994)
Gil Carlos Rodríguez Iglesias (1994-2003)

– Registrars

Albert Van Houtte (1953-1982)
Paul Heim (1982-1988)
Jean-Guy Giraud (1988-1994)

Chapter II

The Court of First Instance of the European Communities

A — Proceedings of the Court of First Instance in 2004

By Mr Bo Vesterdorf, President of the Court of First Instance

The Court of First Instance of the European Communities experienced significant changes in 2004 which will leave their mark on the European judicial institution's history.

First of all, the accession to the European Union of 10 new States enabled the Court of First Instance to welcome 10 new Judges: Mrs E. Cremona, Mr O. Czúcz, Ms I. Wiszniewska-Białecka, Ms I. Pelikánová, Mr D. Šváby, Mr V. Vadapalas, Ms K. Jürimäe, Ms I. Labucka and Mr S.S. Papasavvas took the oath on 12 May 2004, while Ms V. Trstenjak entered into the same commitment on 7 July 2004.

For the second time in the Court of First Instance's history, the number of Judges, initially set at 12, was increased. The Court is now composed of 25 Judges, one from each Member State.

The term of office of a number of members of the Court of First Instance, some of whom had just been appointed, came to an end on 31 August 2004. By decision of 14 July 2004, the representatives of the governments of the Member States of the European Union renewed the term of office of the following members for the period from 1 September 2004 to 31 August 2010: Mr B. Vesterdorf, Ms V. Tiili, Mr J. Azizi, Mr M. Jaeger, Mr A.W.H. Meij, Mr M. Vilaras, Ms M.E. Martins de Nazaré Ribeiro, Mr F. Dehousse, Mr O. Czúcz, Ms I. Wiszniewska-Białecka, Mr D. Šváby, Ms K. Jürimäe and Mr S.S. Papasavvas.

In light of the enlargement of the European Union, the Rules of Procedure of the Court of First Instance were amended to increase the number of Judges comprising the Grand Chamber from 11 to 13 (OJ 2004 L 127, p. 108). The provisions relating to the language of a case were also amended: since 1 May 2004 actions may be brought in 21 languages – the 20 official languages and Irish (OJ 2004 L 132, p. 3).

The organisation and operation of the Court of First Instance were adapted to respond to the needs resulting from the increased number of Judges. Initially, for the period from 1 May to 31 August 2004, the new Judges joined the five existing Chambers of three Judges. Each of the Chambers of three Judges was therefore supplemented by two Judges, and formed in that way the Chamber in its extended composition. Subsequently, the Court decided to retain for the 2004/05 judicial year the structure entailing five Chambers composed of five Judges. It follows that, during this judicial year, each of the five Chambers sits with three Judges in two distinct and predetermined trial formations that are presided over by the President of the Chamber.

Four of the five Chambers composed of five Judges are presided over by Presidents who were elected by their fellow Judges in September 2004 for a period of three years, namely Mr Jaeger, Mr Pirrung, Mr Vilaras and Mr Legal. This election of Presidents of Chambers which on 10 September 2004 took place for the first time, pursuant to Article 15 of the Rules of Procedure of the Court of First Instance, is a consequence of the entry into force on 1 February 2003 of the new Protocol on the Statute of the Court of Justice (Article 50).

The other Chamber of five Judges is presided over by the President of the Court, who on 8 September 2004 was elected for three years (that is to say until 31 August 2007). Since the President of the Court does not sit in a Chamber composed of three Judges, the Chamber is presided over by one of the Chamber's other Judges, Mr Cooke, when it sits with three Judges.

Also, implementation of the reforms made possible by the Treaty of Nice has begun. The EC Treaty, as amended by the Treaty of Nice which entered into force on 1 February 2003, provides in Article 225 that the Court of First Instance is to have jurisdiction to hear and determine at first instance all direct actions with the exception of those assigned to a judicial panel and those reserved in the Statute for the Court of Justice.

The Council has (i) amended the Protocol on the Statute of the Court of Justice and (ii) adopted provisions for the establishment of a 'judicial panel'.

First, on 26 April 2004 the Council adopted Decision 2004/407/EC, Euratom amending Articles 51 and 54 of the Protocol on the Statute of the Court of Justice (OJ 2004 L 132, p. 5; corrigendum at OJ 2004 L 194, p. 3). As a result of the new division of direct actions between the Court of Justice and the Court of First Instance, which came into effect on 1 June 2004, actions for annulment and for failure to act brought by a Member State against an act of, or failure to act by, the Commission [1] fall within the jurisdiction of the Court of First Instance. The same is true of actions brought by the Member States against:

– decisions of the Council concerning State aid;

– acts of the Council adopted pursuant to a Council regulation concerning measures to protect trade;

– acts of the Council by which it exercises implementing powers;

– acts of the European Central Bank.

On account of this new division of jurisdiction for direct actions, cases initially brought before the Court of Justice but in which the written procedure had not yet been brought to a close were transferred to the Court of First Instance; these cases related mostly to State aid and to the European Agriculture Guidance and Guarantee Fund.

Second, on 2 November 2004 the Council adopted Decision 2004/752/EC, Euratom establishing the European Union Civil Service Tribunal (OJ 2004 L 333, p. 7). This reform, likewise made possible by the Treaty of Nice (Articles 220 EC and 225a EC; Articles 136 EA and 140b EA; see also Declaration No 16 annexed to the Treaty of Nice), was keenly desired by the Court of First Instance because of the special nature of this field of litigation and the workload which is anticipated as a result of application of the provisions of the new Staff Regulations. This new specialised tribunal, consisting of seven judges, will be called on to hear disputes involving the European Union civil

[1] With the exception of acts of the Commission that concern enhanced cooperation under the EC Treaty.

service, in respect of which jurisdiction is currently exercised by the Court of First Instance. Its decisions will be open to an appeal, limited to points of law, before the Court of First Instance and, exceptionally, subject to review by the Court of Justice in the circumstances prescribed by the Protocol on the Statute. It should begin to operate in the course of 2005.

Finally, the statistics relating to 2004 call for some comments. The number of cases brought continued to increase – a constant feature for a number of years – rising to 536 (compared with 466 in 2003). This increase is partly due to the fact that since 1 June 2004 the Court of First Instance has had jurisdiction to decide direct actions brought by the Member States (see the explanation above). On this basis 48 additional cases were received, namely 21 cases whose referral was ordered by the Court of Justice and 27 new cases lodged by Member States. Community trade-mark litigation continues to grow in absolute terms (110 cases were brought, 10 more than in 2003) and accounts in relative terms for 21% of the total number of cases brought. Staff cases still form the most significant category of cases in terms of numbers, as they have since 2000: 146 new cases were lodged (that is to say 27% of the total number of cases brought).

The number of cases decided, which comes to 361, is close to that of 2003 (339). Of these cases, 76% were decided by Chambers composed of three Judges, 18% by Chambers composed of five Judges and 4% by the Court sitting as a single Judge. It can be seen that the increase in the number of Judges has not yet enabled the number of cases decided each year to be increased significantly.

The number of cases pending crossed the critical threshold of 1 000 cases, there being 1 174 such cases as at 31 December 2004. This number of cases corresponds, as things stand, to more than three years of the Court's work.

The average duration of proceedings increased slightly compared with the preceding three years: in 2004 the average duration was 22.6 months for cases other than those falling within the special areas constituted by intellectual property cases and staff cases.

A very small number of cases have been dealt with under the expedited procedure: 13 such applications were made in the course of the year and two of the cases were accorded expedited treatment.

Developments in the case-law are set out in the following account, covering in turn proceedings concerning the legality of measures (I), actions for damages (II) and applications for interim relief (III).

I. *Proceedings concerning the legality of measures*

Consideration of the substance of an action presupposes that the action is admissible. Cases which broached the question of the admissibility of actions for annulment (B) will therefore be covered before the essential aspects of substantive law (C to H). The latter are

grouped according to subject matter. Not every field falling within the jurisdiction of the Court of First Instance is included in the following account, which is therefore not exhaustive. [2]

Some issues of a procedural nature will be set out under a specific heading (A), since the clarification of the law provided by certain decisions is worthy of emphasis.

A. Procedural aspects

1. Default proceedings

The delivery of judgments by default is extremely rare. In order for such a judgment to be delivered, a defendant on whom an application initiating proceedings has been duly served must fail to lodge a defence to the application in the proper form within the time prescribed and the applicant must apply to the Court of First Instance for judgment by default.

It was in accordance with those provisions that the Court of First Instance, following the Commission's failure to lodge a defence within the prescribed period, delivered judgments by default in favour of five banks which had been fined for their participation in an agreement relating to commission charged on exchange transactions in respect of euro-zone banknotes. By its judgments of 14 October 2004 in Case T-56/02 *Bayerische Hypo- und Vereinsbank* v *Commission*, not yet published in the ECR, Case T-44/02 *Dresdner Bank* v *Commission*, not published in the ECR, Case T-54/02 *Vereins- und Westbank* v *Commission*, not published in the ECR, Case T-60/02 *Deutsche Verkehrsbank* v *Commission*, not published in the ECR, and Case T-61/02 *Commerzbank* v *Commission*, not published in the ECR, the Court annulled the Commission decision [3] after finding that the applicants' submissions appeared to be well founded. The Court held that the matters put forward by the applicants in their applications enabled it to conclude that the existence of the agreement was not sufficiently proven, as regards both the fixing of the prices for currency exchange services in the euro-zone currencies and also the ways of charging those prices. The aggregate amount of the fines imposed

[2] In particular, this account does not deal with decisions in customs cases since they very largely involve the application to particular cases of solutions that are already well established (inter alia judgments of 12 February 2004 in Case T-282/01 *Aslantrans* v *Commission*, of 21 September 2004 in Case T-104/02 *Société française de transports Gondrand Frères* v *Commission*, and of 14 December 2004 in Case T-332/02 *Nordspedizionieri di Danielis Livio & C. and Others* v *Commission*, none yet published in the ECR). Nor, for identical reasons, does this account include judgments concerning the annulment of decisions reducing or cancelling Community financial assistance, whether granted under the European Regional Development Fund (ERDF) (judgment of 14 September 2004 in Case T-290/02 *Ascontex* v *Commission*, not yet published in the ECR) or under the European Agricultural Guidance and Guarantee Fund (EAGGF), Guidance Section (judgment of 28 January 2004 in Case T-180/01 *Euroagri* v *Commission*, not yet published in the ECR; under appeal, Case C-153/04 P).

[3] Commission Decision 2003/25/EC of 11 December 2001 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/E – 1/37.919 (ex 37.391) – Bank charges for exchanging euro-zone currencies – Germany) (OJ 2003 L 15, p. 1).

on the five banks by the Commission in the annulled decision amounted to more than EUR 100 000 000.

The Commission has applied for the setting aside of those judgments, as the relevant provisions allow.

2. Raising of an absolute bar to proceedings by the Court of its own motion

An absolute bar to proceedings may, and even must, be considered by the Community judicature of its own motion. Such a bar may therefore be pleaded by the parties at any stage in the proceedings, whether it relates to the admissibility of the action or to the legality of the contested measure.

The Court of First Instance has thus considered of its own motion absolute bars to proceedings, which include bars relating to the time-limit for bringing an action (judgment of 28 January 2004 in Joined Cases T-142/01 and T-283/01 *OPTUC* v *Commission*, not yet published in the ECR), to whether the contested measure is of a challengeable nature (orders of 29 April 2004 in Case T-308/02 *SGL Carbon* v *Commission* and of 13 July 2004 in Case T-29/03 *Comunidad Autónoma de Andalucía* v *Commission*, neither yet published in the ECR), to the interest of the applicant in obtaining the annulment of the contested measure (judgment of 28 September 2004 in Case T-310/00 *MCI* v *Commission*, not yet published in the ECR) and to standing to bring proceedings (judgments of 7 July 2004 in Joined Cases T-107/01 and T-175/01 *Sacilor-Lormines* v *Commission* and of 1 December 2004 in Case T-27/02 *Kronofrance* v *Commission*, neither yet published in the ECR).

It has also considered, in so far as it constitutes an absolute bar to proceedings, the bar arising from infringement of essential procedural requirements, which encompasses the lack of a statement of reasons for the contested measure or an inadequate statement of reasons (judgment of 8 July 2004 in Case T-44/00 *Mannesmannröhren-Werke* v *Commission*, not yet published in the ECR, paragraphs 126 and 210; under appeal, Case C-411/04 P). On the other hand, the Court held that a breach of the rights of the defence, which by its nature is subjective, does not fall within the scope of an infringement of essential procedural requirements and, therefore, is not be raised by the Court of its own motion (judgment of 8 July 2004 in Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others* v *Commission*, not yet published in the ECR, paragraph 425; under appeal, Cases C-403/04 P and C-405/04 P).

3. Costs

Where a party is unsuccessful before the Court of First Instance, he must in principle bear, in addition to his own costs, those of the opposing party. In accordance with the Rules of Procedure of the Court of First Instance, recoverable costs are limited, first, to those incurred for the purpose of the proceedings before the Court of First Instance and, second, to those necessarily incurred for that purpose.

The amount of the costs to be recovered is frequently a ground for dispute. The Commission thus regarded as excessive the amounts claimed by the representatives of the companies Airtours and Schneider Electric after the Court of First Instance had

annulled the decisions respectively prohibiting Airtours from acquiring First Choice (Case T-342/99 *Airtours* v *Commission* [2002] ECR II-2585) and Schneider Electric from acquiring Legrand (Case T-310/01 *Schneider Electric* v *Commission* [2002] ECR II-4071) as well as a decision ordering a separation of the undertakings (Case T-77/02 *Schneider Electric* v *Commission* [2002] ECR II-4201).

In an order of 28 June 2004 in Case T-342/99 DEP *Airtours* v *Commission*, not yet published in the ECR, the Court observed that the sum which Airtours sought to recover from the Commission amounted to more than GBP 1 700 000. The Commission, for its part, had assessed initially at GBP 130 000, and then at GBP 170 000, the costs incurred by Airtours.

For the purpose of fixing the amount recoverable, the Court held, in particular, that where a client decides to be represented by both a solicitor and counsel, it is possible for the fees due to each of them to be regarded as costs necessarily incurred for the purpose of the proceedings. The Court stated that in those circumstances, however, it must examine the extent to which the services supplied by all the advisers concerned were necessary for the conduct of the legal proceedings and satisfy itself that the fact that both categories of lawyers were instructed did not entail any unnecessary duplication of costs. That was partially the case in this instance.

It also held that the essentially economic nature of the findings made by the Commission in the context of merger control may justify the involvement of economic advisers or experts specialising in that field to supplement the legal advisers' work, thus resulting in costs that are recoverable. The costs of that nature were, however, considered excessive by the Court.

Finally, where an applicant is subject to value added tax, as Airtours was, it is entitled to recover from the tax authorities value added tax paid on goods and services purchased by it. Since this tax does not represent an expense for it, it cannot claim reimbursement of the tax on costs which are recoverable.

In the light of those considerations, and of the importance of the case from the point of view of Community competition law, the numerous and complex economic and legal questions which were examined by the advisers, the financial interest that Airtours had in the case and the amount of work generated by the court proceedings for the legal and economic advisers, the Court set the total amount of costs that Airtours could recover at slightly less than GBP 490 000.

By order of 29 October 2004 in Case T-310/01 DEP *Schneider Electric* v *Commission*, not published in the ECR, the Court set the amount to be recovered by Schneider Electric, the Commission having refused to pay the sum of roughly EUR 830 000. This sum was claimed in respect, essentially, of the fees and disbursements of Schneider Electric's advisers incurrred for the purpose of the procedure before the Court that resulted in annulment of the decision prohibiting the merger between Schneider Electric and Legrand.

While acknowledging the great complexity of the case, its financial importance to the applicant, its interest from the point of view of Community law and the complexity of the economic and legal questions raised by it, the Court held that the number of chargeable

hours put forward by the lawyers in support of their claim was excessive. In the light of all those factors, the total amount of costs was reduced to almost EUR 420 000.

For reasons of the same nature, the amount of the costs relating to the proceedings for interim relief and to the proceedings that resulted in annulment of the decision ordering Schneider to sell as a whole the assets held in Legrand, which had been assessed at EUR 830 000, was set at almost EUR 427 000 (order of 29 October 2004 in Case T-77/02 DEP *Schneider Electric* v *Commission*, not published in the ECR).

B. Admissibility of actions brought under Article 230 EC

Under the fourth paragraph of Article 230 EC, 'any natural or legal person may ... institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former'.

The fifth paragraph of Article 230 EC provides that an action for annulment is to be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

1. Measures against which an action may be brought

It is settled case-law that only a measure which produces binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action for annulment under Article 230 EC.

By contrast, as recalled in the order in *SGL Carbon* v *Commission*, cited above, a measure which merely confirms a previous decision not contested within the time-limit for initiating proceedings is not a reviewable act. That is so in the case of a measure which contains no new factor as compared with the previous decision and was not preceded by a re-examination of the circumstances of the person to whom that decision was addressed. The Court points out, however, that the question whether a measure is confirmatory cannot be determined solely with reference to its content as compared with that of the previous decision which it confirms. The nature of the contested measure must also be appraised in the light of the nature of the request to which it constitutes a reply. In particular, if the measure constitutes the reply to a request in which substantial new facts are relied on, and whereby the administration is requested to reconsider its previous decision, that measure cannot be regarded as merely confirmatory in nature, since it constitutes a decision taken on the basis of those facts and thus contains a new factor as compared with the previous decision. The Court held that the Commission was fully entitled to maintain that the letter which it had sent to the applicant was not in the nature of a decision because, even if the financial information supplied by the applicant was new, that information was not capable of substantially altering the applicant's legal

situation as at the date of the previous decision, which was not contested within the time-limit for initiating proceedings.

Also, the Court has held that where, in the context of an action for annulment, the contested measure is negative, it must be appraised in the light of the nature of the request to which it constitutes a reply. In particular, the refusal by a Community institution to withdraw or amend a measure may constitute a measure whose legality may be reviewed under Article 230 EC only if the measure which the Community institution refuses to withdraw or amend could itself have been contested under that provision (order of 15 March 2004 in Case T-139/02 *Institouto N. Avgerinopoulou and Others* v *Commission*, not yet published in the ECR, and *Comunidad Autónoma de Andalucía* v *Commission*, cited above). In this regard, the Court held in *Comunidad Autónoma de Andalucía* v *Commission* that a letter from the Director-General of the European Anti-Fraud Office (OLAF) informing the applicant that it was not possible to investigate its complaint directed against the final report which was drawn up by OLAF following an external investigation and forwarded to the competent Spanish authorities in accordance with Article 9 of Regulation No 1073/1999 [4] could not be regarded as a decision against which proceedings could be brought, since that report did not constitute a measure producing binding legal effects such as to affect the applicant's interests, but a recommendation or an opinion lacking binding legal effects.

2. Time-limit for bringing an action

While the Court was called on in a number of decisions to verify whether the time-limit for bringing an action was complied with (judgment of 28 January 2004 in Joined Cases T-142/01 and T-238/01 *OPTUC* v *Commission*, not yet published in the ECR, and order of 25 May 2004 in Case T-264/03 *Schmoldt and Others* v *Commission*, not yet published in the ECR (under appeal, Case C-342/04 P), it is the order of 9 November 2004 in Case T-252/03 *FNICG* v *Commission*, not yet published in the ECR, that is to be focused upon.

In an action brought by the Fédération nationale de l'industrie et des commerces en gros des viandes (French National Federation for the Meat Industry and Meat Wholesalers (FNICGV)) for annulment, on the basis of Article 229 EC, of the fine which the Commission had imposed on it for breach of the competition rules, [5] the Court observed that this article of the Treaty does not enshrine the 'action under the Court's unlimited jurisdiction' as an autonomous remedy. Indeed, this provision, which states that 'regulations adopted jointly by the European Parliament and the Council, and by the Council, pursuant to the provisions of [the EC] Treaty, may give the Court of Justice unlimited jurisdiction with regard to the penalties provided for in such regulations', is not mentioned in Article 225(1) EC, as amended by the Treaty of Nice, among the types of action falling within the jurisdiction of the Court of First Instance.

[4] Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (OJ 1999 L 136, p. 1).

[5] Commission Decision 2003/600/EC of 2 April 2003 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case COMP/C.38.279/F3 – French beef) (OJ 2003 L 209, p. 12).

Since that unlimited jurisdiction can be exercised by the Community judicature only in the context of the review of acts of the Community institutions, more particularly in actions for annulment, an action in which the Community judicature is asked to exercise its unlimited jurisdiction must be brought within the time-limit laid down by the fifth paragraph of Article 230 EC, which was not the case in this instance. [6]

3. Legal interest in bringing proceedings

In the case between MCI, formerly called WorldCom, and the Commission, the Court found that MCI had an interest in obtaining the annulment of the Commission decision prohibiting it from merging with Sprint even though that decision was adopted after withdrawal of the notification.

The Court held in its judgment in *MCI* v *Commission*, cited above, that the applicant had an interest in obtaining the annulment of a decision by which the Commission refused to regard the parties' statement as amounting to a formal withdrawal of the notified agreement, when the applicant had vainly sought to prevent adoption of the decision by formally stating that it was abandoning the notified merger transaction with which the decision deals. The Court added that, as long as the Commission decision continues to stand, the undertaking is prevented by law from merging with the other party to the notified transaction, at least in the configuration and under the conditions put forward in the notification, should it again have the intention to do so. The fact that the undertaking does not necessarily have that intention, or that it will perhaps not carry it out, is, in this respect, a purely subjective circumstance that cannot be taken into account when assessing its interest in bringing proceedings for the annulment of a measure which, unquestionably, produces binding legal effects such as to affect its interests by bringing about a distinct change in its legal position.

4. Standing to bring proceedings

So far as concerns the circumstances in which an applicant is regarded as directly concerned by the measure whose annulment he seeks, the Court recalled that a Community measure is of direct concern to an individual if it directly produces effects on his legal position and its implementation leaves no discretion to the addressees of the measure, implementation being a purely automatic matter flowing solely from the Community legislation without the application of other intermediate rules. The order in *Institouto N. Avgerinopoulou and Others* v *Commission*, cited above, and the order of 8 July 2004 in Case T-341/02 *Regione Siciliana* v *Commission*, not yet published in the ECR (under appeal, Case C-417/04 P), dismiss for lack of direct interest (i) an action, brought by private parties not appearing among the final beneficiaries of the measures envisaged, for annulment of a Commission decision addressed to the Hellenic Republic approving a draft operational programme for the purposes of the regulation on structural funds [7] and (ii) an action for annulment of a Commission decision addressed to the Italian Republic terminating financial assistance from the European

[6] The other actions brought against the decision mentioned in the preceding footnote are still pending before the Court (Case T-217/03 *Fédération nationale de la coopération bétail et viande* v *Commission* and Case T-245/03 *FNSEA and Others* v *Commission*).

[7] Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds (OJ 1999 L 161, p. 1).

Regional Development Fund (ERDF) in relation to a motorway project between Messina and Palermo, which had been brought by the authority responsible for carrying out the project, namely the Region of Sicily. In both orders the Court found that the national authorities had a discretion in implementing the contested measures.

So far as concerns the circumstances in which an applicant is regarded as individually concerned by a measure which is not addressed to him, it should be noted that the new interpretation of the criterion for determining whether applicants are individually concerned, which was adopted in Case T-177/01 J*égo-Quéré* v *Commission* [2002] ECR II-2365, now clearly belongs to the past. After the Court of Justice had decided to confirm its interpretation of the concept of individual concern in Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677 (see also the judgment of the Court of Justice of 1 April 2004 in Case C-236/02 P *Commission* v *Jégo-Quéré*, not yet published in the ECR, setting aside the judgment of the Court of First Instance in Case T-177/01), the Court of First Instance examined the concept of individual concern in the cases before it by reference to the formula laid down in Case 25/62 *Plaumann* v *Commission* [1963] ECR 95. Thus, in order for natural and legal persons to be regarded as individually concerned by a measure not addressed to them, it must affect their position by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee.

Where a legal person bringing an action for annulment is an association of undertakings, it may, when it has taken part in the procedure leading to the adoption of the contested measure, be granted standing in at least three kinds of circumstances: where a legal provision expressly grants it a series of procedural powers; where the association itself is distinguished individually because its own interests as an association are affected, in particular because its negotiating position has been affected by the measure whose annulment is being sought; and where it represents the interests of undertakings which would themselves be entitled to bring proceedings. In its order of 10 May 2004 in Case T-391/02 *Bundesverband der Nahrungsmittel- und Speiseresteverwertung and Kloh* v *Parliament and Council*, not yet published in the ECR, and in *Schmoldt and Others* v *Commission*, cited above, the Court, in particular, refused to accept that the applicant associations had occupied a clearly circumscribed position as negotiator which was intimately linked to the subject-matter of the contested measure.

a) *Decisions*

In the field of State aid, actions mainly seek the annulment either of a decision taken without opening the formal investigation procedure referred to in Article 88(2) EC or of a decision taken at the end of that procedure. Since those decisions are addressed to the Member State concerned, it is for the undertaking, which is not the addressee, to show that that measure is of direct and individual concern to it.

Where the Commission, without opening the formal investigation procedure, finds in the course of a preliminary investigation that State aid is compatible with the common

market, the parties concerned within the meaning of Article 88(2) EC, who are entitled to the guarantees of the formal investigation procedure when it is implemented, must be regarded as individually concerned by the decision making that finding.

In the judgment of 16 March 2004 in Case T-157/01 *Danske Busvognmaend* v *Commission*, not yet published in the ECR, a trade association representing the interests of the majority of Danish bus companies was recognised as having the status of a 'party concerned', on the ground that it made a complaint to the Commission, that its interventions influenced the course of the administrative procedure and that at least some of its members were in competition with the undertaking which benefited from the disputed aid.

In the judgment of 1 December 2004 in Case T-27/02 *Kronofrance* v *Commission*, not yet published in the ECR, the Court held that the applicant, who had pleaded the failure to open the formal investigation procedure, was indeed a 'party concerned' in light of its status as a competitor, a status established by having regard to the identity of the products manufactured by it with those of the undertaking benefiting from the aid and to the fact that their sales areas overlapped.

In the judgment of 13 January 2004 in Case T-158/99 *Thermenhotel Stoiser Franz and Others* v *Commission*, not yet published in the ECR, hotel operators in a tourist resort in the Province of Styria (Austria) were entitled to challenge the legality of a Commission decision declaring the public financing of the construction of a luxury hotel in the same resort to be compatible with the common market. The Court observed that the applicants were direct competitors of the hotel receiving the aid in question and that they were recognised as having this status in the contested decision.

In the above three cases it was held that the applicant undertakings were, in their capacity as parties concerned within the meaning of Article 88(2) EC, individually concerned by the decisions declaring at the end of the preliminary investigation procedure that aid was compatible with the common market. It should nevertheless be noted, with regard to the extent of the review of the pleas, that in one instance the Court regarded the pleas for annulment in their entirety as seeking to establish that the Commission had unlawfully failed to open the formal investigation procedure (*Thermenhotel Stoiser Franz and Others* v *Commission*), whereas in another instance it annulled on the merits the decision approving the grant of aid (*Danske Busvognmaend* v *Commission*).

Where the contested decision has been adopted at the end of the formal investigation procedure provided for by Article 88(2) EC, it is not sufficient, in order for an undertaking to be distinguished individually in the same way as the addressee of the decision, that it has the status of a 'party concerned'. According to the case-law, such a decision is of individual concern to the undertakings which were at the origin of the complaint which led to that procedure and whose views were heard and determined the conduct of the procedure, provided, however, that their position on the market is substantially affected by the aid which is the subject of that decision.

Applying those criteria identified for the first time by the Court of Justice in Case 169/84 *COFAZ and Others* v *Commission* [1986] ECR 391, the Court of First Instance held that

the Austrian company Lenzing was individually concerned by a Commission decision concerning the State aid granted by the Kingdom of Spain to the company Sniace, since Lenzing, a competitor of the recipient company, first, was at the origin of the complaint that led to the opening of the procedure and participated actively in the procedure and, second, provided information such as would show that its position on the market was substantially affected by the contested decision, for instance information concerning the characteristics of the market in question, namely a very limited number of producers, fierce competition and significant production surpluses (judgment of 21 October 2004 in Case T-36/99 *Lenzing* v *Commission*, not yet published in the ECR; under appeal, Case C-525/04 P).

On the other hand, by order of 27 May 2004 in Case T-358/02 *Deutsche Post and DHL* v *Commission*, not yet published in the ECR (under appeal, Case C-367/04 P), the Court found that Deutsche Post and DHL International, two companies operating on the Italian market in postal services open to competition, had not played an active role during the administrative procedure which preceded the adoption of the decision relating to State aid granted by the Italian Republic in favour of Poste Italiane. It therefore examined whether the measure authorised by that decision was nevertheless liable to affect significantly their position on the market in question and concluded, in the absence of sufficient proof of the magnitude of the prejudice to their position on the market, that that was not the case.

b) *Measures of general application*

The Court did not fail to recall that although the fourth paragraph of Article 230 EC makes no express provision regarding the admissibility of actions brought by private persons for annulment of measures of general application, the mere fact that the contested measure is of general application is not sufficient to render such an action inadmissible.

None the less, after analysing whether the private persons were individually concerned by the measures of general application whose legality they put in issue, the Court concluded that they were not and dismissed actions for the annulment of regulations (order of 6 July 2004 in Case T-370/02 *Alpenhain-Camembert-Werk and Others* v *Commission*, not yet published in the ECR), [8] directives (order of 6 September 2004 in Case T-213/02 *SNF* v *Commission*, not yet published in the ECR (under appeal, Case C-482/04 P)), [9] and decisions of general application (*Schmoldt and Others* v *Commission*, cited above).

[8] By this order the Court dismissed an action for annulment of 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 2002 L 277, p. 10), by which ‘Feta’ was added as a protected designation of origin.

[9] By this order the Court dismissed an action for partial annulment of the Twenty-sixth Commission Directive (2002/34/EC) of 15 April 2002 adapting to technical progress Annexes II, III and VII to Council Directive 76/768/EEC on the approximation of the laws of the Member States relating to cosmetic products (OJ 2002 L 102, p. 19) in so far as it restricts the use of polyacrylamides in the composition of cosmetic products.

C. Competition rules applicable to undertakings

The points raised in this area in 2004 are primarily concerned with questions relating to the procedure before the Commission and the determination of the amounts of fines. The decisions of the Court of First Instance in the 'graphite electrodes' [10] and 'seamless steel tubes and pipes' [11] cases are the main cases dealt with below.

In *Tokai Carbon and Others* v *Commission*, cited above, the eight United States, German and Japanese undertakings which participated in the cartel – seeking, on a worldwide scale, to fix prices and to share national and regional markets according to the 'home producer' principle in the graphite electrodes sector (graphite electrodes are used mainly in the production of steel in electric arc furnaces) – were fined a total of approximately EUR 220 million by the Commission, [12] the individual fines varying between EUR 10.3 million and 80.2 million.

In the 'seamless steel tubes and pipes' case, the Commission ordered eight producers (four European companies and four Japanese companies) of certain types of seamless steel tubes used in the oil and gas industry to pay fines amounting to EUR 99 million for infringing Article 81 EC. [13] The Commission found that each undertaking had undertaken not to sell standard borehole tubes and certain types of line pipe on the national market of any other undertaking participating in the agreement.

The actions brought in those cases (by seven undertakings in the 'graphite electrodes' and also by seven undertakings in the 'seamless steel tubes and pipes' cases) reveal, thus confirming a tendency already observed, that it is now rare for undertakings which are fined for infringing Article 81 EC to challenge the legal classification of the infringements and the evidence of their participation in the agreement. They now essentially dispute the determination of the amount of the fines, claiming that there has been an incorrect application of the rules which the Commission has imposed upon itself in setting fines, in particular the Guidelines on the method of setting fines imposed under Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty ('the Guidelines') [14] and the Notice

10 Judgment of 29 April 2004 in Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others* v *Commission*, not yet published in the ECR (under appeal, Cases C-289/04 P, C-301/04 P, C-307/04 P and C-308/04 P).

11 Judgments of 8 July 2004 in Case T-44/00 *Mannesmannröhren-Werke* v *Commission* (under appeal, Case C-411/04 P); Case T-48/00 *Corus UK* v *Commission*; Case T-50/00 *Dalmine* v *Commission* (under appeal, Case C-407/04 P); and Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others* v *Commission* (under appeal, Cases C-403/04 P and C-405/04 P); none yet published in the ECR.

12 Commission Decision 2002/271/EC of 18 July 2001 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement – Case COMP/E-1/36.490 – Graphite electrodes (OJ 2002 L 100, p. 1).

13 Commission Decision 2003/382/EC of 8 December 1999 relating to a proceeding under Article 81 of the EC Treaty (Case IV/E-1/35.860-B seamless steel tubes) (OJ 2003, L 140, p. 1).

14 OJ 1998 C 9, p. 3.

on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; 'the Leniency Notice'). [15] As explained below, the Court of First Instance recognises that the Commission has a margin of discretion, indeed a very wide margin of discretion, depending on the case, in applying the criteria for determining the amount of fines. However, the Court scrupulously ensures that the undertakings fined for having participated in the same cartel are treated in according with the principle of equal treatment.

It will also be recalled that the Court of First Instance may exercise its unlimited jurisdiction not only to reduce fines but also to increase them. The reduction by the Court of the overall amount of the fines imposed on the applicants by the Commission in the 'graphite electrodes' and 'welded steel tubes and pipes' cases (from EUR 207 200 200 to EUR 152 772 400) in the 'graphite electrodes' case and from EUR 90 900 000 to EUR 78 120 000 in the 'seamless steel tubes and pipes' case) is a result which merits some qualification (see below).

As no judgment has entailed an adjudication on the lawfulness of decisions adopted under Article 82 EC (as far as 2004 is concerned, *Microsoft* v *Commission* was dealt with by the judge responsible for granting interim relief; see below) and the only decision relating to Regulation No 4064/89 concluded that the Commission was not competent to deal with the matter (judgment of 28 September in Case T-310/00 *MCI* v Commission, not yet published in the ECR), the developments relating to Article 81 EC and the sanctions imposed for infringement of that provision will constitute the essential part of this section on competition law.

1. Points raised in the case-law on the scope of Article 81 CE

a) *Scope ratione materiae*

In Case T-313/02 *Meca-Medina and Majcen* v *Commission* (judgment of 30 September 2004, not yet published in the ECR; under appeal, Case C-519/04 P), the Court of First Instance had occasion to apply the concept of economic activity to sport. In its judgment, the Court upheld the Commission's decision rejecting the complaint lodged by two professional athletes who compete in long-distance swimming events. Those two athletes, who were suspended under the Olympic Movement's Anti-Doping Code after testing positive for nandrolone, had claimed before the Commission that the International Olympic Committee's anti-doping rules infringed the Community rules on competition and the free movement of services.

The Court recalled that, according to the settled case-law of the Court of Justice, sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 EC. The provisions of the EC Treaty on free movement of workers and services apply to the rules adopted in the field of sport which concern the economic aspect which sporting activity can present. That applies, in particular, to the rules providing for the payment of fees for the transfer of professional players between clubs (transfer clauses) or limiting the number of professional players who are nationals of other Member States which those clubs may field in matches. On the other hand, Community law does not extend to what are purely sporting rules which for that reason have nothing to do with

[15] The 1996 Leniency Notice was replaced in 2002 by the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3).

economic activity, like the rules on the composition of national teams or 'the rules of the game' fixing, for example, the length of matches or the number of players on the field.

After noting that the Court of Justice had not, in cases concerning Article 39 EC et seq. and Article 49 EC et seq., had to rule on whether sporting rules are subject to the Treaty provisions on competition, the Court of First Instance considered that the principles identified in respect of free movement of workers and services are equally valid as regards the provisions of the EC Treaty relating to competition and that the opposite is also true. It follows that purely sporting legislation does not come under either the Community provisions on free movement of persons and services or the provisions on competition.

b) *Competition procedure*

– Access to the file

The rule that undertakings being investigated under Articles 81 EC and 82 EC must have access to the Commission's file is now clearly recognised in Community law. That rule has its basis in the principle of equality of arms and is therefore essential to the exercise of the rights of the defence. None the less, there are limits to the rule, which seek to protect the Commission's decision-taking process or the legitimate interests of third parties.

In *Tokai Carbon and Others* v *Commission*, cited above, the Court of First Instance first observed that, in order to allow the undertakings concerned to defend themselves effectively against the objections raised against them in the statement of objections, the Commission is required to make available to them the entire investigation file, except for documents containing business secrets of other undertakings, other confidential information and internal documents of the Commission. As regards those internal documents, the restriction of access to them is justified by the need to ensure the proper functioning of the Commission when it deals with infringements of the Treaty competition rules; internal documents can be made available only if the exceptional circumstances of the case so require, on the basis of serious evidence which it is for the party concerned to provide, both before the Community Court and in the administrative procedure conducted by the Commission.

– The scope of the Statement of Objections

The function of the Statement of Objections is well established: it must enable those concerned to be fully aware of the conduct in respect of which the Commission criticises them and to exercise their rights of defence effectively. That requirement is satisfied where the final decision does not impute to the parties concerned infringements different from those referred to in the statement of objections and sets out only facts in respect of which the parties concerned have had the opportunity to provide an explanation.

In its judgment of 8 July 2004 in Case T-44/00 *Mannesmannröhren-Werke* v *Commission*, not yet published in the ECR (under appeal, Case C-411/04 P), the Court of First Instance recalled that the rights of the defence are infringed as a result of a discrepancy between the statement of objections and the final decision only where an objection stated in the decision was not set out in the statement of objections in a manner sufficient to enable

the addressees to defend their interests. The obligation placed on the Commission in connection with a statement of objections is limited to setting out the objections and to specifying clearly the facts upon which it relies and its classification of those facts, so that the addressees of the statement of objections are able to defend their interests. In that regard, the Court held that the legal classification of the facts made in the statement of objections can, by definition, be only provisional, and a subsequent Commission decision cannot be annulled on the sole ground that the definitive conclusions drawn from those facts do not correspond precisely with that intermediate classification. The Commission is required to hear the addressees of a statement of objections and, where necessary, to take account of any observations made in response to the objections by amending its analysis, specifically in order to respect their rights of defence.

– **Consequences of an express acknowledgement of the facts during the administrative procedure**

Where the undertaking involved in an infringement of the competition rules does not expressly acknowledge the facts, the Commission must prove the facts and the undertaking is free to put forward, in the procedure before the Court, any plea in its defence which it deems appropriate. On the other hand, that is not the case where the undertaking *expressly, clearly and specifically acknowledges the facts*: where the undertaking explicitly admits during the administrative procedure the substantive truth of the facts which the Commission alleges against it in the statement of objections, those facts must thereafter be regarded as established and the undertaking estopped in principle from disputing them during the procedure before the Court (*Tokai Carbon and Others* v *Commission*, cited above, paragraph 108). In the light of those criteria, the Court considered that an inference made by the Commission on the basis of a range of evidence such as the objective conduct of the undertaking concerned towards the Commission during the administrative procedure and its no-contest statements taken from a wide generality did not constitute such an acknowledgement (ibid., paragraph 109).

In reaching that decision, the Court made specific reference to the finding made in 2003 in the 'lysine' cases that the elements of fact on which the Commission relied in determining the amount of the fine could no longer be called in question before the Court if the applicant expressly acknowledged them during the administrative procedure (Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597 (under appeal, Case C-397/03 P), commented on in the *Annual Report 2003*).

– **No recognition of an absolute right to silence**

The question has regularly arisen whether the undertakings to which decisions taken under Article 11(5) of Regulation No 17 [16] requesting that they communicate certain information are sent have an absolute right to silence. The Court of Justice (Case 374/87

[16] Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-62, p. 87).

Orkem v *Commission* [1989] ECR 3283 and Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375) and the Court of First Instance (Case T-112/98 *Mannesmannröhren-Werke* v *Commission* [2001] ECR II-729) have consistently held that to acknowledge the existence of such a right would be to go beyond what is necessary in order to preserve the rights of defence of undertakings and would constitute an unjustified hindrance to the Commission's performance of its duty to ensure that the rules on competition within the common market are observed and that a right to silence can be recognised only to the extent that the undertaking concerned would be compelled to provide answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove. It has always been inferred that, in order to ensure the effectiveness of Article 11 of Regulation No 17, the Commission is therefore entitled to compel the undertakings to provide all necessary information concerning such facts as may be known to them and to disclose to the Commission, if necessary, such documents relating thereto as are in their possession, even if the latter may be used to establish the existence of anti-competitive conduct. It follows from those decisions that this power of the Commission to request information does not fall foul of Article 6(1) and (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms.

However, the applicants have not been deterred from invoking the judgments of the European Court of Human Rights [17] in an effort to ensure that the Community case-law develops in a way favourable to their case. The Court of First Instance has none the less refused to embark on that road and emphasised in *Tokai Carbon and Others* v *Commission* that the Commission's power to request information does not fall foul of either Article 6(1) and (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms or the case-law of the European Court of Human Rights.

In any event, the Court of First Instance observes, the mere fact of being obliged to answer purely factual questions put by the Commission and to comply with its requests for the production of documents already in existence cannot constitute a breach of the principle of respect for the rights of defence or impair the right to fair legal process, which offer, in the specific field of competition law, protection equivalent to that guaranteed by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. There is nothing to prevent the addressee of a request for information from showing, whether later during the administrative procedure or in proceedings before the Community Courts, when exercising his rights of defence, that the facts set out in his replies or the documents produced by him have a different scope from that ascribed to them by the Commission.

17 *Funke* v *France* judgment of 25 February 1993, Series A No 256-A, § 44a; *Saunders* v *United Kingdom* judgment of 17 December 1996, Reports of judgments and decisions, 1996-VI, p. 2044; and *J.B.* v *Switzerland* judgment of 3 May 2001, not yet published in the Reports of judgments and decisions.

– **Reasonable time**

The need to act within a reasonable time in conducting administrative proceedings relating to competition policy is a general principle of Community law whose observance is ensured by the Community judicature (Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739).

In its judgment of 13 January 2004 in Case T-67/01 *JCB Service* v *Commission*, not yet published in the ECR (under appeal, Case C-167/04 P), the Court of First Instance had occasion to recall that infringement of that principle is capable of vitiating the decision adopted by the Commission at the close of the administrative procedure only if it is shown that it also entails infringement of the rights of defence of the undertaking concerned. In that case, although the Commission flagrantly breached its obligation to comply with such a time-limit when examining an application for exemption under Article 81(3) EC when it rejected an application for exemption 27 years after an agreement was notified to it in 1973, the Court of First Instance held that that breach had not affected the lawfulness of the rejection of the application for exemption.

As regards the period of more than four years taken to investigate the complaint lodged by a competitor of the party which notified the agreements in issue, the Court of First Instance did not find it excessive, given the complexity of the case, which involved several Member States and covered five heads of infringement, and the need to draw up a second statement of objections.

c) *Proof of the infringement of Article 81 EC*

It is for the Commission to demonstrate the circumstances constituting an infringement of Article 81 EC (Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 86). The Commission must, in particular, demonstrate the duration of the infringement in respect of which it is imposing a sanction. The challenges mounted by the applicants in the ‘seamless steel tubes and pipes’ cases helped to clarify a number of aspects relating to the level of proof required and also to the burden of proof before the Court of First Instance when the evidence adduced by the Commission is disputed by the undertakings concerned.

In those cases, the Commission had not adduced evidence of the entire duration of the infringement. In order to determine the duration of the infringement, the Commission took the view that, although the Europe-Japan club had first met in 1977, 1990 should be taken as the starting date of the infringement because, between 1977 and 1990, agreements on the voluntary restraint of exports had been concluded between the European Community and Japan.

The Court noted that none of the parties had challenged the Commission’s position, consisting in not setting the starting date of the infringement as 1977 because of the existence of the voluntary restraint agreements. When the applicants disputed the starting date of the infringement, however, the Court observed that the alleged cessation of the voluntary restraint agreements constituted the decisive criterion for the purpose of

determining whether 1990 should be taken as the starting date for the infringement. In that regard, the Court recalled that, in principle, it is for the applicant to adduce evidence of its claims. None the less, the Court found that, in the specific circumstances of the case, it was incumbent on the Commission to produce evidence of the date of cessation of the international voluntary restraint agreements. It was held that that evidence had not been produced, after the Court considered that '[t]he Commission's inexplicable inability to produce evidence relating to a circumstance which concern[ed] it directly [made] it impossible for the Court to give a ruling in full knowledge of the facts concerning the date of cessation of those agreements'.

In the absence of evidence adduced by the Commission, and faced with evidence adduced by the Japanese undertakings that the international agreements had been extended until 31 December 1990, at least at the Japanese level, the Court considered that those agreements had remained in force until the end of 1990. The contested decision was annulled in part on that point and the amount of the fines reduced accordingly.

The Japanese undertakings also disputed the date on which the infringement in which they were found to have participated came to an end. The Court held that, on the basis of the evidence adduced by the Commission, the existence of the infringement had not been established, so far as the Japanese undertakings were concerned, after 1 July 1994 and that, accordingly, the duration of the infringement must be reduced by six months in addition to the reduction of one year indicated above. Consequently, the Court annulled the contested decision in so far as it established the existence of the infringement before 1 January 1991 and, so far as the Japanese undertakings were concerned, beyond 30 June 1994, and the fines imposed on the undertakings were reduced accordingly (Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others* v *Commission*, not yet published in the ECR; under appeal, Cases C-403/04 P and C-405/04 P).

d) *Fines*

Under Article 15 of Regulation No 17, [18] where the Commission finds an infringement of Article 81 EC or Article 82 EC, it may, by decision, not only require the undertakings to bring the infringement to an end, but also impose fines on them. The amount of the fine, which may be up to 10% of the worldwide turnover in the business year preceding the adoption of the decision making a finding of infringement of each of the undertakings participating in the infringement, is determined in the light of the gravity and the duration of the infringement.

[18] Article 23 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty (OJ 2003 L 1, p. 1) is identical to Article 15 of Regulation No 17.

– **Guidelines**

As regards, first, the Guidelines, the Court of First Instance recalled, as it had already held in the judgments in the 'district heating', [19] 'Lysine' [20] and 'FETTSCA' [21] cases, that the Guidelines are binding on the Commission. The Commission must therefore comply with the rules which it has imposed upon itself (*Mannesmannröhren-Werke* v *Commission*, cited above, paragraphs 212 and 231), unless it sets out expressly its reasons for departing from them in any particular regard (*Tokai Carbon and Others* v *Commission*, cited above, paragraph 352). The undertakings may therefore invoke the incorrect application of the Guidelines before the Community Courts.

As regards, second, certain more particular provisions of the Guidelines, the Court has defined the conditions for the application of the criteria set for determining the amount of the fine in the light of the gravity of the infringement and also of its duration.

Gravity

In its decision in the 'graphite electrodes' case, the Commission had concluded that the infringement was 'very serious', regard being had to the nature of the infringement, its actual impact on the graphite electrodes market in the EEA and the size of the relevant geographic market. The Court approved the approach taken by the Commission. It considered, in particular, that since the cartel sought to share the markets at worldwide level, the Commission had not made a manifest error of assessment in choosing the worldwide turnover achieved from sales of the relevant product for the purposes of determining the starting amount, because, in the Court's view, that turnover allowed the Commission to take account of 'the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers', within the meaning of point 1.A, fourth paragraph, of the Guidelines. [22]

19 Judgments of 20 March 2002 in Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487 (under appeal, Case C-202/02 P); Case T-15/99 *Brugg Rohrsysteme* v *Commission* [2002] ECR II-1613 (under appeal, Case C-207/02 P); Case T-16/99 *Lögstör Rör* v *Commission* [2002] ECR II-1633 (under appeal, Case C-208/02 P); Case T-17/99 *KE KELIT* v *Commission* [2002] ECR II-1647 (under appeal, Case C-205/02 P); Case T-21/99 *Dansk Rørindustri* v *Commission* [2002] ECR II-1681 (under appeal, Case C-189/02 P); Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705 (under appeal, Case C-206/02 P); Case T-28/99 *Sigma Tecnologie* v *Commission* [2002] ECR II-1845, and Case T-31/99 *ABB Asea Brown Boveri* v *Commission* [2002] ECR II-1881 (under appeal, Case C-213/02 P); these judgments are commented on in the *Annual Report 2002.*

20 In particular, the judgment of 9 July 2003 in Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* (under appeal, Case C-397/03 P); the judgments delivered in the '*Lysine*' cases were commented on in the *Annual Report 2003*.

21 Judgment of 19 March 2003 in Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, concerning the FETTSCA agreement; this judgment was commented on in the *Annual Report 2003*.

22 Point 1 A of the Guidelines states that '[i]n assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market'. It also follows from point 1 that it is possible to 'apply weightings to the amounts determined within each of the three categories [of gravity] in order to take account of the specific weight and, therefore, the real impact of the offending conduct of each undertaking on competition'.

The Commission had also divided the undertakings concerned into three categories, on the basis of the worldwide turnover of each undertaking in sales of the product concerned, in order to take account of the actual economic capacity of each undertaking to cause significant harm to competition and of the great disparity in size between the undertakings. On that point, the Court observed that the Commission was entitled to divide the members of a cartel into several categories for the purposes of setting the amount of fines. Although that categorisation ignored the differences in size between undertakings in the same category, it could not in principle be condemned. However, the thresholds determined for each of the categories thus identified must be coherent and objectively justified. In the present case, the Court held that the method of differentiation used in the decision, which was based on turnover and market shares, had not been correctly applied by the Commission vis-à-vis Tokai Carbon and the Carbide/Graphite Group, which came in one of the three categories in question. In the exercise of its unlimited jurisdiction, the Court therefore decided to dismantle the category in question and to make its own classification. It also fixed the starting amount of the fines for the undertakings coming within that classification and also for the undertakings in the third category.

Last, in regard to the two undertakings considered the most important, the Commission had applied multipliers for gravity to the starting amount. The Court confirmed that it is in principle possible for the Commission to apply a multiplier for gravity to the starting amounts in order to set the fine at a sufficiently deterrent level (Case T-31/99 *ABB Asea Brown Boveri* v *Commission* [2002] ECR II-1881, paragraphs 165 to 167; under appeal, Case C-213/02 P). However, the multiplier applied in the present case to SDK (2.5) was held not to comply with the principles of proportionality and equal treatment and the Court, in the exercise of its unlimited jurisdiction, reduced the multiplier applicable to that undertaking to 1.5.

Although, by applying a multiplier, the Commission therefore remains free to increase the level of fines, it also has the option of reducing the starting amount which would result from a strict application of the Guidelines. The Court confirmed that, in the seamless steel tubes and pipes decision, the Commission was entitled, in spite of what was recognised as the 'very serious' nature of the infringement, to take a starting amount (EUR 10 million) corresponding to 50% of the minimum amount mentioned in the Guidelines for infringements in that category (EUR 20 million), in order to take account of the fact that the actual impact of the infringement on the market had been limited.

On the other hand, the Court considered that the Commission had failed to take into consideration the second infringement by the European producers (the contracts relating to the United Kingdom market) when setting the amount of the fine. By that omission, the Commission therefore infringed the principle of equal treatment, since different situations were treated in the same way. In order to remedy that unequal treatment of the European producers and the Japanese producers, the Court reduced the fine imposed on each of the Japanese producers by 10%. As the Commission had not requested it to do so, the Court did not increase the fines imposed on the European producers.

Duration

In its judgment in *Tokai Carbon and Others* v *Commission*, cited above, the Court of First Instance rejected all the complaints relating to the basic amounts applied in the decision in order to take account of duration.

SGL Carbon maintained that the Guidelines were unlawful in that they envisaged the duration of an infringement in the same way, irrespective of its nature. It maintained that a cartel is by definition long-lasting and that it cannot be treated in the same way for the purpose of duration as other infringements. The Court rejected that argument, observing that certain cartels, being of short duration, are less harmful than they would have been had they been in operation for a long period.

Aggravating circumstances

In *Tokai Carbon and Others* v *Commission* the Court of First Instance confirmed that the Commission could increase the basic amounts for: (i) continuing the infringement after the Commission had begun its investigations (*ABB Asea Brown Boveri* v *Commission*, paragraphs 211 to 213); (ii) acting as ringleader (*Archer Daniels Midland and Archer Daniels Midlands Ingredients* v *Commission*, paragraph 239); and (iii) attempting to impede the procedure by warning other undertakings that dawn raids were imminent (Case T-334/94 *Sarrió* v *Commission* [1998] ECR II-1439, paragraph 320).

Attenuating circumstances

None of the attenuating circumstances which the Commission was alleged to have failed to take into account was recognised by the Court of First Instance.

– The Leniency Notice

Generally, cooperation which allows the Commission to establish the existence of an infringement with less difficulty and, where appropriate, to put an end to it may be rewarded by a reduction in the fine. The 1996 Leniency Notice defines the conditions in which the benefit of its provisions may be granted.

The findings of the Court of First Instance on the application of that notice by the Commission show that the fact of voluntarily sending the Commission, in answer to a request for information under Regulation No 17, documents and information constituting an admission of having participated in an infringement of the Community competition rules must be regarded as voluntary collaboration on the part of the undertaking of such a kind as to warrant a reduction in the fine. In concluding that that was not the case, the Commission, according to the Court of First Instance, failed to appreciate the importance of the cooperation provided by certain applicants (*Tokai Carbon and Others* v *Commission*, cited above).

It should also be noted that the Court criticised the Commission for having failed to appreciate the importance of the cooperation of UCAR, which had provided information

such as the names of other undertakings which were members of the cartel, the names of a number of representatives of those members or code names used to conceal contacts, not in documentary form but orally.

Last, while the notice provides, in point A.3, only for a reduction 'in the fine which would have been imposed upon [the undertakings cooperating with the Commission]', it does not require that each individual item of information must relate to an infringement of competition law in respect of which a separate sanction may be imposed. In order to be able to benefit from that notice, it is sufficient, therefore, that, by revealing its involvement in an infringement, the undertaking minded to cooperate exposes itself to sanctions, while whether the various items of information may be taken into consideration for the purposes of a possible reduction in the fine depends on how useful they are to the Commission in its task of establishing the existence of the infringement and putting an end to it.

In that last regard, since a disloyal Commission official is in a position to sabotage his institution's mission by supporting the members of an illegal cartel and may thus considerably complicate the investigation carried out by the Commission, for example by destroying or manipulating evidence, by informing the members of the cartel of a forthcoming unannounced investigation and by revealing the entire investigation strategy drawn up by the Commission, information about the existence of such an official must, in principle, be regarded as being capable of making it easier for the Commission to carry out its task of establishing an infringement and putting an end to it. Such information is particularly useful when it is provided at the beginning of the investigation opened by the Commission into possible anti-competitive conduct.

In *Mannesmannröhren-Werke* v *Commission*, cited above, the Court of First Instance stated that, in order to receive a reduction in the fine on the ground of not contesting the facts, in accordance with point D.2 of the Leniency Notice, an undertaking must expressly inform the Commission that it has no intention of substantially contesting the facts, after perusing the statement of objections. In the absence of such an express declaration, mere passivity on the part of an undertaking cannot be considered to facilitate the Commission's task, since the Commission is required to establish the existence of all the facts in the final decision without being able to rely on a declaration by the undertaking in doing so.

– **The principle *ne bis in idem***

As it has already had occasion to state (*Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, cited above, paragraph 85), the Court of First Instance recalled in *Tokai Carbon and Others* v *Commission* that the principle *ne bis in idem*, which is also enshrined in Article 4 of Protocol No 7 to the Convention on the Protection of Human Rights and Fundamental Freedoms, is a general principle of Community law upheld by the Community judicature. In the field of Community competition law, the principle precludes an undertaking from being sanctioned by the Commission or made the defendant to proceedings brought by the Commission a second time in respect of anti-competitive conduct for which it has already been penalised or of which it has been exonerated by a previous decision of the Commission that is no longer amenable to challenge.

The question none the less arose as to whether the Commission infringes that principle when it imposes sanctions on undertakings in respect of unlawful conduct which has already been punished by the authorities of non-member States.

On that point, the Court of First Instance considered that the principle *ne bis in idem* does not preclude the possibility of concurrent sanctions, one a Community sanction, the other a national one, resulting from two sets of parallel proceedings which pursue distinct ends. *A fortiori*, that principle cannot apply where procedures are conducted and penalties imposed by the Commission on the one hand and the authorities of non-member States on the other, provided that those procedures do not pursue the same ends.

Furthermore, the Court of First Instance held that the Commission was not required, under a general requirement of natural justice, to take account of penalties imposed by the authorities or the courts of a non-member State which have already been borne by the same undertaking in respect of the same conduct. The conditions on which it may be concluded that there is an obligation to take account of the penalties imposed by an authority of a Member State which have already been borne by the same undertaking in respect of the same conduct are not satisfied where the penalties were imposed by the authorities of non-member States. In those circumstances, given that the applicants pointed to no express provision of a convention requiring the Commission, when determining the amount of a fine, to take account of penalties already imposed on the same undertaking in respect of the same conduct by the authorities or courts of a non-member State, such as the United States or Canada, they could not validly complain that, in the present case, the Commission had failed to satisfy any such alleged obligation.

The principles thus recalled by the Court of First Instance confirm those already identified in the 'Lysine' cases (see, in particular, *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraphs 85 to 104).

– The exercise of unlimited jurisdiction

Pursuant to Article 17 of Regulation No 17, the Court of First Instance has unlimited jurisdiction within the meaning of Article 229 EC in an action against a decision imposing a fine and may thus cancel, reduce or increase the fine imposed.

The Court has on a number of occasions exercised its unlimited jurisdiction to reduce fines after finding that certain elements of the infringement were not established to the requisite legal standard (*JCB Service* v *Commission*, paragraph 193) or that the Commission had failed to comply with the Guidelines or the Leniency Notice (*Tokai Carbon and Others* v *Commission*).

Particular attention should be drawn to the Court's exercise of its unlimited jurisdiction to increase the amount of fines. In *Tokai Carbon and Others* v *Commission* the Court thus exercised for the first time its unlimited jurisdiction to increase the amount of the fine, at an intermediate stage of the calculation. As the undertaking Nippon had contested before the Court facts which it had previously admitted during the administrative procedure – although without expressly, clearly and specifically acknowledging them – the reduction in the fine initially granted by the Commission was reduced.

The Court further observed that, in the context of its unlimited jurisdiction, its assessment of the appropriateness of the fine could take into account information not mentioned in the Commission decision.

2. Regulation No 4064/89

The only decision delivered in the field of concentrations in 2004 was a judgment annulling a Commission decision prohibiting the concentration between the United States telecommunications undertakings WorldCom (now MCI) and Sprint. [23]

However, the judgment of 28 September 2004 in Case T-310/00 *MCI* v *Commission*, not yet published in the ECR, did not involve a determination of the substance of the case, as the ground of annulment concerned the Commission's lack of power to adopt the decision.

After the parties had jointly notified the merger pursuant to Regulation No 4064/89 [24] on 10 January 2000, they formally stated on 27 June 2000 that they were withdrawing their notification and that they no longer intended to implement the proposed merger in the form set out in the notification. On 28 June 2000, the Commission none the less adopted its decision declaring the merger incompatible with the common market and the EEA Agreement.

The Court found that the communication which WorldCom and Sprint sent to the Commission on 27 June 2000 concerned not the abandonment, as a matter of principle, of any idea of, or proposal for, a merger, but only the abandonment of the proposed merger 'in the form presented in the notification', i.e. in the form envisaged by the notified merger agreement. Press releases issued on the same day in the United States by the two undertakings confirmed that at the time WorldCom and Sprint still entertained some hopes of merging their activities in one form or another. In reality, it was only by the press release of 13 July 2000 that the notifying parties announced that they were definitively abandoning their proposed merger. However, the Court of First Instance further stated that a merger agreement capable of forming the subject-matter of a Commission decision does not automatically exist (or continue to exist) between two undertakings simply because they are considering merging (or continue to consider merging). Commission competence cannot rest on the mere subjective intentions of the parties. Just as it does not have the power to prohibit a merger before a merger decision has been concluded, the Commission ceases to have that power as soon as that agreement is abandoned, even if the undertakings concerned continue negotiations with a view to concluding an agreement in a modified form. In that particular case, the Commission should have found that it no longer had the power to adopt the decision.

23 Commission Decision 2003/790/EC of 28 June 2000 declaring a concentration incompatible with the common market and the EEA Agreement (Case COMP/M.1741 – MCI WorldCom/Sprint) (OJ 2003 L 300, p. 1).

24 Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1, corrigendum OJ 1990 L 257, p. 13, since repealed by Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1)).

D. State aid

1. The concept of State aid

a) *Constituent elements*

The benefit and the specificity of the State measure are characteristic elements of the concept of State aid within the meaning of Article 87(1) EC. [25] The Commission was condemned on a number of occasions for not having correctly appraised the criteria in question (judgments of 16 March 2004 in Case T-157/01 *Danske Busvognmaend* v *Commission*, of 16 September 2004 in Case T-274/01 *Valmont Nederland* v *Commission*, of 21 October 2004 in Case T-36/99 *Lenzing* v *Commission* and of 1 December 2004 in Case T-27/02 *Kronofrance* v *Commission*, none yet published in the ECR).

– Advantage

The concept of State aid covers not only positive benefits, such as subsidies, loans or the taking of shares in undertakings, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect.

Thus, in its judgment of 21 October 2004 in *Lenzing* v *Commission*, the Court of First Instance held that where public bodies with responsibility for collecting social security contributions tolerate late payment of such contributions, their conduct gives a recipient undertaking in serious financial difficulties, by mitigating, for that undertaking, the burden associated with the normal application of the social security system, a significant commercial advantage which cannot be wholly removed by the interest and default surcharges which it is required to pay. By concluding in that case that those bodies had acted in the same way as a hypothetical private creditor in, so far as possible, the same situation vis-à-vis its debtor as those bodies, the Commission made a manifestly incorrect application of the private creditor test; and, accordingly, the Court annulled the contested decision.

It was also by reference to the private creditor test that the Court of First Instance determined whether the Commission had been entitled to conclude that the reduction of some of the debts of the German company Technische Glaswerke Ilmenau to the public-law body responsible for the restructuring of undertakings of the former German Democratic Republic ('the BvS') constituted State aid. The restricted review which the court carries out of the complex economic appraisals of that nature led to the conclusion that, in the light of the circumstances of the case, the Commission had not committed a

[25] As established in Article 87(1) EC, a State aid incompatible with the common market is an advantage, granted by the State or through State resources in any form whatsoever in favour of certain undertakings or the production of certain goods, which affects trade between Member States and which distorts or threatens to distort competition.

manifest error of assessment in finding that the BvS had not behaved like a private creditor operating under normal market conditions. As none of the other pleas was upheld, the action for annulment was dismissed (judgment of 8 July 2004 in Case T-198/01 *Technische Glaswerke Ilmenau* v *Commission*, not yet published in the ECR; under appeal, Case C-404/04 P).

In its judgment in *Valmont Nederland* v *Commission*, moreover, the Court of First Instance adopted for the first time the solution arrived at by the Court of Justice in its judgment of 24 July 2003 in Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, according to which State intervention in favour of an undertaking in return for discharging public service obligations does not constitute aid, provided that a number of conditions are satisfied. [26]

In that case, the Commission had considered that the financing granted by a Netherlands municipality to an undertaking to construct a car park constituted State aid in part, on the ground that it corresponded to business costs which that undertaking should normally have borne and placed it at an advantage. The Commission none the less considered that the other part of the financing benefited other undertakings and did not benefit the applicant.

The Court of First Instance found, first, that the undertaking bore a burden in allowing others to use its car park in various ways regularly and free of charge, under an agreement concluded, in the public interest as much as in that of the third parties concerned, with a territorial authority and, second, that a portion of the financing granted by the territorial authority for the construction of that car park effectively benefited Valmont.

In those circumstances, the Court held that the Commission could not automatically consider that the portion of the financing had necessarily benefited Valmont but should have first examined, in the light of the information available, whether or not that portion of the financing could be regarded as being in fact compensation for the burden borne by Valmont. To that end, the Commission was required to ascertain whether the conditions set out in *Altmark Trans and Regierungspräsidium Magdeburg*, cited above, were

[26] Namely: (i) the recipient undertaking must actually be responsible for carrying out public service obligations and those obligations must be clearly defined; (ii) the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings; (iii) the compensation cannot exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations; (iv) when the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped to be able to satisfy the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

satisfied. As it was not apparent from the decision that the Commission had done so, the decision was annulled. [27]

Last, by its judgment in *Danske Busvognmaend* v *Commission*, the Court of First Instance annulled the Commission decision declaring the aid granted by Danish authorities to the bus company Combus to be compatible with the common market.

In particular, the Court held that that company had not been entrusted with the performance of public service obligations within the meaning of Regulation No 1191/69. [28] It considered that an undertaking, such as Combus, whose obligations to operate, to carry and to collect the tariffs were not imposed unilaterally, which was not obliged to operate its transport services in an unprofitable manner, contrary to its commercial interests, but which, on the contrary, had voluntarily assumed those obligations once it had been successful in the tendering procedures, which did not provide for any State subsidies and in which it had been free to participate or not, depending on its economic interests, and whose transport services were paid for by the price it had proposed in its bids in the tendering procedures and which had been included in the contracts subsequently concluded, did not bear public service obligations within the meaning of Article 2(1) of Regulation No 1191/69; such an undertaking did not therefore receive compensation within the meaning of that article, as the Commission had found, but financial remuneration provided for in the transport contracts.

– **Specific or selective nature of the State measure**

In *Lenzing* v *Commission*, the Court considered that the Commission had been entitled to conclude that the measure granted in favour of Sniace was selective.

The Court recalled, in that regard, that measures of purely general scope do not fall within Article 87(1) EC, but that, however, the case-law has already established that even assistance which at first sight is applicable to undertakings in general may present a certain selectivity and, accordingly, be regarded as a measure intended to favour certain undertakings or certain products. That is the case, in particular, where the administration called upon to apply the general rule has a discretion when applying the measure. In this case, the Court found that the Spanish public bodies responsible for collecting social security contributions had a certain discretion both when concluding restructuring and repayment agreements and when determining certain detailed terms in those agreements, such as the repayment timetable, the amount of the surcharges and the sufficiency of the guarantees offered in return for the settlement of the debts. It was

27 As well as this ground for annulment of the decision of 18 July 2001, there had been an infringement of Article 87(1) EC – established in the same judgment – by the Commission, which had concluded on the basis of an expert report having no probative calue that the price of the land sold to the applicant was below market price and, accordingly, contained an element of State aid.

28 Council Regulation (EEC) No 1191/69 of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (OJ, English Special Edition 1969 (I), p. 276), as amended by Council Regulation (EEC) No 1893/91 of 20 June 1991 (OJ 1991 L 169, p. 1).

also within the discretion of those bodies whether or not to allow the company not to comply with those agreements and to tolerate non-payment of the debts for several years.

The condition that a State measure should relate to a specific undertaking or apply selectively is one of the defining features of State aid, not only in the context of the EC Treaty but also in that of the ECSC Treaty, as recalled in the judgment of 1 July 2004 in Case T-308/00 *Salzgitter* v *Commission*, not yet published in the ECR (under appeal, Case C-408/04 P), which, on that point, confirms that the fact that the advantage conferred by a tax measure provided for by law is made subject to a condition that the investments must be made in a geographically-limited area within a Member State, as was the position in this case, is in principle sufficient for the measure in question to be viewed as relating to a specific category of undertakings. The Court referred in support of its findings – a fact sufficiently rare to deserve mention – to a judgment of the EFTA Court [29] and emphasised that what mattered, for a measure to be found to be State aid, was that the recipient undertakings belonged to a specific category determined by the application, in law or in fact, of the criterion established by the measure in question.

b) *Guidelines*

Although the Commission, for the purposes of applying Article 87(3) EC, enjoys a wide discretion, the exercise of which involves assessments of an economic and social nature which must be made within a Community context, it is none the less bound by the guidelines and notices that it issues in the area of supervision of State aid where they do not depart from the rules in the Treaty and are accepted by the Member States. The persons concerned are therefore entitled to rely on them and the Court will ascertain whether the Commission has complied with the rules which it has imposed on itself when adopting the contested decision.

The Court of First Instance has thus adjudicated on a number of applications in which it has been requested to declare that there have been errors of law in the application of the Community guidelines on State aid for environmental protection of 1994 and 2001 (judgment of 18 November 2004 in Case T-176/01 *Ferriere Nord* v *Commission*, not yet published in the ECR), of the multisectoral framework on regional aid for large investment projects [30] (*Kronofrance* v *Commission*, cited above), of the notice laying down Community guidelines on State aid for rescuing and restructuring firms in difficulty [31] (*Technische Glaswerke Ilmenau* v *Commission*, cited above), and also of Recommendation 96/280/EC concerning the definition of small and medium-sized enterprises [32] and the notice on the Community guidelines on State aid for small and medium-sized

29 Judgment of the EFTA Court of 20 May 1999 in Case E-6/98 *Norway* v *EFTA Surveillance Authority* Reports of EFTA Court, p. 74.

30 OJ 1998 C 107, p. 7.

31 OJ 1994 C 368, p. 12.

32 Commission Recommendation 96/280/EC of 3 April 1996 concerning the definition of small and medium-sized enterprises (SMEs) (OJ 1996 L 107, p. 4).

enterprises [33] (judgment of 14 October 2004 in Case T-137/02 *Pollmeier Malchow* v *Commission*, not yet published in the ECR).

In *Ferriere Nord* v *Commission* the Court of First Instance confirmed that the Commission was able to declare the project of aid for Ferriere Nord incompatible with the common market in so far as the investment did not satisfy the requirement of environmental performance sought by the 1994 and 2001 Guidelines.

Likewise, in *Pollmeier Malchow* v *Commission* the Court upheld the Commission's finding that the recipient of the aid was a large enterprise and did not therefore satisfy the criteria of the definition of SMEs. The Court considered, in particular, that, in the light of the general scheme of the texts concerned, the Commission was entitled to ensure that the recipient of the aid in question was not in reality a group whose power exceeded that of an SME.

In *Technische Glaswerke Ilmenau* v *Commission* the Court of First Instance considered, in the light of the guidance provided by the Guidelines on aid for rescuing and restructuring firms in difficulty, whether the Commission made a manifest error of assessment by refusing to declare the price reduction in question compatible with the common market under Article 87(3)(c) EC without taking into account the monopoly situation that would be created should the applicant disappear. The Court held that that circumstance would suffice to justify the grant of State aid intended to save undertakings and to encourage their restructuring only if the general conditions for the authorisation of rescue or restructuring aid, as laid down in the Guidelines, were satisfied. In this case, the Court held that the Commission had not made a manifest error of assessment in concluding that the restructuring plan was not such as to allow Technische Glaswerke Ilmenau to restore its viability, and, consequently, rejected the plea.

In *Kronofrance* v *Commission*, on the other hand, the Court of First Instance annulled the Commission's decision not to raise objections to aid granted by the German authorities to Glunz for the construction of an integrated wood processing centre. The Court considered that the Commission had not complied with the rules laid down in the multisectoral framework on regional aid for large investment projects, since it had not ascertained, as provided for in that framework, whether the relevant product market was a 'declining market'. Owing to that error of law on the part of the Commission, there had been no assessment of the compatibility of the notified aid on the basis of all the applicable criteria.

c) *Recovery*

The judgment of 14 January 2004 in Case T-109/01 *Fleuren Compost* v *Commission*, not yet published in the ECR, provided the opportunity for the Court of First Instance to recall

[33] Commission notice on the Community guidelines on State aid for SMEs (OJ 1996 C 213, p. 4).

that undertakings in receipt of aid cannot in principle have a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in Article 88 EC but that, none the less, the case-law does not preclude the possibility that, in order to challenge its repayment, the recipients of unlawful aid may, in the procedure for recovery of the aid, plead exceptional circumstances which may have legitimately given rise to a legitimate expectation that the law was lawful.

However, the Court held that those recipients can rely on such exceptional circumstances, on the basis of the relevant provisions of national law, only in the framework of the recovery procedure before the national courts, and that it is for those courts alone to assess the circumstances of the case, if necessary after obtaining a preliminary ruling on interpretation from the Court of Justice. In so holding, the Court of First Instance took a clear position on a question to which hesitant answers had thus far been given (see, in that regard, the *Annual Report 1999*).

Unlike the applicant in *Fleuren Compost* v *Commission*, Salzgitter maintained, in order to challenge repayment of the aid, not that the Commission had breached the principle of protection of legitimate expectations but that it had failed to observe the principle of legal certainty; and the Court considered that the breach of that principle of legal certainty justified in that case the annulment of the provisions of the Commission decision [34] requiring the Federal Republic of Germany to recover the aid granted to the undertakings forming part of Salzgitter AG.

In *Salzgitter* v *Commission* the Court of First Instance held, first of all, that the possibility of relying on the principle of legal certainty did not depend on the conditions which must be satisfied where a party relies on a legitimate expectation that State aid was properly granted. It was for that reason that the steel undertaking which had obtained State aid which had not been notified to the Commission could rely, in order to challenge the Commission decision requiring repayment of the aid, on legal certainty, although the recipient of aid is precluded, other than in certain circumstances, from having a legitimate expectation that the aid was properly granted if it was granted in breach of the provisions on prior control of State aid.

The Court of First Instance then held that the steel undertaking which had received unlawful aid was entitled to rely on the principle of legal certainty in order to challenge the lawfulness of a Commission decision ordering repayment of the aid in a case where at the time when it received the aid there was, owing to reasons attributable to the Commission, a situation of uncertainty and lack of clarity as regards the legal rules applicable to the type of aids involved, combined with the prolonged lack of reaction on the part of the Commission, which was none the less aware that the aid was being paid and which thus led to the creation, in disregard of its duty of care, of an equivocal situation which the Commission was under a duty to clarify before it could take any action to order the repayment of the aid which had been paid.

[34] Commission Decision 2000/797/ECSC of 28 June 2000 on State aid granted by the Federal Republic of Germany to Salzgitter AG, Preussag Stahl AG and the group's steel-industry subsidiaries, now known as Salzgitter AG – Stahl und Technologie (SAG) (OJ 2000 L 323, p. 5).

2. Procedural matters

The question of the scope of the rights recognised to the interested parties in the formal procedure involving examination of State aid has been clarified. The case-law of the Court of First Instance draws a clear distinction between the Member States providing the aid and the parties concerned. Whereas the Member States enjoy the full rights of defence, the parties concerned are only entitled to present observations.

First, in one of the pleas examined in the case which it brought against the Commission, Ferriere Nord – an undertaking in the steel, mechanical and metallurgical industrial sector – claimed that the Commission had breached its rights of defence in initiating the formal examination procedure in accordance with the 1994 Community guidelines framework on State aid for environmental protection, [35] although the decision had been adopted on the basis of the 2001 guidelines, [36] without either the Italian Republic or itself having been invited to submit comments on the new guidelines. In its judgment in *Ferriere Nord* v *Commission*, the Court of First Instance stated, first of all, that that plea must be examined not from the point of view of the rights of the defence, which only the States enjoy in State aid matters, but in consideration of the right which, pursuant to Article 88(2) EC, the 'parties concerned' have to submit comments during the review stage referred to in that provision. The Court then observed that the Commission would not have been able, without disregarding the procedural rights of the parties concerned, to have based its decision on new principles introduced by the 2001 Guidelines without inviting the parties concerned to submit their comments in that regard. However, the Court found that the principles laid down by the two sets of guidelines were, in the light of the grounds on which the Commission relied to declare the aid in question incompatible, substantially identical; it concluded that there had been no requirement to consult the parties concerned again.

Second, the question arose whether the undertaking in receipt of the aid must be recognised as having guarantees over and above the right to submit comments after initiation of the procedure recognised to all the parties concerned within the meaning of Article 88(2) EC. The answer given by the Court of First Instance in *Fleuren Compost* v *Commission* and *Technische Glaswerke Ilmenau* v *Commission* is unambiguous: 'the recipient of the aid does not play a special role pursuant to any provision governing the procedure for the review of State aid', and the Court recalled that the procedure for the review of State aid is not a procedure initiated 'against' the recipient of aid by virtue of which it could rely on rights as extensive as the rights of the defence as such.

As the parties concerned other than the Member State in question cannot rely on the right to participate in an adversarial procedure before the Commission, the Court of First Instance rejected the applicants' complaints, in particular Technische Glaswerke Ilmenau's complaint that it ought to have been granted access to the non-confidential part of the file in the administrative procedure and to have received the comments or

35 OJ 1994 C 72, p. 3.

36 Community guidelines on State aid for environmental protection (OJ 2001 C 37, p. 3).

replies to the Commission's questions submitted by one of its competitors on the market.

In one of the pleas which it formulated in the action for annulment of the Commission decision declaring incompatible with the common market the aid which the Italian Republic proposed to grant to Ferriere Nord, that undertaking criticised the Commission for not having asked it or the Italian Republic to provide documentation relating to the environmental purpose of the investment, then for having stated in its decision that no evidence on that point had been provided. In that regard, the Court of First Instance (*Ferriere Nord* v *Commission*) held that the principle of protection of legitimate expectations meant that in carrying out the procedure involving review of State aid, the Commission must take account of the legitimate expectations which the parties concerned might entertain as a result of what had been said in the decision opening the formal examination procedure and, subsequently, that it did not base its final decision on the absence of elements which, in the light of those indications, the parties concerned had been unable to consider that they must provide to it. In that case, the plea was rejected on the ground that the indications in the decision to open the procedure were sufficiently clear and precise. [37]

E. Trade protection measures

Although mention must be made of the judgment of 28 October 2004 in Case T-35/01 *Shanghai Teraoka Electronic* v *Council*, not yet published in the ECR, dismissing the action for annulment of a regulation imposing definitive anti-dumping duties on imports of certain electronic weighing scales, [38] in particular because it is the only decision delivered in the anti-dumping sphere, it is to the judgment of 14 December 2004 in Case T-317/02 *Fédération des industries condimentaires de France (FICF) and Others* v *Commission*, not yet published in the ECR, that the reader's attention is drawn.

In adjudicating for the first time on the lawfulness of a Commission decision rejecting a complaint lodged in accordance with the Council regulation on trade barriers [39], the Court of First Instance specified the conditions in which those obstacles to trade justify Community intervention.

37 See also, to that effect, *Pollmeier Malchow* v *Commission*, cited above, paragraph 76.

38 Council Regulation (EC) No 2605/2000 of 27 November 2000 imposing definitive anti-dumping duties on imports of certain electronic weighing scales (REWS) originating in the People's Republic of China, the Republic of Korea and Taiwan (OJ 2000 L 301, p. 42).

39 Council Regulation (EC) No 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspicies of the World Trade Organisation (OJ 1994 L 349, p. 71).

In this case, the complaint lodged in June 2001 by the FICF, which represents all the principal French producers of prepared mustard, sought to denounce the effects of the measures which the United States of America had been authorised to take by the Dispute Settlement Body of the World Trade Organisation (WTO), [40] which consisted, inter alia, in imposing an additional customs duty of 100% on certain products from the Member States of the European Community, including 'prepared mustard'.

In its complaint, the FICF denounced the selective nature of the United States retaliatory measures applied only vis-à-vis certain Member States and not vis-à-vis the European Community as a whole. The complaint also stated that the trade barrier created by the United States had unfavourable commercial effects on the exports of prepared mustard of the undertakings that were members of the FICF and that it was in the Community interest, under the rules on international trade, to initiate proceedings against the measures adopted by the United States.

In accordance with the trade barriers regulation, the Commission initiated an examination procedure which was subsequently extended to three other trade organisations of producers of foie gras, Roquefort and shallots. That procedure was closed in 2002, the Commission concluding that no specific action was necessary in the interests of the Community, as the selective withdrawal of concessions by the United States did not cause adverse trade effects within the meaning of that regulation.

Upon application by the FICF and the other organisations concerned for annulment of the Commission's decision not to take action against the retaliatory measures taken by the United States, the Court of First Instance upheld that decision.

The Court observed, first of all, that under the Trade Barriers Regulation, the Community may take action pursuant to international rules against an obstacle to trade created by a third country on the basis of three cumulative conditions: there must be an obstacle to trade which produces adverse trade effects and action must be necessary in the interests of the Community.

The Court of First Instance then considered that the Commission had correctly taken into account all the essential and indissociable elements of the concept of an obstacle to trade. As regards adverse trade effects, the Court found that the increase in exports of prepared mustard between 1996-1998 and 2000 from the United Kingdom to the United States, in terms of both value and volume, was extremely small in size and proportion by comparison to exports from other Member States of the Community. Therefore, even on the assumption that exporters from Member States other than the United Kingdom themselves would have benefited from that increase if the retaliatory measures adopted by the United States had been extended to prepared mustard from the United Kingdom

[40] Between 1981 and 1996, the Council of the European Union adopted a number of directives against the use of certain substances having a hormonal action in animal feedstuffs, in order to protect human health. In January 1998, the Appellate Body of the WTO, following a complaint lodged by the United States, declared that legislation contrary to the WTO rules. In July 1999, as the Community legislation had not been adjusted to comply with those rules, the Appellate Body authorised the United States to adopt retaliatory measures and in particular to impose additional customs duties of 100% on a number of products from the European Community.

– which the applicants had failed to show –, those exporters would not have been able to enjoy greater opportunities for export.

Last, the Court observed that an assessment of the interests of the Community required a balancing of the interests of the various parties involved against those of the general interest of the Community. Although the examination procedure had not precluded a general Community interest in taking action in future, the Commission had closed the procedure because there was no specific Community interest in challenging an obstacle to trade which did not produce adverse trade effects within the meaning of the Trade Barriers Regulation. The Court held that a complainant may not urge the Community to take action on principle to protect the general interest without, at the least, having itself suffered adverse trade effects within the meaning of the Trade Barriers Regulation. Contrary to the French producers' contention, therefore, the Commission had not confused the interests of the Community with those of the FICF. Furthermore, although the contested decision did not refer to the interested parties other than the FICF, the Court found that the Commission had considered their interests in the context of its examination.

F. Community trade mark

Given the place which it now occupies in the Court's work, the registration of Community trade marks is a prime source of litigation before the Court: 110 actions were brought in 2004 (compared with 100 in 2003) and 76 cases were disposed of (47 by judgment and 29 by order), which is 29 more than last year.

Under Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark, [41] registration as a Community trade mark is to be refused if, inter alia, the mark is devoid of distinctive character (Article 7(1)(b)) or descriptive (Article 7(1)(c)) (absolute grounds for refusal) or in the event of well-founded opposition on the basis of an earlier mark protected in a Member State or as a Community trade mark (Article 8) (relative grounds for refusal). [42]

1. Absolute grounds for refusal of registration

In its 14 judgments ruling on the lawfulness of decisions of the Boards of Appeal relating to absolute grounds for refusal of registration, the Court annulled only one of those

41 OJ 1994 L 11, p. 1.

42 A Community trade mark may also be declared invalid by OHIM where an application for such a declaration has been made under Article 51(1) of Regulation No 40/94. No ruling was given by the Court in 2004 on the lawfulness of any decision of the Cancellation Division of OHIM.

decisions (judgment of 24 November 2004 in Case T-393/02 *Henkel* v *OHIM* (*shape of a white and transparent bottle*)) and dismissed all the other actions. [43]

First, the marks covered by Article 7(1)(b) of Regulation No 40/94 are those which are incapable of performing the essential function of the trade mark, which is to identify the trade origin of goods or a service. In other words, to be distinctive within the meaning of that provision, a mark must be capable of identifying the goods or service in respect of which registration is applied as originating from a particular undertaking and thus to distinguish those goods or that service from those of other undertakings.

The Court upheld, inter alia, the decisions of the Boards of Appeal refusing to register the following as Community trade marks on account of a lack of distinctiveness: representations of stand-up pouches for packaging drinks in respect of fruit juices; the word mark 'LOOKS LIKE GRASS... FEELS LIKE GRASS... PLAYS LIKE GRASS' for synthetic surfacing and installation services for that product; a transparent bottle, filled with a yellow liquid, with a long neck in which a slice of lemon with a green skin has been plugged for drinks and certain services; the word mark 'Mehr für Ihr Geld' for cleaning and cosmetic materials and foods for everyday consumption; the representation of a twisted wrapper for sweets; and a three-dimensional shape representing a light-brown sweet for confectionery.

By contrast, the Court annulled the decision of the Board of Appeal which held that a three-dimensional mark consisting of the shape of a white and transparent bottle for cleaning products was devoid of distinctive character. In *Henkel* v *OHIM (shape of a white and transparent bottle)*, cited above, the Court found that the three-dimensional mark applied for was unusual and capable of enabling the goods in question to be distinguished from those having a different commercial origin.

Second, it may be observed that, in the cases concerning the descriptiveness of the marks applied for within the meaning of Article 7(1)(c) of Regulation No 40/94, the Court upheld all of the findings made by the Boards of Appeal on that point. It thus found lawful the decisions declaring the following to be incapable of fulfilling the trade mark's function of an indication of origin: the word mark TELEPHARMACY SOLUTIONS for equipment which may be used to distribute pharmaceutical products from a distance; the word mark LIMO for certain categories of laser products; the word mark APPLIED MOLECULAR EVOLUTION for services relating to the molecular engineering of compounds; and the word mark NURSERYROOM for goods for young children.

[43] Judgments of 28 January 2004 in Joined Cases T-146/02 to T-153/02 *Deutsche SiSi-Werke* v *OHIM (stand-up pouch)* (under appeal, Case C-173/04 P); of 31 March 2004 in Case T-216/02 *Fieldturf* v *OHIM (LOOKS LIKE GRASS... FEELS LIKE GRASS... PLAYS LIKE GRASS)*; of 21 April 2004 in Case T-127/02 *Concept* v *OHIM (ECA)*; of 29 April 2004 in Case T-399/02 *Eurocermex* v *OHIM (shape of a beer bottle)* (under appeal, Case C-286/04 P); of 30 June 2004 in Case T-281/02 *Norma Lebensmittelf ilialbetrieb* v *OHIM (Mehr für Ihr Geld)*; of 8 July 2004 in Case T-289/02 *Telepharmacy Solutions* v *OHIM – (TELEPHARMACY SOLUTIONS)*; of 8 July 2004 in Case T-270/02 *MLP Finanzdienstleistungen* v *OHIM (bestpartner)*; of 20 July 2004 in Case T-311/02 *Lissotschenko and Hentze* v *OHIM (LIMO)*; of 14 September 2004 in Case T-183/03 *Applied Molecular Evolution* v *OHIM (APPLIED MOLECULAR EVOLUTION)*; of 10 November 2004 in Case T-402/02 *Storck* v *OHIM (shape of a sweet wrapper)*; of 10 November 2004 in Case T-396/02 *Storck* v *OHIM (shape of a sweet)*; of 23 November 2004 in Case T-360/03 *Frischpack* v *OHIM (shape of a cheese box)*; of 30 November 2004 in Case T-173/03 *Geddes* v *OHIM (NURSERYROOM)*, none yet published in the ECR.

Moreover, for the first time, the Court applied Article 111 of the Rules of Procedure in order to dismiss by order an action brought against a decision of a Board of Appeal, in which it was held that QUICK-GRIP was descriptive of clamps (DIY equipment), on the ground that it was manifestly lacking any foundation in law (order of 27 May 2004 in Case T-61/03 *Irwin Industrial Tool* v *OHIM (QUICK GRIP)*, not yet published in the ECR).

Third, in *Concept* v *OHIM (ECA)*, cited above, the Court reviewed whether the Board of Appeal had properly applied the absolute ground for refusal laid down in Article 7(1)(h) of Regulation No 40/94. [44] In that case, the Court confirmed that registration of a figurative mark composed of a circle of stars of the same shape and size with five points one of which points upwards, surrounding, on a square background, the word element 'ECA', without specification of any of the colours, in respect of which registration was sought for, inter alia, record data carriers and the arranging and conducting of seminars, had to be refused. It found that such a mark is an imitation from a heraldic point of view of the European emblem within the meaning of Article 6 ter (1)(b) of the Paris Convention. It held, in addition, that the Board of Appeal had been right to find that registration of the mark sought was likely to give the public the impression that there is a connection between the mark sought and the Council of Europe, the European Union or the European Community.

Fourth, since Article 7(3) of Regulation No 40/94 expressly provides that Article 7(1)(b) to (d) does not apply if the mark has become distinctive in relation to the goods or services for which registration is requested 'in consequence of the use which has been made of it', applicants do not neglect to rely on that provision before OHIM in support of their argument that the mark should be registered. The Court set out the circumstances in which such distinctiveness may be regarded as established, in terms of both the procedural requirements and the necessary proof, in its judgments *Eurocermex* v *OHIM (shape of a beer bottle)* and Case T-396/02 *Storck* v *OHIM (shape of a sweet)* and Case T-402/02 *Storck* v *OHIM (shape a sweet wrapper)*, cited above. In the last of those judgments, the Court stated that the Boards of Appeal do not infringe the first clause of Article 74(1) of Regulation No 40/94 where they refrain from examining, of their own motion, all the facts on the basis of which it may be concluded that a mark has become distinctive as a result of use within the meaning of Article 7(3). Although, in contrast to what is stated at the end of Article 74(1) with regard to the relative grounds for refusal, there is no rule in the first clause of that provision requiring that the examination by OHIM (that is, by the examiner or the Board of Appeal, as the case may be) be limited to the facts pleaded by the parties, the Court found that, if the applicant for a mark does not plead distinctiveness acquired through use, OHIM is, in practical terms, unable to take account of the fact that the mark claimed may have become distinctive. Accordingly, under the principle that 'no one is obliged to do the impossible', OHIM is not bound to examine facts showing that the mark claimed has become distinctive through use within the meaning of Article 7(3) of Regulation No 40/94 unless the applicant has pleaded them.

[44] That provision states that 'trade marks which have not been authorised by the competent authorities and are to be refused pursuant to Article 6 ter of the Paris Convention are not to be registered'.

2. Relative grounds for refusal of registration

In addition to the cases which were disposed of by order, including that ordering that there was no need to adjudicate where the opposition to the mark had been withdrawn (order of 9 February 2004 in Case T-120/03 *Synopharm* v *OHIM – Pentafarma (DERMAZYN)*, not yet published in the ECR), the Court gave 19 rulings by way of judgment. Fourteen of the judgments delivered upheld the decisions of the Boards of Appeal, [45] whilst the others annulled the contested decisions either for reasons of form and procedure [46] or because the Board of Appeal had infringed Article 8(1)(b) of Regulation No 40/94. [47]

That provision states that, upon opposition by the proprietor of an earlier trade mark, the mark applied for is not to be registered if, because of its identity with or similarity to the earlier trade mark and the identity or similarity of the goods or services covered by the two marks, there is a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected.

Having regard to the fact that the likelihood of confusion must be assessed globally, by reference to the perception by the relevant public and taking into account all the factors relevant to each case, in particular the interdependence between the similarity of the marks and the similarity of the goods or services, the Court confirmed, for example, that there was a likelihood of confusion between the word mark CONFORFLEX for bedroom furniture and the figurative marks FLEX previously registered in Spain for categories of goods including

45 Judgments of 18 February 2004 in Case T-10/03 *Koubi* v *OHIM – Flabesa (CONFORFLEX)*; of 3 March 2004 in Case T-355/02 *Mülhens* v *OHIM – Zirh International (ZIRH)* (under appeal, Case C-206/04 P); of 31 March 2004 in Case T-20/02 *Interquell* v *OHIM – SCA Nutrition (HAPPY DOG)*; of 17 March 2004 in Joined Cases T-183/02 and T-184/02 *El Corte Inglés* v *OHIM – González Cabello and Iberia Líneas Aéreas de España (MUNDICOR)*; of 28 April 2004 in Joined Cases T-124/02 and T-156/02 *Sunrider* v *OHIM – Vitakraft-Werke Wührmann and Friesland Brands (VITATASTE and METABALANCE 44)*; of 22 June 2004 in Case T-66/03 '*Drie Mollen sinds 1818*' v *OHIM – Nabeiro Silveria (Galáxia)*; of 22 June 2004 in Case T-185/02 *Ruiz-Picasso and Others* v *OHIM – DaimlerChrysler (PICARO)* (under appeal, Case C-361/04 P); of 30 June 2004 in Case T-186/02 *BMI Bertollo* v *OHIM – Diesel (DIESELIT)*; of 6 July 2004 in Case T-117/02 *Grupo El Prado Cervera* v *OHIM – Heirs of Mr Debuschewitz (CHUFAFIT)*; of 8 July 2004 in Case T-203/02 *Sunrider* v *OHIM – Espadafor Caba (VITAFRUIT)* (under appeal, Case C-416/04 P); of 13 July 2004 in Case T-115/02 *AVEX* v *OHIM – Ahlers (Image 'a')*; of 13 July 2004 in Case T-115/03 *Samar* v *OHIM – Grotto (GAS STATION)*; of 16 September 2004 in Case T-342/02 *Metro-Goldwyn-Mayer Lion* v *OHIM – Moser Grupo Media (Moser Grupo Media)*; of 6 October 2004 in Joined Cases T-117/03, T-118/03, T-119/03 and T-171/03 *New Look* v *OHIM – Naulover (NLSPORT, NLJEANS, NLACTIVE and NLCollection)*, none yet published in the ECR.

46 Judgments of 30 June 2004 in Case T-107/02 *GE Betz* v *OHIM – Atofina Chemicals (BIOMATE)*; of 8 July 2004 in Case T-334/01 *MFE Marienfelde* v *OHIM – Vétoquinol (HIPOVITON)*; of 6 October 2004 in Case T-356/02 *Vitakraft-Werke Wührmann* v *OHIM – Krafft (VITAKRAFT)* (under appeal, Case C-512/04 P); and of 10 November 2004 in Case T-164/02 *Kaul* v *OHIM – Bayer (ARCOL)*, none yet published in the ECR.

47 Judgment of 30 June 2004 in Case T-317/01 *M+M* v *OHIM – Mediametrie (M+M EURODATA)*, not yet published in the ECR.

bedroom furniture and, conversely, that there was no such likelihood between the word mark PICARO for vehicles and the earlier Community trade mark PICASSO for the same goods or between the word mark CHUFAFIT for processed and fresh nuts and two earlier national trade marks, namely the word mark CHUFI and a figurative mark containing the word CHUFI, for goods including those covered by the application for registration.

Moreover, several judgments help to clarify the rules governing the procedure for examining an opposition laid down in Article 43(2) and (3) of Regulation No 40/94. More specifically, Article 43(2) provides that, if the applicant so requests, the proprietor of an earlier Community trade mark who has given notice of opposition is to furnish proof that, during the period of five years preceding the date of publication of the Community trade mark application, the earlier Community trade mark has been put to genuine use in the Community in connection with the goods or services in respect of which it is registered and which he cites as justification for his opposition, or that there are proper reasons for non-use, provided that the earlier Community trade mark has at that date been registered for not less than five years. Article 43(3) provides for the application of paragraph 2 to earlier national trade marks by substituting use in the Member State in which the earlier national trade mark is protected for use in the Community.

It is apparent from the case-law that proof of genuine use may be requested only if five years have elapsed between the date of registration of the earlier mark and the date of publication of the application for registration of a Community trade mark (*BMI Bertollo* v *OHIM – Diesel (DIESELIT)*, cited above) and that proof of genuine use need be adduced only in so far as the applicant has 'expressly and timeously requested such proof before OHIM' (*El Corte Inglés* v *OHIM – González Cabello and Iberia Líneas Aéreas de España (MUNDICOR)*, cited above). In several decisions (*MFE Marienfelde* v *OHIM – Vétoquinol (HIPOVITON)*, *Sunrider* v *OHIM – Espadafor Caba (VITAFRUIT) and Vitakraft-Werke Wührmann* v *OHIM – Krafft (VITAKRAFT)*), the Court also clarified the definition of genuine use and the standard of proof which must be met by the opponent and reviewed the Board of Appeal's assessment of the genuine nature of the use. With respect to such an assessment, the Court held, in *Vitakraft-Werke Wührmann* v *OHIM – Krafft (VITAKRAFT)*, that the Board of Appeal was wrong to find that proof of genuine use had been adduced because its reasoning was based on mere presumptions and therefore annulled the contested decision.

3. Formal and procedural issues

Although the Court dealt with a relatively large number of formal and procedural issues, the limited nature of this account means that only some of them can be addressed. Four points have thus been chosen.

The first point concerns the admissibility or inadmissibility of certain forms of order. First of all, the question arose as to whether OHIM may seek a form of order other than dismissal of the action, given that OHIM is designated as the defendant before the Court in the Rules of Procedure. [48] According to the judgment in *GE Betz* v *OHIM – Atofina Chemicals (BIOMATE)*, cited above, the answer is that it may. The Court accepted that OHIM could endorse the applicant's claim for annulment of the decision of the Board of

[48] Article 133(2) of the Rules of Procedure of the Court of First Instance.

Appeal or simply leave the decision to the discretion of the Court. Referring to the principle of continuity in terms of their functions between the Board of Appeal, the examiner and/or the competent division and of the functional independence of the Boards of Appeal and their members in carrying out their tasks, the Court took the view that it must be recognised that, while the Office does not have the requisite capacity to bring an action against a decision of a Board of Appeal, conversely it cannot be required to defend systematically every contested decision of a Board of Appeal or to claim automatically that every action challenging such a decision should be dismissed. [49]

Moreover, the question also arose as to the admissibility of a claim for annulment of, in addition to the contested decision, the decision of the Opposition Division. It follows from the judgment in *MFE Marienfelde* v *OHIM – Vétoquinol (HIPOVITON)*, cited above, that such an application is admissible because it seeks to have the Court take the decision which, according to the applicant, the Board of Appeal should lawfully have taken when hearing the appeal before OHIM. Since the Board of Appeal may annul the decision taken by the section of OHIM, such annulment is likewise one of the measures which may be taken by the Court in the exercise of its power to amend decisions, which is provided for in Article 63(3) of Regulation No 40/94.

The second point is that Article 73 of Regulation No 40/94, which provides that decisions of OHIM are to be based only on reasons on which the parties have had an opportunity to present their comments, is not regarded as having been infringed where the information not communicated served only to confirm the accuracy of a finding based on reasoning independent of that information (*Fieldturf* v *OHIM (LOOKS LIKE GRASS... FEELS LIKE GRASS... PLAYS LIKE GRASS)*, cited above).

The third point relates to the application of Article 74 of Regulation No 40/94 by the Board of Appeal in proceedings concerning relative grounds for refusal of registration. The scope of that provision, which provides that, in such proceedings, the 'examination [is restricted] to the facts, evidence and arguments provided by the parties and the relief sought', was clarified in the judgment in *Ruiz-Picasso and Others* v *OHIM – DaimlerChrysler (PICARO)*, cited above. [50]

In that judgment, the Court observed that, as it had already held in Case T-308/01 *Henkel* v *OHIM – LHS (UK) (KLEENCARE)* [2003] ECR II-3253, under Article 74 of Regulation No 40/94, the Board of Appeal, when hearing an appeal against a decision terminating opposition proceedings, may base its decision only on the relative grounds for refusal which the party concerned has relied on and the related facts and evidence it has presented. However, it stated, for the first time, that the restriction of the factual basis of the examination by the Board of Appeal does not preclude it from taking into consideration, in addition to the facts expressly put forward by the parties to the opposition proceedings, facts which are well

[49] With respect to this issue, see also the judgment of 12 October 2004 in Case C-106/03 P *Vedial* v *OHIM*, not yet published in the ECR.

[50] With respect to the inadmissibility before the Court of a document which was not produced during a procedure before OHIM relating to the relative grounds for refusal of registration and of which OHIM was therefore not required to take account of its own motion, see *Samar* v *OHIM – Grotto (GAS STATION)*, cited above.

known, that is, which are likely to be known by anyone or which may be learned from generally accessible sources. In that respect, it explained that the object of Article 74(1) *in fine* is to relieve OHIM of the task of investigating the facts itself in the context of proceedings between parties. That object is not compromised if OHIM takes well-known facts into account.

Finally, as a fourth point, it may be noted that the Court offered some important clarifications with regard to the language requirements of the opposition procedure in *GE Betz* v *OHIM – Atofina Chemicals (BIOMATE)*.

4. Operational continuity of the departments of OHIM

It is appropriate to apply the case-law established in the ex parte cases [51] according to which there is continuity in terms of function between the examiner and the Board of Appeal to the relationship between the Opposition Division of OHIM ruling at first instance and the Boards of Appeal. Relying expressly on the approach adopted in *Henkel* v *OHIM – LHS (UK) (KLEENCARE)*, cited above (commented on in the *Annual Report 2003*), the Court held in its judgment of 10 November 2004 in *Kaul* v *OHIM – Bayer (ARCOL)* that the Board of Appeal had erred in refusing to take account of the evidence intended to demonstrate that the earlier mark was highly distinctive, on the ground that that evidence had not been produced before the Opposition Division. In light of the principle of operational continuity of the departments of OHIM, the Board of Appeal is bound to base its decision on all the factual and legal evidence that the party concerned has submitted either during the proceedings before the division ruling at first instance or, subject to compliance with the prescribed time-limits, [52] during the appeal proceedings. In the case at issue, the factual evidence had been produced in good time before the Board of Appeal so that it ought to have taken account of it. The failure to do so was penalised by annulment of the decision of the Board of Appeal. [53]

G. Access to documents

Regulation No 1049/2001, [54] adopted pursuant to Article 255 EC, defines the principles, conditions and limits governing the right of access by the public to European Parliament,

51 Case T-163/98 *Procter & Gamble* v *OHIM (BABY-DRY)* [1999] ECR II-2383, which was not set aside on that point in Case C-383/99 P *Procter & Gamble* v *OHIM (BABY-DRY)* [2001] ECR I-6251, and Case T-63/01 *Procter & Gamble* v *OHIM (soap bar shape)* [2002] ECR II-5255.

52 That is to say, subject to compliance with Article 74(2) of Regulation No 40/94, which provides: 'The Office may disregard facts or evidence which are not submitted in due time by the parties concerned'.

53 Although the position taken on the issue was less clear, the operational continuity of the departments of OHIM was referred to in other inter partes cases, namely in the judgments of 30 June 2004 in *GE Betz* v *OHIM – Atofina Chemicals (BIOMATE)* and of 8 July 2004 in *MFE Marienfelde* v *OHIM – Vétoquinol (HIPOVITON)*.

54 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

Council and Commission documents in such a way as to enable citizens to participate more closely in the decision-making process, guarantee that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system and strengthen the principles of democracy and respect for fundamental rights.

The refusal of access to documents by the Commission and the Council which gave rise to the judgments of 30 November 2004 in Case T-168/02 *IFAW Internationaler Tierschutz-Fonds* v *Commission* and of 23 November 2004 in Case T-84/03 *Turco* v *Council*, neither yet published in the ECR, gave the Court of First Instance an opportunity to define the scope of certain provisions of that regulation more clearly.

The regulation provides, first, that an institution which is asked to disclose a document originating from a third party is to consult the third party with a view to assessing whether one of the exceptions provided for by the regulation is applicable, unless it is clear that the document is or is not to be disclosed (Article 4(4)) and, second, that a Member State may request the institution not to disclose a document originating from that Member State without its prior agreement (Article 4(5)).

As the Federal Republic of Germany had refused to agree to the disclosure to the applicant of certain documents originating from the German authorities, the Commission refused to disclose them to that applicant. On an application for annulment of the decision refusing access, the Court of First Instance upheld that decision in its judgment in *IFAW Internationaler Tierschutz-Fonds* v *Commission*, cited above. Pointing out that the Member States are in a different position from that of other third parties, the Court of First Instance observed that a Member State has the power to request an institution not to disclose a document originating from it and the institution is obliged not to disclose it without its 'prior agreement'. That obligation imposed on the institution to obtain the Member State's prior agreement, which is clearly laid down in Article 4(5) of the Regulation, would risk becoming a dead letter if the Commission were able to decide to disclose that document despite an explicit request not to do so from the Member State concerned. Thus, contrary to what the applicant argued, with the support of three Member States, where a request is made by a Member State under that provision, the institution is obliged not to disclose the document in question.

In *Turco* v *Council*, the issue was the Council's refusal to disclose to the applicant an opinion of the Council's legal service on a proposal for a Council Directive laying down minimum standards for the reception of applicants for asylum in Member States. The Council had relied on Article 4(2) of Regulation No 1049/2001, which provides that the institutions are to refuse access to a document where disclosure would undermine the protection of, inter alia, court proceedings and legal advice unless there is an overriding public interest in disclosure.

The Court of First Instance held in favour of the Council, which was supported in those proceedings by the United Kingdom and the Commission. It held that, contrary to the argument of the applicant, the words 'legal advice' must be understood as meaning that the protection of the public interest may preclude the disclosure of the contents of documents drawn up by the Council's legal service in the context of court proceedings

but also for any other purpose. It pointed out, citing the judgment in Case T-92/98 *Interporc* v *Commission* [1999] ECR II-3521 (see the *Annual Report 1999*), that legal advice drawn up in the context of court proceedings was already covered by the exception relating to the protection of such proceedings.

As exceptions to the right of access to the institutions' documents under Regulation No 1049/2001 must be interpreted and applied strictly, the Court of First Instance held that the fact that the document in question is a legal opinion cannot, of itself, justify application of the exception relied upon. However, since, first, the Council made no error of assessment in considering that the disclosure of such advice could give rise to lingering doubts as to the lawfulness of the legislative act in question and there was, therefore, an interest in the protection of that opinion and, second, the applicant has not cited any matter of public interest liable to justify the disclosure of such a document, the Court of First Instance dismissed the action in its entirety.

H. Community staff cases

The hundred or so decisions giving rulings in disputes between officials and staff of the institutions of the Community, on the one hand, and those institutions, on the other, tackle many different legal situations, and since this section is necessarily a summary, it can give an account of only some of them. In brief, those actions sought to contest the legality of:

– decisions not to promote (judgments of 21 January 2004 in Case T-97/02 *Mavridis* v *Commission*, of 2 March 2004 in Case T-197/02 *Caravelis* v *Parliament*, of 17 March 2004 in Case T-175/02 *Lebedef* v *Commission* and Case T-4/03 *Lebedef* v *Commission*, of 10 June 2004 in Case T-330/03 *Liakoura* v *Council* and of 28 September 2004 in Case T-216/03 *Tenreiro* v *Commission*, none yet published in the ECR);

– decisions taken in the course of appointment procedures (judgments of 21 January 2004 in Case T-328/01 *Robinson* v *Parliament*, of 2 March 2004 in Case T-234/02 *Michael* v *Commission*, of 23 March 2004 in Case T-310/02 *Theodorakis* v *Conseil* and of 31 March 2004 in Case T-10/02 *Girardot* v *Commission*, none yet published in the ECR). In this connection it must also be noted that the judgment of 9 November 2004 in Case T-116/03 *Montalto* v *Council*, not yet published in the ECR, annuls the decision of the Council of 23 May 2002 appointing an additional Chairman of a Board of Appeal, also President of the Appeals Department of the OHIM;

– decisions no longer to engage conference interpreters over the age of 65 (judgments of 10 June 2004 in Joined Cases T-153/01 and T-323/01 *Alvarez Moreno* v *Commission* (under appeal, Case C-373/04 P), in Case T-275/01 *Alvarez Moreno* v *Parliament* and in Case T-276/01 *Garroni* v *Parliament*, none yet published in the ECR);

– decisions taken by competition selection boards not to admit candidates to tests (judgments of 20 January 2004 in Case T-195/02 *Briganti* v *Commission*, of 19 February 2004 in Case T-19/03 *Konstantopoulou* v *Court of Justice*, of 25 March 2004 in Case T-145/02 *Petrich* v *Commission*, of 21 October 2004 in Case T-49/03 *Schumann* v *Commission*, of 26 October 2004 in Case T-207/02 *Falcone* v *Commission* and of 28 October 2004 in Joined Cases T-219/02 and T-337/02 *Lutz Herrera* v *Commission*, none yet published in the ECR), awarding a number of marks

such that the applicant was excluded (judgment of 9 November 2004 in Joined Cases T-285/02 and T-395/02 *Vega Rodríguez* v *Commission*, not yet published in the ECR), or refusing to include the applicant on a reserve list (judgments of 28 April 2004 in Case T-277/02 *Pascall* v *Council* and of 10 November 2004 in Case T-165/03 *Vonier* v *Commission*, neither yet published in the ECR);

– decisions taken in the course of disciplinary procedures (judgment of 16 December 2004 in Joined Cases T-120/01 and T-300/01 *De Nicola* v *EIB*, not yet published in the ECR), or imposing disciplinary sanctions (judgments of 16 March 2004 in Case T-11/03 *Afari* v *European Central Bank*, of 1 April 2004 in Case T-198/02 *N* v *Commission*, and of 10 June 2004 in Case T-307/01 *Eveillard* v *Commission* and in Case T-307/01 *François* v *Commission*, none yet published in the ECR).

Other judgments rule on claims for compensation for the damage suffered as a result of delay in drawing up staff reports (judgments of 6 July 2004 in Case T-281/01 *Huygens* v *Commission* and of 30 September 2004 in Case T-16/03 *Ferrer de Moncada* v *Commission*, neither yet published in the ECR), or as a result of an occupational disease of an official (judgments of 3 March 2004 in Case T-48/01 *Vainker and Vainker* v *Parliament* and of 14 October 2004 in Case T-256/02 *I* v *Court of Justice* and in Case T-389/02 *Sandini* v *Court of Justice*, none yet published in the ECR). Also of interest are the judgments of 5 October 2004 in Case T-45/01 *Sanders and Others* v *Commission* and in Case T-144/02 *Eagle* v *Commission*, neither yet published in the ECR, which order the defendant institution to pay damages for the loss sustained by the applicants as a result of the fact that they were not recruited as temporary servants of the Communities during the time they worked at the Joint European Tours (JET) Joint Undertaking.

II. *Actions for damages* [55]

For the Community to incur non-contractual liability for an unlawful act, three conditions must be fulfilled: the conduct alleged against the Community institutions must be unlawful, there must be actual damage and there must be a causal link between that conduct and that damage.

The concurrence of those three conditions allowing the non-contractual liability of the Community to be incurred was regarded as established by the Court in its interlocutory judgment of 23 November 2004 in Case T-166/98 *Cantina sociale di Dolianova and Others* v *Commission*, not yet published in the ECR. As one or more of those conditions were not met in the other actions for damages, the Court of First Instance dismissed all the other actions brought under Article 288 EC.

As regards the condition that the conduct alleged against the Community institutions should be unlawful, it was recalled in the judgment of 10 February 2004 in Joined Cases T-64/01 and T-65/01 *Afrikanische Frucht-Compagnie and Internationale Fruchtimport Gesellschaft Weichert & Co.* v *Commission*, not yet published in the ECR, and in *Cantina sociale di Dolianova and Others* v *Commission*, cited above, that the case-law requires that a sufficiently serious breach of a rule of law intended to confer rights on individuals

[55] Excluding Community staff cases.

must be established (judgment in Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291). As regards the requirement that the breach must be sufficiently serious, the decisive test for finding that there has been such a breach is whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion. Where the Member State or the institution in question has only considerably reduced discretion, or even no discretion at all, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach.

The expression 'rule of law intended to confer rights on individuals' has been analysed on several occasions by the Court of First Instance. For instance, it has been held that the aim of the rules applicable to the system of the division of powers between the various Community institutions is to ensure that the balance between the institutions provided for in the Treaty is maintained and not to confer rights on individuals. Accordingly, any unlawful delegation of the Council's powers to the Commission is not such as to engage the Community's liability (judgment in *Afrikanische Frucht-Compagnie and Internationale Fruchtimport Gesellschaft Weichert & Co.* v *Commission*, cited above). It has also been held, by reference to the case-law of the Court of Justice, that infringement of the obligation to state reasons is not such as to give rise to the liability of the Community (judgment in *Afrikanische Frucht-Compagnie and Internationale Fruchtimport Gesellschaft Weichert & Co.* v *Commission* and judgment of 25 May 2004 in Case T-154/01 *Distilleria F. Palma* v *Commission*, not yet published in the ECR).

On the other hand, in its judgment in *Cantina sociale di Dolianova and Others* v *Commission*, the Court of First Instance held that the prohibition on unjust enrichment and the principle of non-discrimination were intended to confer rights on individuals. The breach by the Commission of those principles was held to be sufficiently serious, a conclusion which the Court of First Instance did not reach with regard to any of the other actions for damages in which it ruled in 2004.

Further, in *Afrikanische Frucht-Compagnie and Internationale Fruchtimport Gesellschaft Weichert & Co.* v *Commission*, the Court of First Instance outlined the conditions which would give rise to the non-contractual liability of the Community in the event of the principle of such liability as a result of a lawful act being recognised in Community law (see, on that subject, the *2001*, *2002* and *2003 Annual Reports*). Citing its previous decisions, it thus considered that those three conditions would have to be met, namely the reality of the damage allegedly suffered, the causal link between it and the act on the part of the Community institutions, and the unusual and special nature of that damage, it being specified that damage is 'special' when it affects a particular class of economic operators in a disproportionate manner by comparison with other operators, and 'unusual' when it exceeds the limits of the economic risks inherent in operating in the sector concerned, the legislative measure that gave rise to the damage pleaded not being justified by a general economic interest. In that case, the Court of First Instance held that damage of that sort was manifestly not established.

Finally, the order of 7 June 2004 in Case T-338/02 *Segi and Others* v *Council*, not yet published in the ECR (under appeal, Case C-355/04 P) [56] is interesting and important. By their action, the applicants seek compensation for damage suffered as a result of their being included in the list annexed to Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism, [57] updated by Common Positions 2002/340 and 2002/462. [58] Common Position 2001/931/CFSP was adopted on the basis of Article 15 of the Treaty on European Union under Title V: 'Provisions on a common foreign and security policy' (CFSP), and Article 34 of the Treaty on European Union under Title VI: 'Provisions on police and judicial cooperation in criminal matters' (together called justice and home affairs (JHA)).

Holding that the provision [59] of the Common Position which affects the applicants entails no measure coming under the CFSP and that, therefore, Article 34 of the Treaty on European Union is the only relevant legal basis as regards the measures which, it is claimed, give rise to the alleged damage, the Court of First Instance declared that it was clear that it had no jurisdiction to take cognisance of the action for damages since the only remedies provided for under Title VI of the Treaty on European Union are a reference for a preliminary ruling, an action for annulment and a ruling in disputes between Member States and, therefore, there is no provision for an action for damages under Title VI. The Court of First Instance points out that the fact that the applicants 'probably have no effective judicial remedy' cannot of itself found a claim to Community jurisdiction proper in a legal system based on the principle of specific jurisdiction.

As regards the applicants' claim for damages, in so far as it seeks a finding that the Council, acting in the area of JHA, has encroached on the jurisdiction of the Community, the Court of First Instance declared that it had jurisdiction but held that the claim manifestly lacked any foundation in law, since the relevant legal basis for the adoption of the provision giving rise to damage was actually Article 34 of the Treaty on European Union.

III. *Applications for interim relief*

The number of applications for interim relief submitted in 2004 was lower than for the previous year, since 26 were registered, compared with 39 in 2003. Contrary to what had been observed in 2002, the fall in the number of applications for interim relief was not offset by a large number of applications for expedited procedures in the main proceedings, since, as indicated previously, only 13 applications for expedited procedure were lodged.

56 See also the order of the same date in Case T-333/02 *Gestoras Pro-Amnistía and Others* v *Council*, not yet published in the ECR; under appeal, Case C-354/04 P.

57 OJ 2001 L 344, p. 93.

58 Common Positions 2002/340/CFSP and 2002/462/CFSP adopted by the Council pursuant to Articles 15 and 34 of the Treaty on European Union of 2 May and 17 June 2002 respectively (OJ 2002 L 116, p. 75, and OJ 2002 L 160, p. 32).

59 Namely, Article 4, according to which the Member States are, through police and judicial cooperation in criminal matters within the framework of Title VI of the Treaty on European Union, to afford each other the widest possible assistance in preventing and combating terrorist acts.

The President of the Court of First Instance, in his capacity as judge responsible for granting interim relief, completed 34 interim relief cases. Apart from cases in which provisional measures were ordered for a limited period (orders of 21 January 2004 in Case T-217/03 R *FNCBV* v *Commission* and Case T-245/03 R *FNSEA and Others* v *Commission* and of 12 May 2004 in Case T-198/01 R III *Technische Glaswerke Ilmenau* v *Commission*, none yet published in the ECR) and the cases in which suspension of operation pending final judgment was granted, the applications with which the President dealt in 2004 were dismissed, in particular the application by the Autonomous Region of the Azores for suspension of the new fisheries rules applicable to Azorean waters (order of 8 July 2004 in Case T-37/04 R *Região autónoma dos Açores* v *Council*, not yet published in the ECR) and the application by Microsoft.

In the latter case, the President of the Court of First Instance, by order of 22 December 2004 in Case T-201/04 R *Microsoft* v *Commission*, not yet published in the ECR, the President of the Court of First Instance found that the evidence adduced by Microsoft was not sufficient to show that the immediate enforcement of the remedies imposed by the Commission might cause Microsoft serious and irreparable damage.

That case originated in the Commission's decision of 24 March 2004 [60] finding that Microsoft had infringed Article 82 EC by abusing its dominant position by engaging in two distinct types of conduct. The Commission also fined Microsoft more than EUR 497 million.

The first type of conduct concerned Microsoft's refusal to provide its competitors with certain 'interoperability information' and to authorise its use in the development and distribution of products competing with its own products on the work group server operating system market during the period October 1998 to the date of adoption of the decision. By way of remedy, the Commission ordered Microsoft to disclose the 'specifications' for its client-to-server and server-to-server communications protocols to any undertaking wishing to develop and distribute work group server operating systems. The specifications describe certain characteristics of a program and must therefore be distinguished from the program's 'source code', which designates the software code actually run by the computer.

The second type of conduct sanctioned by the Commission was the tying of Windows Media Player with the Windows operating system. The Commission considered that that practice affected competition on the media reader market. By way of remedy, the Commission ordered Microsoft to offer for sale a version of Windows without Windows Media Player. Microsoft none the less retains the possibility to market Windows with Windows Media Player.

On 7 June 2004, Microsoft brought an action before the Court of First Instance for annulment of the Commission's decision (Case T-201/04). On 25 June 2004, Microsoft sought suspension of operation of the remedies imposed by that decision. Following the lodging of that application, the Commission stated that it did not intend to enforce the remedies until a decision had been reached on the application for suspension.

60 Commission Decision C(2004) 900 final of 24 March 2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-37.792 Microsoft).

In his order of 22 December 2004, the President of the Court of First Instance, after examining the circumstances of the case, held that Microsoft had not shown that it might suffer serious and irreparable damage if the contested decision should be enforced.

As regards the refusal to provide the interoperability information, the President considered that the main action raised a number of questions of principle relating to the conditions in which the Commission is justified in concluding that a refusal to disclose information constitutes an abuse of a dominant position contrary to Article 82 EC. Emphasising that it is solely for the court dealing with the substance of the application to answer those questions, the President of the Court of First Instance concluded that the application for annulment lodged by Microsoft was not at first sight unfounded and that the prima facie requirement (which entails an assessment of whether the main action is prima facie well founded) was therefore satisfied.

However, the President of the Court of First Instance held that the condition relating to urgency was not satisfied, since Microsoft had not adduced evidence that disclosure of the information thus far kept secret would cause serious and irreparable harm. Following a factual examination of the actual consequences of disclosure as alleged by Microsoft, the President found, in particular, that disclosure of information thus far kept secret does not necessarily entail serious harm and that, regard being had to the circumstances of the case, such damage had not been demonstrated in the present case. Nor had Microsoft demonstrated, first, that the use of the disclosed information by its competitors would have the effect of placing the information in the public domain; second, that the fact that the competing products would remain in distribution channels after annulment of the decision would constitute serious and irreparable damage; third, that Microsoft's competitors would be able to 'clone' its products; fourth, that Microsoft would have to make a fundamental change to its business policy; and, fifth, that the decision would cause an irreversible development on the market.

As regards the tying of Windows and Windows Media Player, the President considered, first of all, that certain of Microsoft's arguments raised complex issues, such as that of the anti-competitive effect of the tying resulting from 'indirect network effects', which it was for the Court of First Instance to resolve in the main action. The President concluded that the prima facie requirement was satisfied and then considered whether the requested suspension must be ordered as a matter of urgency. On the basis of a factual analysis of the alleged damage, the President held that Microsoft had not demonstrated in concrete terms that it might suffer serious and irreparable damage owing to interference with its commercial freedom or harm to its reputation.

Table of Contents for the Proceedings of the Court of First Instance in 2004

Page

I. PROCEEDINGS CONCERNING THE LEGALITY OF MEASURES 79

A. Procedural aspects 80

1. Default proceedings 80

2. Raising of an absolute bar to proceedings by the Court of its own motion 81

3. Costs 81

B. Admissibility of actions brought under Article 230 EC 83

1. Measures against which an action may be brought 83

2. Time-limit for bringing an action 84

3. Legal interest in bringing proceedings 85

4. Standing to bring proceedings 85

a) Decisions 86

b) Measures of general application 88

C. Competition rules applicable to undertakings 89

1. Points raised in the case-law on the scope of Article 81 CE 90

a) Scope ratione materiae 90

b) Competition procedure 91

– Access to the file 91

– The scope of the Statement of Objections 91

– Consequences of an express acknowledgement of the facts during the administrative procedure 92

– No recognition of an absolute right to silence 92

– Reasonable time 93

c) Proof of the infringement of Article 81 EC 94

d) Fines 95
– Guidelines 96
Gravity 96
Duration 98
Aggravating circumstances 98
Attenuating circumstances 98
– The Leniency Notice 98
– The principle *ne bis in idem* 99
– The exercise of unlimitied jurisdiction 100
2. Regulation No 4064/89 101
D. State aid 102
1. The concept of State aid 102
a) Constituent elements 102
– Advantage
– Specific or selective nature of the State measure
b) Guidelines 105
c) Recovery 106
2. Procedural matters 108
E. Trade protection measures 109
F. Community trade mark 111
1. Absolute grounds for refusal of registration 111
2. Relative grounds for refusal of registration 114
3. Formal and procedural issues 115
4. Operational continuity of the departments of OHIM 117
G. Access to documents 117
H. Community staff cases 119
II. ACTIONS FOR DAMAGES 120
III. APPLICATIONS FOR INTERIM RELIEF 122

B — Composition of the Court of First Instance

(Order of precedence as at 10 September 2004)

First row, from left to right:

V. Tiili, Judge; J.D. Cooke, President of Chamber; M. Vilaras, President of Chamber; M. Jaeger, President of Chamber; B. Vesterdorf, President of the Court; J. Pirrung, President of Chamber; H. Legal, President of Chamber; R. García-Valdecasas, Judge; P. Lindh, Judge.

Second row, from left to right:

O. Czúcz, Judge; F. Dehousse, Judge; N.J. Forwood, Judge; P. Mengozzi, Judge; J. Azizi, Judge; A.W.H. Meij, Judge; M.E. Martins de Nazaré Ribeiro, Judge; E. Cremona, Judge; I. Wiszniewska-Białecka, Judge.

Third row, from left to right:

H. Jung, Registrar; S.S. Papasavvas, Judge; K. Jürimäe, Judge; D. Šváby, Judge; I. Pelikánová, Judge; V. Vadapalas, Judge; I. Labucka, Judge; V. Trstenjak, Judge.

1. Members of the Court of First Instance

(in order of their entry into office)

Bo Vesterdorf

Born 1945; Lawyer-linguist at the Court of Justice; Administrator in the Ministry of Justice; Examining Magistrate; Legal Attaché in the Permanent Representation of Denmark to the European Communities; Temporary Judge at the Østre Landsret (court of appeal); Head of the Constitutional and Administrative Law Division in the Ministry of Justice; Director of a department in the Ministry of Justice; University Lecturer; Member of the Steering Committee on Human Rights at the Council of Europe (CDDH), and subsequently Member of the Bureau of the CDDH; Member of the 'Ad-hoc committee on judicial training' at the Academy of European Law, Trier (Germany); Judge at the Court of First Instance since 25 September 1989; President of the Court of First Instance since 4 March 1998.

Rafael García-Valdecasas y Fernández

Born 1946; Abogado del Estado (at Jaén and Granada); Registrar to the Economic and Administrative Court of Jaén, and subsequently of Cordoba; Member of the Bar (Jaén and Granada); Head of the Spanish State Legal Service for Cases before the Court of Justice of the European Communities; Head of the Spanish delegation in the working group created at the Council of the European Communities with a view to establishing the Court of First Instance of the European Communities; Judge at the Court of First Instance since 25 September 1989.

Virpi Tiili

Born 1942; Doctor of Laws of the University of Helsinki; assistant lecturer in civil and commercial law at the University of Helsinki; Director of Legal Affairs and Commercial Policy at the Central Chamber of Commerce of Finland; Director General of the Office for Consumer Protection, Finland; Judge at the Court of First Instance since 18 January 1995.

Pernilla Lindh

Born 1945; Law graduate of the University of Lund; Judge (assessor), Court of Appeal, Stockholm; Legal adviser and Director General at the Legal Service of the Trade Department at the Ministry of Foreign Affairs; Judge at the Court of First Instance since 18 January 1995.

Josef Azizi

Born 1948; Doctor of Laws and Bachelor of Sociology and Economics of the University of Vienna; Lecturer and senior lecturer at the Vienna School of Economics and the Faculty of Law of the University of Vienna; Ministerialrat and Head of Department at the Federal Chancellery; Member of the Steering Committee on Legal Co-operation of the Council of Europe (CDCJ); Representative ad litem before the Verfassungsgerichtshof (Constitutional Court) in proceedings for review of the constitutionality of federal laws; Coordinator responsible for the adaptation of Austrian Federal law to Community law; Judge at the Court of First Instance since 18 January 1995.

John D. Cooke

Born 1944; called to the Bar of Ireland 1966; admitted also to the Bars of England & Wales, of Northern Ireland and of New South Wales; Practising barrister 1966-96; admitted to the Inner Bar in Ireland (Senior Counsel) 1980 and New South Wales 1991; President of the Council of the Bars and Law Societies of the European Community (CCBE) 1985-86; Visiting Fellow, Faculty of Law, University College Dublin; Fellow of the Chartered Institute of Arbitrators; President of the Royal Zoological Society of Ireland 1987-90; Bencher of the Honorable Society of Kings Inns, Dublin; Honorary Bencher of Lincoln's Inn, London; Judge at the Court of First Instance since 10 January 1996.

Marc Jaeger

Born 1954; lawyer; attaché de justice, delegated to the Public Attorney's Office; Judge, Vice-President of the Luxembourg District Court; teacher at the Centre universitaire de Luxembourg (Luxembourg University Centre); member of the judiciary on secondment, Legal Secretary at the Court of Justice from 1986; Judge at the Court of First Instance since 11 July 1996.

Jörg Pirrung

Born 1940; academic assistant at the University of Marburg; Doctor of Laws (University of Marburg); adviser, subsequently head of the section for private international law and, finally, head of a subdivision for civil law in the German Federal Ministry of Justice; member of the Governing Council of Unidroit (1993-98); chairman of the commission of the Hague Conference on Private International Law to draw up the Convention concerning the protection of children (1996); honorary professor at the University of Trier (private international law, international procedural law, European law); member of the Scientific Advisory Board of the Max Planck Institute for Foreign Private and Private International Law in Hamburg since 2002; Judge at the Court of First Instance since 11 June 1997.

Paolo Mengozzi

Born 1938; Professor of International Law and holder of the Jean Monnet Chair of European Community law at the University of Bologna; Doctor honoris causa of the Carlos III University, Madrid; visiting professor at the Johns Hopkins University (Bologna Center), the Universities of St. Johns (New York), Georgetown, Paris-II, Georgia (Athens) and the Institut universitaire international (Luxembourg); co-ordinator of the European Business Law Pallas Program of the University of Nijmegen; member of the consultative committee of the Commission of the European Communities on public procurement; Under-Secretary of State for Trade and Industry during the Italian tenure of the Presidency of the Council; member of the working group of the European Community on the World Trade Organisation (WTO) and director of the 1997 session of The Hague Academy of International Law research centre devoted to the WTO; Judge at the Court of First Instance since 4 March 1998.

Arjen W.H. Meij

Born 1944; Justice at the Supreme Court of the Netherlands (1996); Judge and Vice-President at the College van Beroep voor het Bedrijfsleven (Administrative Court for Trade and Industry) (1986); Judge Substitute at the Court of Appeal for Social Security, and Substitute Member of the Administrative Court for Customs Tariff Matters; Legal Secretary at the Court of Justice of the European Communities (1980); Lecturer in European Law in the Law Faculty of the University of Groningen and Research Assistant at the University of Michigan Law School; Staff Member of the International Secretariat of the Amsterdam Chamber of Commerce (1970); Judge at the Court of First Instance since 17 September 1998.

Mihalis Vilaras

Born 1950; lawyer (1974-80); national expert with the Legal Service of the Commission of the European Communities, then Principal Administrator in Directorate General V (Employment, Industrial Relations, Social Affairs); Junior Officer, Junior Member and, since 1999, Member of the Greek Council of State; Associate Member of the Superior Special Court of Greece; Member of the Central Legislative Drafting Committee of Greece (1996-98); Director of the Legal Service in the General Secretariat of the Greek Government; Judge at the Court of First Instance since 17 September 1998.

Nicholas James Forwood

Born 1948; Cambridge University BA 1969, MA 1973 (Mechanical Sciences and Law); called to the English Bar in 1970, thereafter practising in London (1971-99) and also in Brussels (1979-99); called to the Irish Bar in 1981; appointed Queen's Counsel 1987; Bencher of the Middle Temple 1998; representative of the Bar of England and Wales at the Council of the Bars and Law Societies of the EU (CCBE) and Chairman of the CCBE's Permanent Delegation to the European Court of Justice (1995-99); Governing Board member of the World Trade Law Association and European Maritime Law Organisation (1993-2002); Judge at the Court of First Instance since 15 December 1999.

Hubert Legal

Born 1954; Maître des Requêtes at the French Conseil d'État from 1991 onwards; graduate of the École normale supérieure de Saint-Cloud and of the École nationale d'administration; Associate Professor of English (1979-85); rapporteur and subsequently Commissaire du Gouvernement in proceedings before the judicial sections of the Conseil d'État (1988-93): legal adviser in the Permanent Representation of the French Republic to the United Nations in New York (1993-97); Legal Secretary in the Chambers of Judge Puissochet at the Court of Justice (1997-2001); Judge at the Court of First Instance since 19 September 2001.

Maria Eugénia Martins de Nazaré Ribeiro

Born 1956; studied in Lisbon, Brussels and Strasbourg; Member of the Bar in Portugal and Brussels; independent researcher at the Institut d'études européennes de l'université libre de Bruxelles (Institute of European Studies, Free University of Brussels); Legal Secretary to the Portuguese Judge at the Court of Justice, Mr Moitinho de Almeida (1986-2000), then to the President of the Court of First Instance, Mr Vesterdorf (2000-03); Judge at the Court of First Instance since 1 April 2003.

Franklin Dehousse

Born 1959; Law degree (University of Liege, 1981); research fellow (Fonds national de la recherche scientifique); legal advisor to the Chamber of Representatives; Doctor in Laws (University of Strasbourg, 1990); Professor (Universities of Liege and Strasbourg; College of Europe; Institut royal supérieur de Défense; Université de Montesquieu, Bordeaux; Collège Michel Servet of the Universities of Paris; Faculties of Notre-Dame de la Paix, Namur); Special Representative of the Minister for Foreign Affairs; Director of European Studies of the Royal Institute of International Relations; assesseur at the Council of State; consultant to the European Commission; member of the Internet Observatory; chief editor of *Studia Diplomatica*; Judge at the Court of First Instance since 7 October 2003.

Ena Cremona

Born 1936; Bachelors Degree (BA) in languages, Royal University of Malta (1955); Doctor of Laws (LLD) of the Royal University of Malta (1958); practising at the Malta Bar from 1959; Legal Adviser to the National Council of Women (1964-79); Member of the Public Service Commission (1987-89); Board Member at Lombard Bank (Malta) Ltd, representing the Government shareholding (1987-93); Member of the Electoral Commission since 1993; examiner for doctoral theses at the Royal University of Malta; Member of the European Commission against Racism and Intolerance (ECRI) (2003-04); Judge at the Court of First Instance since 12 May 2004.

Ottó Czúcz

Born 1946; Doctor of Laws of the University of Szeged (1971); administrator at the Ministry of Labour (1971-74); lecturer (1974-89), Dean of the Faculty of Law (1989-90), Vice-Rector (1992-97) of the University of Szeged; Lawyer; Member of the Presidium of the National Retirement Insurance Scheme; Vice-President of the European Institute of Social Security (1998-2002); Member of the scientific council of the International Social Security Association (1998-2004); Judge at the Constitutional Court (1998-2004); Judge at the Court of First Instance since 12 May 2004.

Irena Wiszniewska-Białecka

Born 1947; Magister Juris, University of Warsaw (1965-69); researcher at the Institute of Legal Sciences, assistant, associate professor, professor at the Academy of Sciences (1969-2004); researcher at the Max-Planck-Institute for Foreign and International Patent, Copyright and Competition Law, Munich (1985-86); Lawyer (1992-2000); Judge at the Supreme Administrative Court (2001-04); Judge at the Court of First Instance since 12 May 2004.

Irena Pelikánová

Born 1949; Doctor of Laws, assistant in economic law (before 1989), Dr Sc, Professor of business law (since 1993) at the Faculty of Law, Charles University, Prague; Member of the Executive of the Securities Commission (1999-2002); Lawyer; Member of the Legislative Council of the Government of the Czech Republic (1998-2004); Judge at the Court of First Instance since 12 May 2004.

Daniel Šváby

Born 1951; Doctor of Laws (University of Bratislava); Judge at District Court, Bratislava; Judge, Appeal Court, responsible for civil law cases, and Vice-President, Appeal Court, Bratislava; member of the civil and family law section at the Ministry of Justice Law Institute; acting Judge responsible for commercial law cases at the Supreme Court; Member of the European Commission of Human Rights (Strasbourg); Judge at the Constitutional Court (2000-04); Judge at the Court of First Instance since 12 May 2004.

Vilenas Vadapalas

Born 1954; Doctor of Laws of the University of Moscow; Doctor habil. in law, University of Warsaw; Professor at the University of Vilnius: international law (since 1981), human rights law (since 1991) and Community law (since 2000); Director-General of the Government's European Law Department; Professor of European law at the University of Vilnius, holder of the Jean Monnet Chair; President of the Lithuanian European Union Studies Association; Chairman of the Parliamentary working group on constitutional reform relating to Lithuanian accession; Member of the International Commission of Jurists (April 2003); former expert to the Council of Europe on questions relating to the compatibility of national legislation with the European Human Rights Convention; Judge at the Court of First Instance since 12 May 2004.

Küllike Jürimäe

Born 1962; degree in law, University of Tartu (1981-86); Assistant to the Public Prosecutor, Tallinn (1986-91); diploma, Estonian School of Diplomacy (1991-92); Legal Adviser (1991-93) and General Counsel at the Chamber of Commerce and Industry (1992-93); Judge, Tallinn Court of Appeal (1993-2004); European Masters in human rights and democratisation, Universities of Padua and Nottingham (2002-03); Judge at the Court of First Instance since 12 May 2004.

Ingrida Labucka

Born 1963; Diploma in law, University of Latvia (1986); investigator at the Interior Ministry for the Kirov Region and the City of Riga (1986-89); Judge, Riga District Court (1990-94); Lawyer (1994-98 and July 1999 to May 2000); Minister for Justice (November 1998 to July 1999 and May 2000 to October 2002); Member of the International Court of Arbitration in the Hague (2001-04); Member of Parliament (2002-04); Judge at the Court of First Instance since 12 May 2004.

Savvas S. Papasavvas

Born 1969; studies at the University of Athens (graduated in 1991); DEA in public law, University of Paris II (1992) and PhD in law, University of Aix-Marseille III (1995); admitted to the Cyprus Bar, Member of the Nicosia Bar since 1993; Lecturer, University of Cyprus (1997-02), Lecturer in Constitutional Law since September 2002; Researcher, European Public Law Centre (2001-02); Judge at the Court of First Instance since 12 May 2004.

Verica Trstenjak

Born 1962; Doctor of Laws of the University of Ljubljana (1995); professor (since 1996) of theory of law and State (jurisprudence) and of private law; researcher; postgraduate study at the Universities of Zurich and Vienna (Institute of Comparative Law), the Max Planck Institute for private international law in Hamburg, the Free University of Amsterdam; visiting professor at the Universities of Vienna and Freiburg (Germany) and at the Bucerius School of Law in Hamburg; head of the legal service (1994-96) and State Secretary in the Ministry of Science and Technology (1996-2000); Secretary-General of the Government (2000); Member of the Study Group on a European Civil Code since 2003; Prize of the Association of Slovene Lawyers 'Lawyer of the Year 2003'; Judge at the Court of First Instance since 7 July 2004.

Hans Jung

Born 1944; Assistant, and subsequently Assistant Lecturer at the Faculty of Law (Berlin); Rechtsanwalt (Frankfurt am Main); Lawyer-linguist at the Court of Justice; Legal Secretary at the Court of Justice in the Chambers of the President, Mr Kutscher, and subsequently in the Chambers of the German judge; Deputy Registrar at the Court of Justice; Registrar of the Court of First Instance since 10 October 1989.

2. Changes in the composition of the Court of First Instance in 2004

As a consequence of the enlargement of the European Union, ten new Judges entered into office. On 12 May, Ms Ena Cremona, a Maltese national, Mr Ottó Czúcz, a Hungarian national, Ms Irena Wiszniewska-Białecka, a Polish national, Ms Irena Pelikánová, a Czech national, Mr Daniel Šváby, a Slovak national, Mr Vilenas Vadapalas, a Lithuanian national, Ms Küllike Jürimäe, an Estonian national, Ms Ingrida Labucka, a Latvian national, and Mr Savvas S. Papasavvas, a Cypriot national, entered into office. On 7July, Ms Verica Trstenjak, a Slovene national, entered into office.

3. Order of precedence

from 1 January to 11 May 2004

B. Vesterdorf, President of the Court of First Instance
P. Lindh, President of Chamber
J. Azizi, President of Chamber
J. Pirrung, President of Chamber
H. Legal, President of Chamber
R. García-Valdecasas y Fernández, Judge
V. Tiili, Judge
J.D. Cooke, Judge
M. Jaeger, Judge
P. Mengozzi, Judge
A.W.H. Meij, Judge
M. Vilaras, Judge
N.J. Forwood, Judge
M.E. Martins de Nazaré Ribeiro, Judge
F. Dehousse, Judge

H. Jung, Registrar

from 12 May to 6 July 2004

B. Vesterdorf, President of the Court of First Instance
P. Lindh, President of Chamber
J. Azizi, President of Chamber
J. Pirrung, President of Chamber
H. Legal, President of Chamber
R. García-Valdecasas y Fernández, Judge
V. Tiili, Judge
J.D. Cooke, Judge
M. Jaeger, Judge
P. Mengozzi, Judge
A.W.H. Meij, Judge
M. Vilaras, Judge
N.J. Forwood, Judge
M.E. Martins de Nazarè Ribeiro, Judge
F. Dehousse, Judge
E. Cremona, Judge
O. Czúcz, Judge
I. Wiszniewska-Białecka, Judge
I. Pelikánová, Judge
D. Šváby, Judge
V. Vadapalas, Judge
K. Jürimäe, Judge
I. Labucka, Judge
S.S. Papasavvas, Judge

H. Jung, Registrar

from 7 July to 9 September 2004

B. Vesterdorf, President of the Court of First Instance
P. Lindh, President of Chamber
J. Azizi, President of Chamber
J. Pirrung, President of Chamber
H. Legal, President of Chamber
R. García-Valdecasas y Fernández, Judge
V. Tiili, Judge
J.D. Cooke, Judge
M. Jaeger, Judge
P. Mengozzi, Judge
A.W.H. Meij, Judge
M. Vilaras, Judge
N.J. Forwood, Judge
M.E. Martins de Nazarè Ribeiro, Judge
F. Dehousse, Judge
E. Cremona, Judge
O. Czúcz, Judge
I. Wiszniewska-Białecka, Judge
I. Pelikánová, Judge
D. Šváby, Judge
V. Vadapalas, Judge
K. Jürimäe, Judge
I. Labucka, Judge
S.S. Papasavvas, Judge
V. Trstenjak, Judge

H. Jung, Registrar

from 10 September to 31 December 2004

B. Vesterdorf, President of the Court of First Instance
M. Jaeger, President of Chamber
J. Pirrung, President of Chamber
M. Vilaras, President of Chamber
H. Legal, President of Chamber
J.D. Cooke, President of Chamber
R. García-Valdecasas y Fernández, Judge
V. Tiili, Judge
P. Lindh, Judge
J. Azizi, Judge
P. Mengozzi, Judge
A.W.H. Meij, Judge
N.J. Forwood, Judge
M.E. Martins de Nazarè Ribeiro, Judge
F. Dehousse, Judge
E. Cremona, Judge
O. Czúcz, Judge
I. Wiszniewska-Białecka, Judge
I. Pelikánová, Judge
D. Šváby, Judge
V. Vadapalas, Judge
K. Jürimäe, Judge
I. Labucka, Judge
S.S. Papasavvas, Judge
V. Trstenjak, Judge

H. Jung, Registrar

4. Former Members of the Court of First Instance

José Luis da Cruz Vilaça (1989-1995), President from 1989 to 1995
Donal Patrick Michael Barrington (1989-1996)
Antonio Saggio (1989-1998), President from 1995 to 1998
David Alexander Ogilvy Edward (1989-1992)
Heinrich Kirschner (1989-1997)
Christos Yeraris (1989-1992)
Romain Alphonse Schintgen (1989-1996)
Cornelis Paulus Briët (1989-1998)
Jacques Biancarelli (1989-1995)
Koen Lenaerts (1989-2003)
Christopher William Bellamy (1992-1999)
Andreas Kalogeropoulos (1992-1998)
André Potocki (1995-2001)
Rui Manuel Gens de Moura Ramos (1995-2003)

Presidents

José Luis da Cruz Vilaça (1989-1995)
Antonio Saggio (1995-1998)

Chapter III

Meetings and visits

A — Official visits and functions at the Court of Justice and the Court of First Instance in 2004

12 January	Delegation of senior judges from the Russian Federation
19 January	HE Roland Lohkamp, Ambassador of the Federal Republic of Germany to the Grand Duchy of Luxembourg
19 January	Mr Ivan Bizjak, Minister for Justice of Slovenia
2 February	HE Georges Santer, Ambassador, Secretary-General of the Ministry of Foreign Affairs, Foreign Trade, Cooperation and Defence in Luxembourg
2 and 3 February	Mr W.E. Haak, President of the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) and Mr W.J.M. Davids, Vice-President of the Hoge Raad der Nederlanden
3 February	Delegation from the European Committee of the Sejm, and the Committee for Foreign Affairs and European Integration of the Senate, of the Republic of Poland
6 February	HE Claus Grube, Permanent Representative of Denmark to the European Union in Brussels
16 February	HE Pavel Telička, Ambassador, Head of Mission of the Czech Republic to the European Union
19 February	HE Gordon Wetherell, Ambassador Extraordinary and Plenipotentiary of the United Kingdom to the Grand Duchy of Luxembourg
4 March	HE Miroslav Adamiš, Ambassador Extraordinary and Plenipotentiary, Head of Mission of the Republic of Slovakia to the European Union in Brussels
15 March	Mr Jerzy Makarczyk, Republic of Poland
15 March	Mr Joachim Becker, President of the Association of European Administrative Judges, accompanied by Mr Francesco Mariuzzo, Mr Pierre Vincent and Mr Erwin Ziermann, Vice-Presidents
17 March	HE Mustafa Oguz Demiralp, Ambassador Extraordinary and Plenipotentiary, Permanent Delegate of Turkey to the European Union in Brussels
18 March	HE Walter Hagg, Ambassador of Austria to the Grand Duchy of Luxembourg
18 March	Professor Jiří Malenovský, Czech Republic
19 March	Ms Irena Pelikánová, Czech Republic
22 and 23 March	Ms Küllike Jürimäe, Republic of Estonia

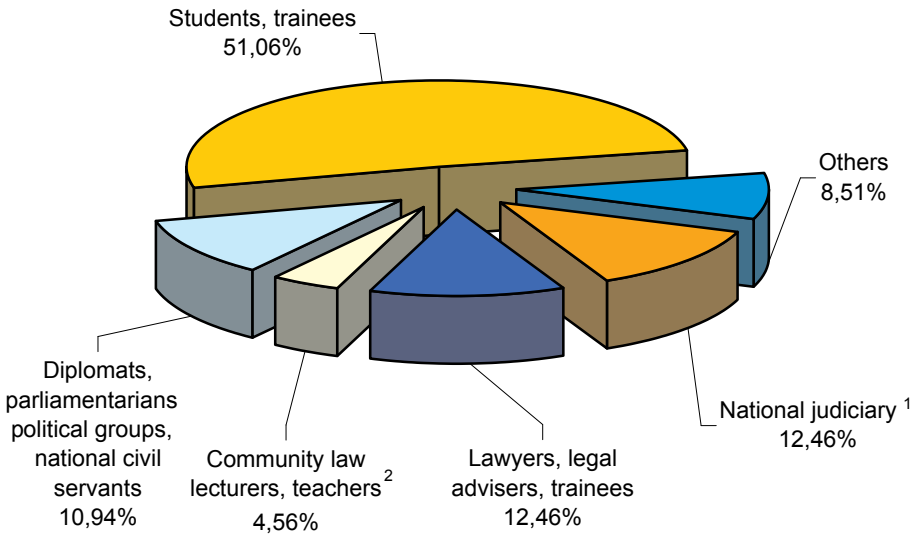
22 March	Delegation from the Bundesverfassungsgericht (Federal Constitutional Court, Germany)
24 March	HE Agneta Söderman, Ambassador of Sweden to the Grand Duchy of Luxembourg
25 March	Mr Ottó Czúcz, Republic of Hungary
25 March	Mr Daniel Šváby, Republic of Slovakia
26 March	Mr Savvas S. Papasavvas, Republic of Cyprus
29 March	Mr Vilenas Vadapalas, Republic of Lithuania
29 and 30 March	Delegation of Netherlands judges, being 'coordinators for questions of Community law'
29 and 30 March	Information days for the prospective Judges of the Court of Justice
31 March	Ms Irena Wiszniewska-Białecka, Republic of Poland
1 April	HE Rui Alfredo de Vasconcelos Félix-Alves, Ambassador of Portugal to the Grand Duchy of Luxembourg
5 April	HE Ricardo Zalacain, Ambassador of the Kingdom of Spain to the Grand Duchy of Luxembourg
23 April	Delegation of Members of the Australian Parliament
26 April	Forum of western Europe environmental judges
26 April	HE Rocco Antonió Cangelosi, Permanent Representative of Italy to the European Union
26 April	Ms Ena Cremona, Republic of Malta
27 April	Ms Ingrida Labucka, Republic of Latvia
25 May	Ms Verica Trstenjak, Republic of Slovenia
8 June	Ms Brigitte Zypries, Minister for Justice of the Federal Republic of Germany
15 June	Mr Mircea Geóana, Minister for Foreign Affairs of Romania, Mr Alexandru Farcas, Minister for European Integration of Romania, HE Lazar Comanescu, Ambassador, Head of Mission of Romania to the European Union, and HE Tudorel Postolache, Ambassador of Romania to the Grand Duchy of Luxembourg
17 June	Delegation of lawyers specialising in social and labour law from the Republic of Lithuania
8 July	HE Julio Núnez Montesinos, Ambassador of the Kingdom of Spain to the Grand Duchy of Luxembourg

15 July	HE Vasilis Kaskarelis, Permanent Representative of Greece to the European Union
2 September	HE Peter Charles Grey, Ambassador Extraordinary and Plenipotentiary of Australia to the European Union
13 and 14 September	Delegation from the Constitutional Court of Austria
16 September	HE Tudorel Postolache, Ambassador of Romania to the Grand Duchy of Luxembourg
21 September	Mr Mats Melin, Chief Parliamentary Ombudsman, Sweden
23 September	Mr Cristoph Leitl, President of the Federal Economic Chamber of Austria and President of the Association of European Chambers of Commerce and Industry (Eurochambres), accompanied by HE Ambassador Walter Hagg
23 September	Mr Wilfrido Fernandez de Brix, member of the Permanent Review Tribunal, arbitral tribunal of Mercosur
28 September	Mr Zoltán Lomnici, President of the Supreme Court of Hungary
28 September	Mr Milan M. Cvikl, Minister for European Affairs of Slovenia
5 October	Mr William N. Wamalwa, consultant (COMESA)
7 October	Mr Pavel Svoboda of the Ministry of Foreign Affairs of the Czech Republic
13 October	Delegation from the European Committee of Social Rights
14 October	Delegation from the Chinese Trademark Review and Adjudication Board, Beijing
18 October	Mr Evagelos Basliakos, Minister for Agriculture of Greece
18 October	HE G.J. Storm, Ambassador of the Netherlands to the Grand Duchy of Luxembourg
18 and 22 October	Delegation from the Court of Justice of the West African Economic and Monetary Union (UEMOA)
25 October	M. József Petrétei, Minister for Justice of Hungary
25 October	Opening of the exhibition ‘Anne Frank – a story for today’ in the presence of Mr P.H. Donner, Minister for Justice of the Netherlands
27 October	HE Tudorel Postolache, Ambassador of Romania to the Grand Duchy of Luxembourg
9 November	Delegation from the Senate of the Parliament of the Czech Republic
11 November	Delegation from the Supreme Court of Lithuania

15 and 19 November	Delegation from the Court of Justice of the West African Economic and Monetary Union (UEMOA)
22 November	Mr Peter Hustinx, European Data Protection Supervisor
2 December	HE Ambassador Nicholas Emiliou, Permanent Representative of the Republic of Cyprus to the European Union
2 December	HE Mitsuaki Kojima, Ambassador of Japan to the Grand Duchy of Luxembourg
17 December	HE Rajendra Madhukar Abhyankar, Ambassador of India, Head of Mission to the European Communities

B — Study visits to the Court of Justice and the Court of First Instance in 2004

Distribution by type of group [1]

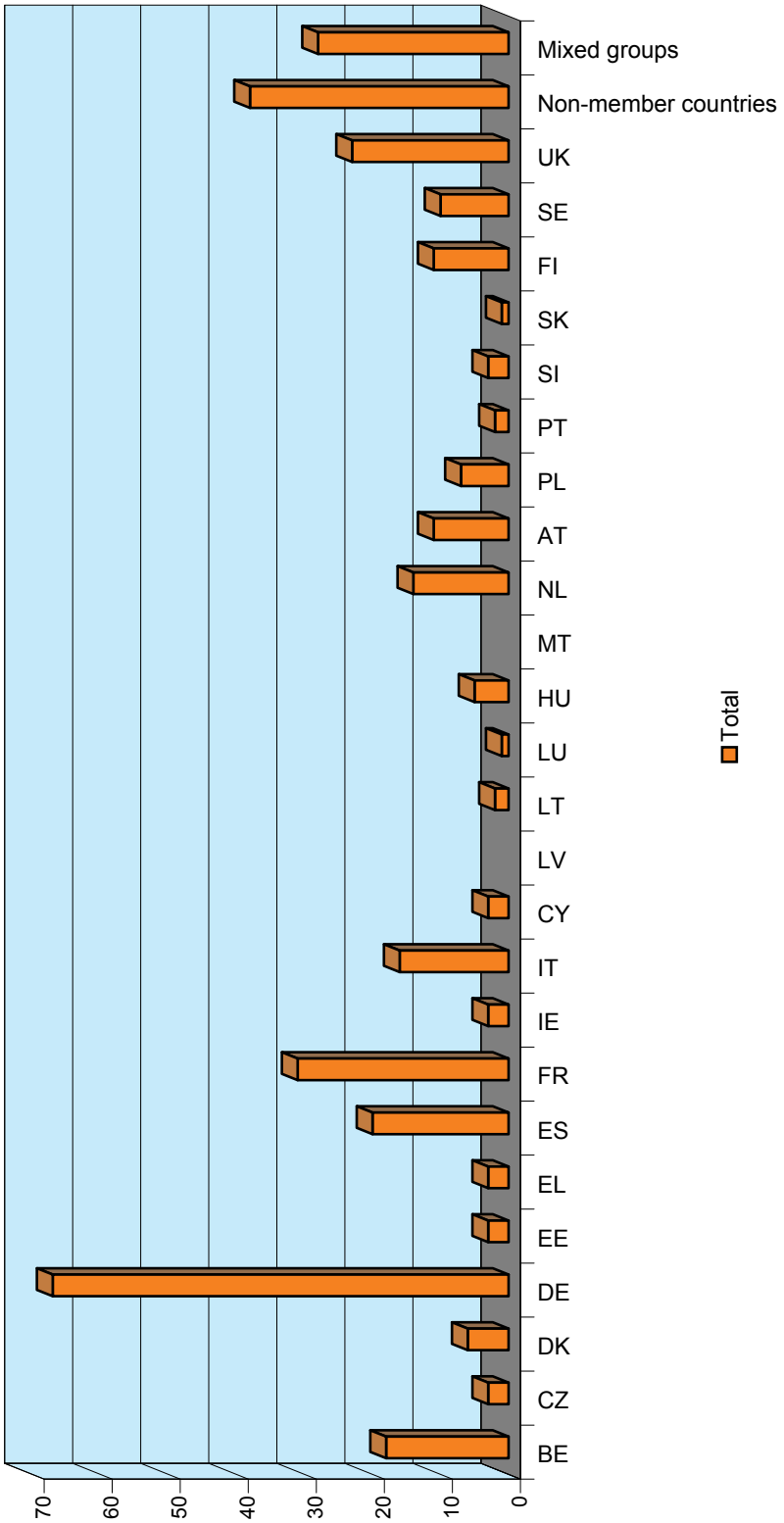


	National judiciary [1]	Lawyers, legal advisers, trainees	Community law lecturers, teachers [2]	Diplomats, parliamentarians, political groups, national civil servants	Students, trainees	Others	Total
Number of groups	41	41	15	36	168	28	329

[1] For the Member States which acceded to the European Union on 1 May 2004, visits throughout 2004 have been included.

[2] Other than those accompanying student groups

Study visits to the Court of Justice and the Court of First Instance in 2004
Distribution by Member State [1]



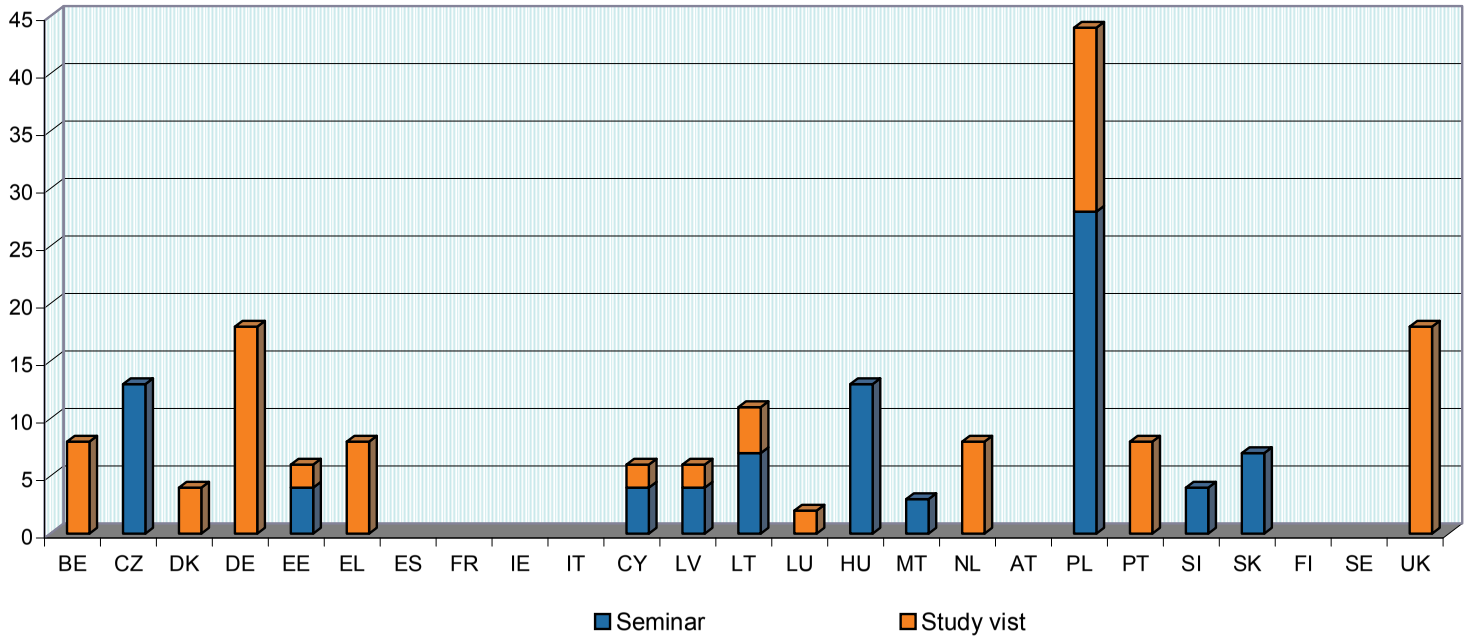
	Number of visitors							Number of groups
	National judiciary	Lawyers, legal advisers, trainees	Community law lecturers, teachers[2]	Diplomats, parliamentarians, political groups, national civil servants	Students, trainees	Others	Total	Total
BE	78		3	15	358	74	**528**	**18**
CZ		6		8		15	**29**	**3**
DK	12			14	68	34	**128**	**6**
DE	232	207	115	143	934	403	**2034**	**67**
EE		1	1	4			**6**	**3**
EL	38		1				**39**	**3**
ES	76	28	34	68	242	32	**480**	**20**
FR	120	119		46	660	50	**995**	**31**
IE		8			73		**81**	**3**
IT	5	17	6		403		**431**	**16**
CY		4		3	2		**9**	**3**
LV								
LT			6			12	**18**	**2**
LU			30				**30**	**1**
HU	62		4	5		4	**75**	**5**
MT								
NL	41	10		79	298		**428**	**14**
AT	15	18	13	77	213		**336**	**11**
PL	36			61	83		**180**	**7**
PT			2		15		**17**	**2**
SI	7		2		31		**40**	**3**
SK					38		**38**	**1**
FI		38		42	95	12	**187**	**11**
SE	114	18		28	32		**192**	**10**
UK	40	28			482	25	**575**	**23**
Non-member countries	112	31	33	43	567	24	**810**	**38**
Mixed group		172	17	58	647	89	**983**	**28**
Total	**988**	**705**	**267**	**694**	**5241**	**774**	**8669**	**329**

[1] For the Member States which acceded to the European Union on 1 May 2004, visits throughout 2004 have been included.

[2] Other than those accompanying student groups.

Study visits to the Court of Justice and the Court of First Instance in 2004

National judiciary



	BE	CZ	DK	DE	EE	EL	ES	FR	IE	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	SI	SK	FI	SE	UK	Total
Seminar		13			4						4	4	7		13	3			28		4	7				87
Study vist	8		4	18	2	8					2	2	4	2			8		16	8					18	100

C — Formal sittings in 2004

7 January	Formal sitting on the occasion of the departure from office of Mr David A.O. Edward, Judge at the Court of Justice, and the entry into office of Sir Konrad Hermann Theodor Schiemann as Judge at the Court of Justice
30 April	Formal sitting for the giving of a solemn undertaking by Mr Stavros Dimas, new member of the Commission of the European Communities
11 May	Formal sitting on the occasion of the entry into office of the new members of the Court of Justice following the enlargement of the European Union
12 May	Formal sitting on the occasion of the entry into office of the new members of the Court of First Instance following the enlargement of the European Union
7 June	Formal sitting for the giving of a solemn undertaking by the new members of the European Court of Auditors following the enlargement of the European Union
28 June	Formal sitting for the giving of a solemn undertaking by Mr Jacques Barrot, new member of the Commission of the European Communities, and the new members of the Commission following the enlargement of the European Union
7 July	Formal sitting on the occasion of the entry into office of Ms Verica Trstenjak as a member of the Court of First Instance
13 October	Formal sitting on the occasion of the departure from office of Ms Fidelma Macken, Judge at the Court of Justice, and the entry into office of Mr Aindrias Ó Caoimh as Judge at the Court of Justice
10 December	Formal sitting for the giving of a solemn undertaking by Mr Kikis Kazamias, new member of the European Court of Auditors

D — Visits and participation in official functions in 2004

Court of Justice

15 January	Participation of the President at the New Year audience at the Grand-Ducal Palace in Luxembourg
22 January	Participation of the President at a formal sitting of the European Court of Human Rights in Strasbourg
23 January	Participation of the President at a reception given by the President of the Hellenic Republic in honour of the members of the Greek judiciary, in Athens
26 January	Receipt by the President of an honorary distinction given by the President of the Hellenic Republic during a ceremony in Athens
27 January	Participation of the President at the ceremony for awarding an honorary doctorate to the Prime Minister of Luxembourg during the conference 'The draft international treaty for a European constitution' organised by the Department for International Studies of the Democritus University of Thrace, in Komotini
2 and 3 April	Participation of the President in the official visit to the European Court of Human Rights in Strasbourg by a delegation from the Court of Justice
17 May	Participation of the President at the formal sitting marking the 75th anniversary of the Greek Council of State, in Athens
from 2 to 5 June	Participation of the President at the congress organised by the International Federation for European Law (FIDE) in Dublin
14 June	Participation of the President at the 'Abschlussfeier' of the School of German Law in Cracow
17 June	Participation of the President at the congress of the European Lawyers' Union in Schengen
from 19 to 21 June	Participation of the President at the congress organised by the foundation 'Budapest Forum for Europe' in Budapest
from 17 to 19 July	Participation of the President at the 'Constitutional Courts Summit 2004' organised by the Dräger Foundation and the Dedman School of Law of the Southern Methodist University, in Oxford
from 22 to 25 July	Participation of the President at the first congress of the Societas Juris Publici Europaei, under the patronage of the Greek Parliament, on 'The New European Union', in Kolimpari

20 September	Participation of the President at a seminar organised by the Ministry of Foreign Affairs of the Republic of Finland, in Helsinki
30 September	Participation of the President at the international conference organised by the Constitutional Court of the Republic of Slovenia on 'The Position of Constitutional Rights following Integration into the European Union', in Bled
21 October	Participation of the President in the events organised in Luxembourg by EFTA marking the 10th anniversary of the EFTA Court
28 and 29 October	Participation of the President at the ceremony for signature of the Treaty establishing a Constitution for Europe, in Rome
1 November	Participation of the President at a meeting with the Presidents and Registrars of the European Court of Human Rights, the German Constitutional Court and the Austrian Constitutional Court, in Basle
3 November	Participation of the President in a ceremony in the course of which he was awarded an honorary doctorate, in Komotini
from 11 to 14 November	Participation of the President in an official visit to Romania on the invitation of the Prime Minister, Mr Adrian Nastase
15 November	Participation of the President at the 'Colloquium on the Judicial Architecture of the European Union' organised by the CCBE in Brussels
2 and 3 December	Participation of the President at the colloquium on 'Das Vorabentscheidungsverfahren und die nationalen Gerichte' ('The preliminary reference procedure and national courts') organised by the Constitutional Court of the Czech Republic, in Brno

Court of First Instance

13 February	Participation of the President of the Court of First Instance in meetings at the Ministry of Justice and the Ministry of Foreign Affairs in Denmark
15 April	Participation of the President of the Court of First Instance in meetings at the Ministry of Justice and the Ministry of Foreign Affairs in Denmark

23 April	Participation of the President of the Court of First Instance at the international conference concerning Council Regulation No 1/2003 and the decentralised application of European competition law, organised by the Dutch-speaking Order of Attorneys at the Brussels Bar
29 April	Participation of the President of the Court of First Instance at the conference 'State Aid Forum' organised by the European State Aid Law Institute, in Brussels
7 May	Participation of the President of the Court of First Instance at a conference on competition law organised by the Ministry of Economic Affairs of the Grand Duchy of Luxembourg
from 2 to 5 June	Participation of the President of the Court of First Instance at the congress organised by the International Federation for European Law (FIDE) in Dublin
14 and 15 June	Participation of the President of the Court of First Instance at the 19th Colloquium of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, in The Hague
1 and 2 July	Participation of the President of the Court of First Instance in a panel on the role and function of the future court for trade-mark law at the '4th FORUM Conference on Cross Border Litigation' organised by FORUM, Institut für Management, in Cologne
10 September	Participation of the President of the Court of First Instance at the commemorative ceremonies marking the 60th anniversary of the liberation of the Grand Duchy of Luxembourg
7 and 8 October	Participation of the President of the Court of First Instance in a panel on rights, privileges and ethics in competition cases at the annual conference of the Fordham Corporate Law Institute, in New York
20 and 21 October	Participation of the President of the Court of First Instance in the events organised in Luxembourg by EFTA marking the 10th anniversary of the EFTA Court
28 and 29 October	Participation of the President of the Court of First Instance at the ceremony for signature of the Treaty establishing a Constitution for Europe, in Rome
15 November	Participation of the President of the Court of First Instance at the 'Colloquium on the Judicial Architecture of the European Union' organised by the CCBE in Brussels
19 November	Participation of the President of the Court of First Instance at a seminar organised by the University of Copenhagen

23 November	Participation of the President of the Court of First Instance at a conference on the new European competition law organised by Copenhagen Business School, in Copenhagen
6 December	Participation of the President of the Court of First Instance at the '3rd Annual Merger Conference' organised by the British Institute of International and Comparative Law in London
29 December	Participation of the President of the Court of First Instance in meetings at the Ministry of Justice and the Ministry of Foreign Affairs in Denmark

Chapter IV

Tables and statistics

A — Statistics concerning the judicial activity of the Court of Justice

General activity of the Court

1. Cases completed, new cases, cases pending (2000-2004)

Cases completed

2. Nature of proceedings (2000-2004)
3. Judgments, orders, opinions (2004)
4. Bench hearing actions (2004)
5. Subject-matter of the action (2004)
6. Proceedings for interim measures: outcome (2004)
7. Judgments concerning failure of a Member State to fulfil its obligations: outcome (2004)
8. Duration of proceedings (2000-2004)

New cases

9. Nature of proceedings (2000-2004)
10. Direct actions – Type of action (2004)
11. Subject-matter of the action (2004)
12. Actions for failure of a Member State to fulfil its obligations (2000-2004)

Cases pending as at 31 December

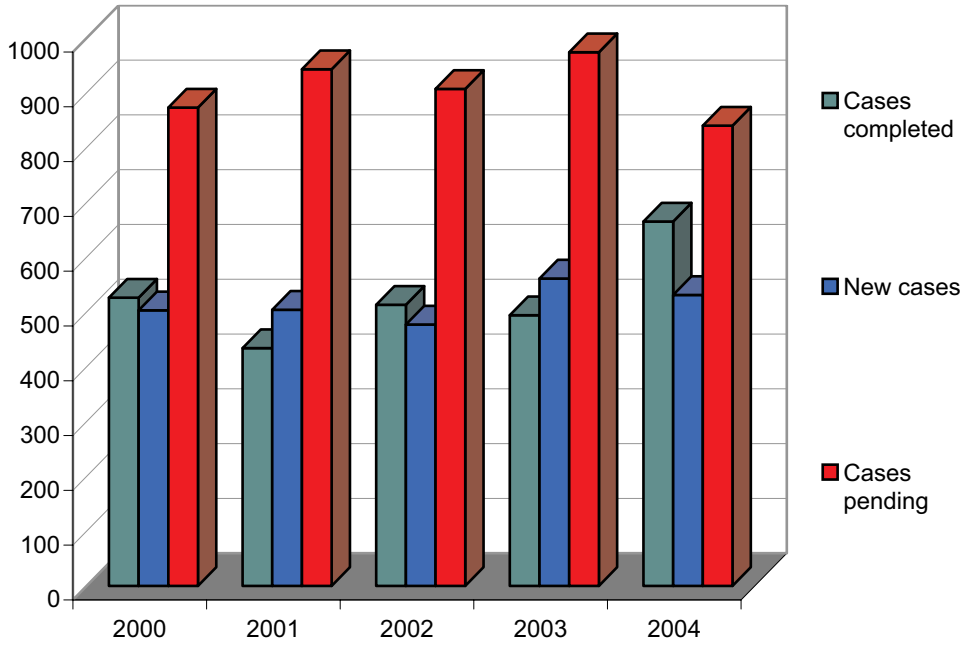
13. Nature of proceedings (2000-2004)
14. Bench hearing actions (2004)

General trend in the work of the Court (1952-2004)

15. New cases and judgments
16. New references for a preliminary ruling (by Member State per year)
17. New references for a preliminary ruling (by Member State and by court or tribunal)
18. New actions for failure of a Member State to fulfil its obligations

General activity of the Court

1. Cases completed, new cases, cases pending (2000-2004)[1]

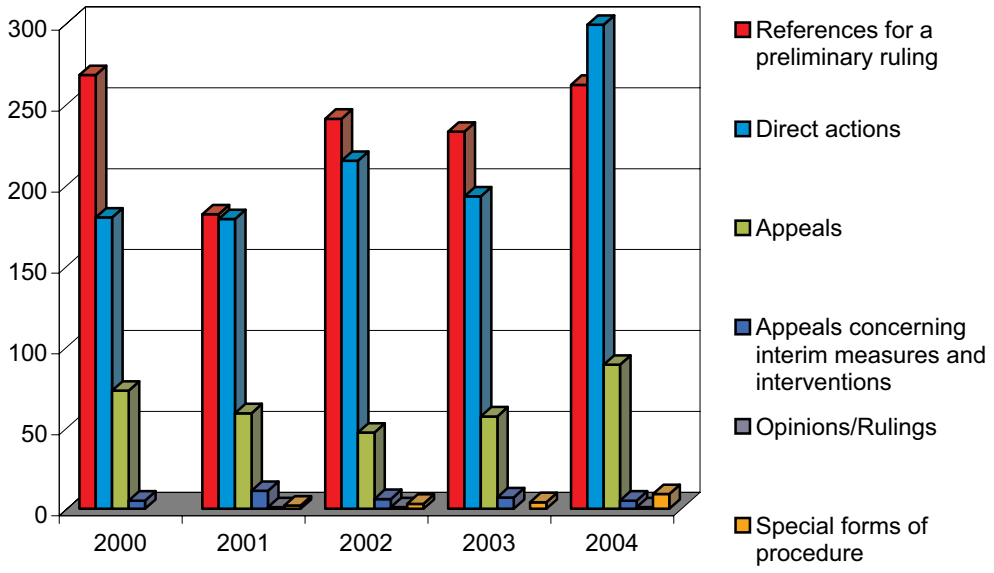


	2000	2001	2002	2003	2004
Cases completed	526	434	513	494	665
New cases	503	504	477	561	531
Cases pending	873	943	907	974	840

[1] The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the grounds of similarity (one case number = one case).

Cases completed

2. Nature of proceedings (2000-2004) [1] [2]

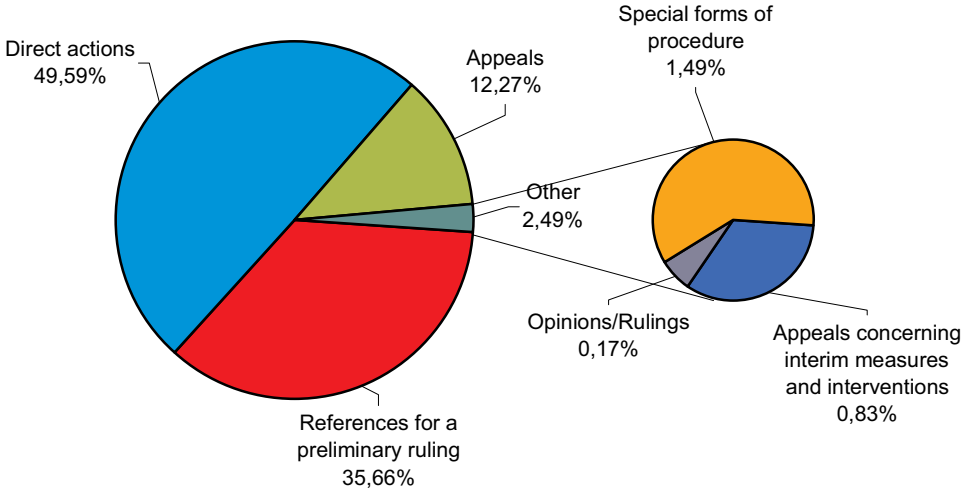


	2000	2001	2002	2003	2004
References for a preliminary ruling	268	182	241	233	262
Direct actions	180	179	215	193	299
Appeals	73	59	47	57	89
Appeals concerning interim measures and interventions	5	11	6	7	5
Opinions/Rulings		1	1		1
Special forms of procedure		2	3	4	9
Total	**526**	**434**	**513**	**494**	**665**

[1] The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the grounds of similarity (one case number = one case).

[2] The following are considered to be 'special forms of procedure': taxation of costs (Article 74 of the Rules of Procedure); legal aid (Article 76 of the Rules of Procedure); application to set a judgment aside (Article 94 of the Rules of Procedure); third party proceedings (Article 97 of the Rules of Procedure); interpretation of a judgment (Article 102 of the Rules of Procedure); revision of a judgment (Article 98 of the Rules of Procedure); rectification of a judgment (Article 66 of the Rules of Procedure); attachment procedure (Protocol on Privileges and Immunities); cases concerning immunity (Protocol on Privileges and Immunities).

3. Completed cases – Judgments, orders, opinions (2004)[1]



	Judgments	Non-interlocutory orders[2]	Interlocutory orders[3]	Other orders[4]	Opinions	Total
References for a preliminary ruling	160	30		25		215
Direct actions	182	1	1	115		299
Appeals	33	34	1	6		74
Appeals concerning interim measures and interventions			5			5
Opinions/Rulings				1		1
Special forms of procedure		7		2		9
Total	**375**	**72**	**7**	**149**	**0**	**603**

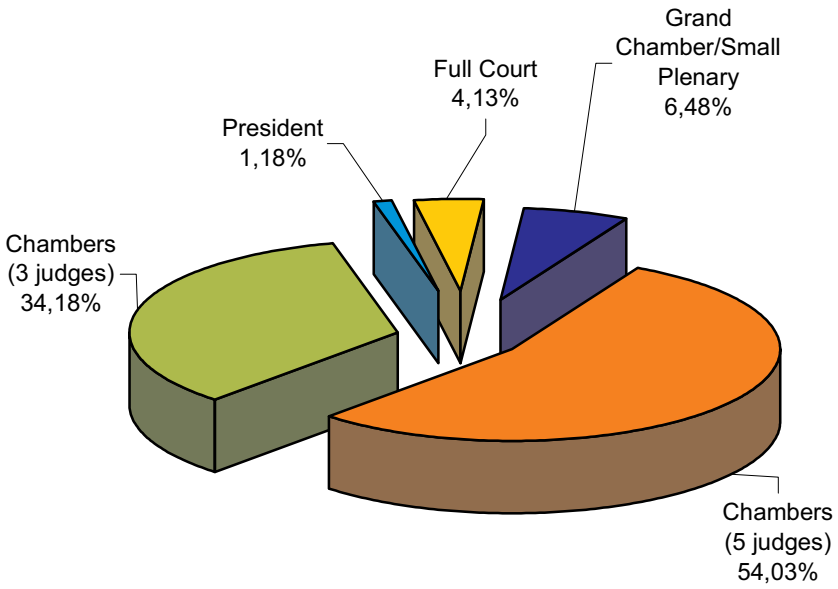
[1] The figures given (net figures) represent the number of cases, after joinder on the grounds of similarity (a set of joined cases = one case).

[2] Orders terminating proceedings by judicial determination (inadmissibility, manifest inadmissibility and so forth).

[3] Orders made following an application on the basis of Article 185 or 186 of the EC Treaty (now Articles 242 EC and 243 EC), Article 187 of the EC Treaty (now Article 244 EC) or the corresponding provisions of the EAEC and ECSC Treaties, or following an appeal against an order concerning interim measures or intervention.

[4] Orders terminating the case by removal from the register, declaration that there is no need to give a decision or referral to the Court of First Instance.

4. Completed cases – Bench hearing actions (2004)[1]



	Judgments/ Opinions	Orders[2]	Total
Full Court	21		21
Grand Chamber/Small Plenary	32	1	33
Chambers (5 judges)	257	18	275
Chambers (3 judges)	113	61	174
President		6	6
Total	**423**	**86**	**509**

[1] The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the grounds of similarity (one case number = one case).

[2] Orders terminating proceedings by judicial determination (other than those removing a case from the register, declaring that there is no need to give a decision or referring a case to the Court of First Instance).

5. Completed cases – Subject-matter of the action (2004)[1]

	Judgments/ Opinions	Orders[2]	Total
Accession of new States		2	2
Agriculture	52	8	60
Approximation of laws	31	2	33
Area of freedom, security and justice		2	2
Association of the Overseas Countries and Territories		1	1
Brussels Convention	7		7
Commun Customs Tariff	3	1	4
Company law	14	2	16
Competition	22	7	29
Customs union	12		12
Economic and monetary policy	2		2
Energy	1		1
Environment and consumers	60	7	67
European citizenship	1		1
External relations	6	3	9
Fisheries policy	5	1	6
Free movement of capital	4		4
Free movement of goods	17		17
Freedom of establishment	11	3	14
Freedom of movement for persons	15	2	17
Freedom to provide services	13	10	23
Industrial policy	11		11
Intellectual property	15	5	20
Law governing the institutions	9	4	13
Principles of Community law	3	1	4
Social policy	41	3	44
Social security for migrant workers	6		6
State aid	17	4	21
Taxation	26	2	28
Transport	11		11
EC Treaty	415	70	485
CS Treaty	1		1
EA Treaty	2		2
Privileges and immunities		1	1
Procedure		8	8
Staff Regulations	5	7	12
Others	5	16	21
OVERALL TOTAL	**423**	**86**	**509**

[1] The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the grounds of similarity (one case number = one case).

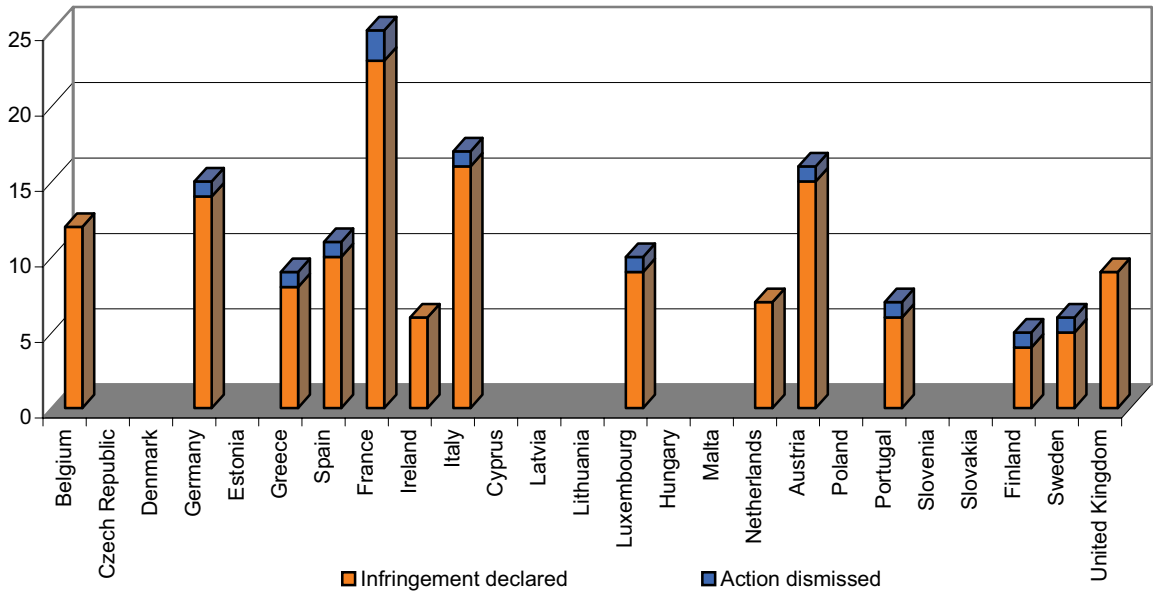
[2] Orders terminating proceedings by judicial determination (other than those removing a case from the register, declaring that there is no need to give a decision or referring a case to the Court of First Instance).

6. Proceedings for interim measures: outcome (2004)[1]

			Outcome	
	Number of applications for interim measures	Number of appeals concerning interim measures and interventions	Dismissed/ Contested decision upheld	Granted/Contested decision set aside
Accession of new States	1	1	2	
Approximation of laws		1	1	
Competition		1		1
Environment and consumers		2	2	
Transport	1			1
Total EC Treaty	2	5	5	2
EA Treaty				
Others				
OVERALL TOTAL	**2**	**5**	**5**	**2**

[1] The figures given (net figures) represent the number of cases, after joinder on the grounds of similarity (a set of joined cases = one case).

7. Completed cases – Judgments concerning failure of a Member State to fulfil its obligations: outcome (2004)[1]

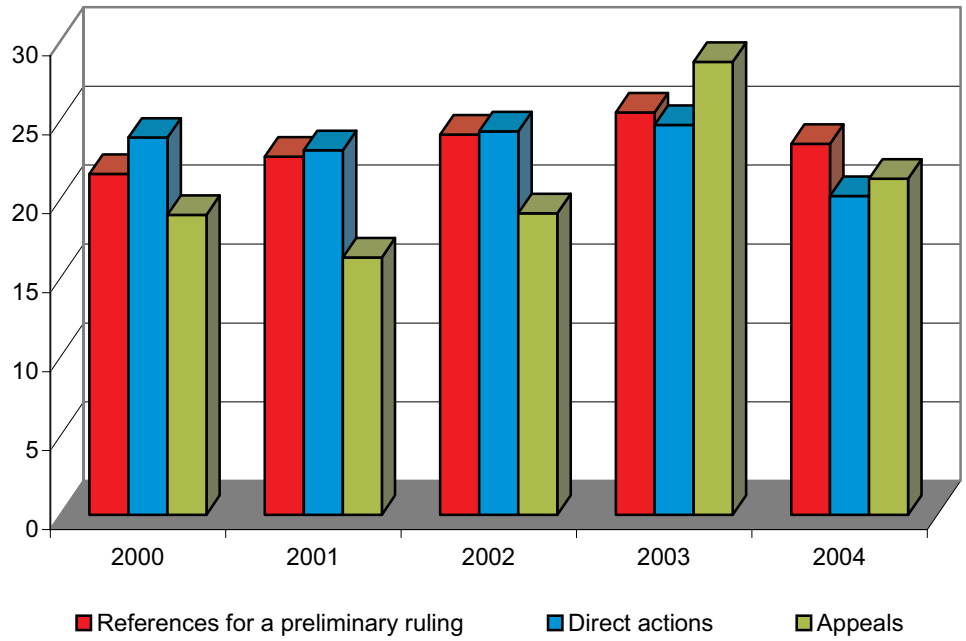


	Infringement declared	Action dismissed	Total
Belgium	12		12
Czech Republic			
Denmark			
Germany	14	1	15
Estonia			
Greece	8	1	9
Spain	10	1	11
France	23	2	25
Ireland	6		6
Italy	16	1	17
Cyprus			
Latvia			
Lithuania			
Luxembourg	9	1	10
Hungary			
Malta			
Netherlands	7		7
Austria	15	1	16
Poland			
Portugal	6	1	7
Slovenia			
Slovakia			
Finland	4	1	5
Sweden	5	1	6
United Kingdom	9		9
Total	**144**	**11**	**155**

[1] The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the grounds of similarity (one case number = one case).

8. Completed cases – Duration of proceedings (2000-2004) [1]

(Decisions by way of judgments and orders)[2]



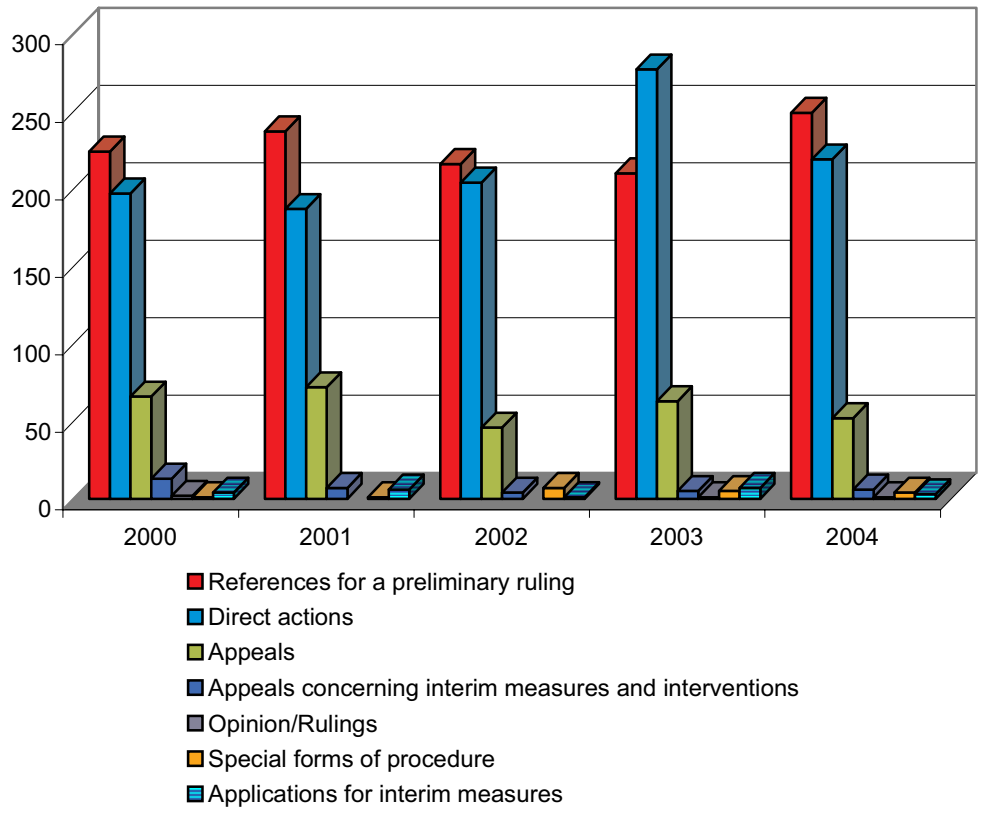
	2000	2001	2002	2003	2004
References for a preliminary ruling	21,6	22,7	24,1	25,5	23,5
Direct actions	23,9	23,1	24,3	24,7	20,2
Appeals	19	16,3	19,1	28,7	21,3

[1] The following types of cases are excluded from the calculation of the duration of proceedings: cases involving an interlocutory judgment or a measure of inquiry; opinions and rulings on agreements; special forms of procedure (namely taxation of costs, legal aid, application to set a judgment aside, third party proceedings, interpretation of a judgment, revision of a judgment, rectification of a judgment, attachment procedure, cases concerning immunity); cases terminated by an order removing the case from the register, declaring that there is no need to give a decision or referring or transferring the case to the Court of First Instance; proceedings for interim measures and appeals concerning interim measures and interventions.
The duration of proceedings is expressed in months and tenths of months.

[2] Other than orders terminating a case by removal from the register, declaration that there is no need to give a decision or referral to the Court of First Instance.

New cases

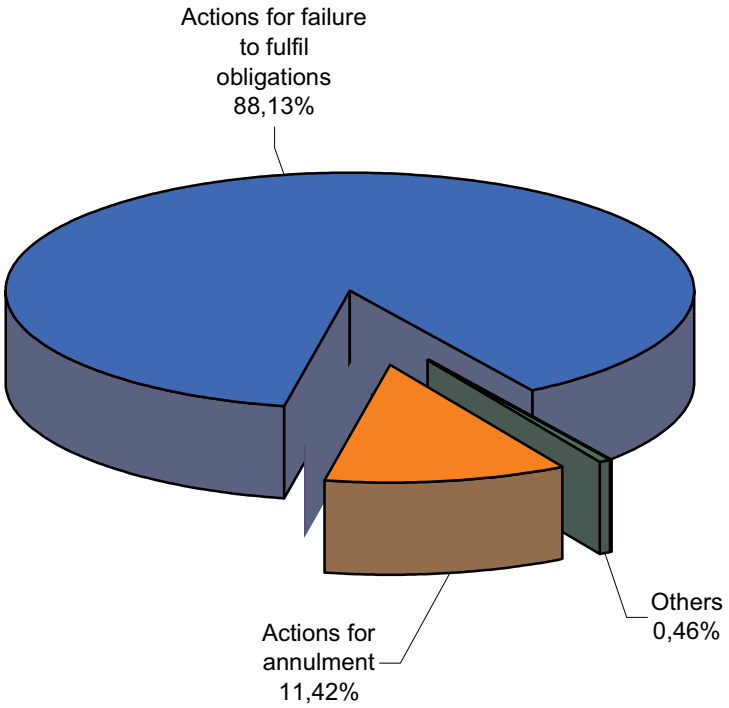
9. Nature of proceedings (2000-2004)[1]



	2000	2001	2002	2003	2004
References for a preliminary ruling	224	237	216	210	249
Direct actions	197	187	204	277	219
Appeals	66	72	46	63	52
Appeals concerning interim measures and interventions	13	7	4	5	6
Opinion/Rulings	2			1	1
Special forms of procedure	1	1	7	5	4
Total	**503**	**504**	**477**	**561**	**531**
Applications for interim measures	4	6	1	7	3

[1] The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the grounds of similarity (one case number = one case).

10. New cases – Direct actions – Type of action (2004)[1]



Actions for annulment	25
Actions for failure to act	
Actions for damages	
Actions for failure to fulfil obligations	193
Actions on arbitration clauses	
Others	1
Total	**219**

[1] The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the grounds of similarity (one case number = one case).

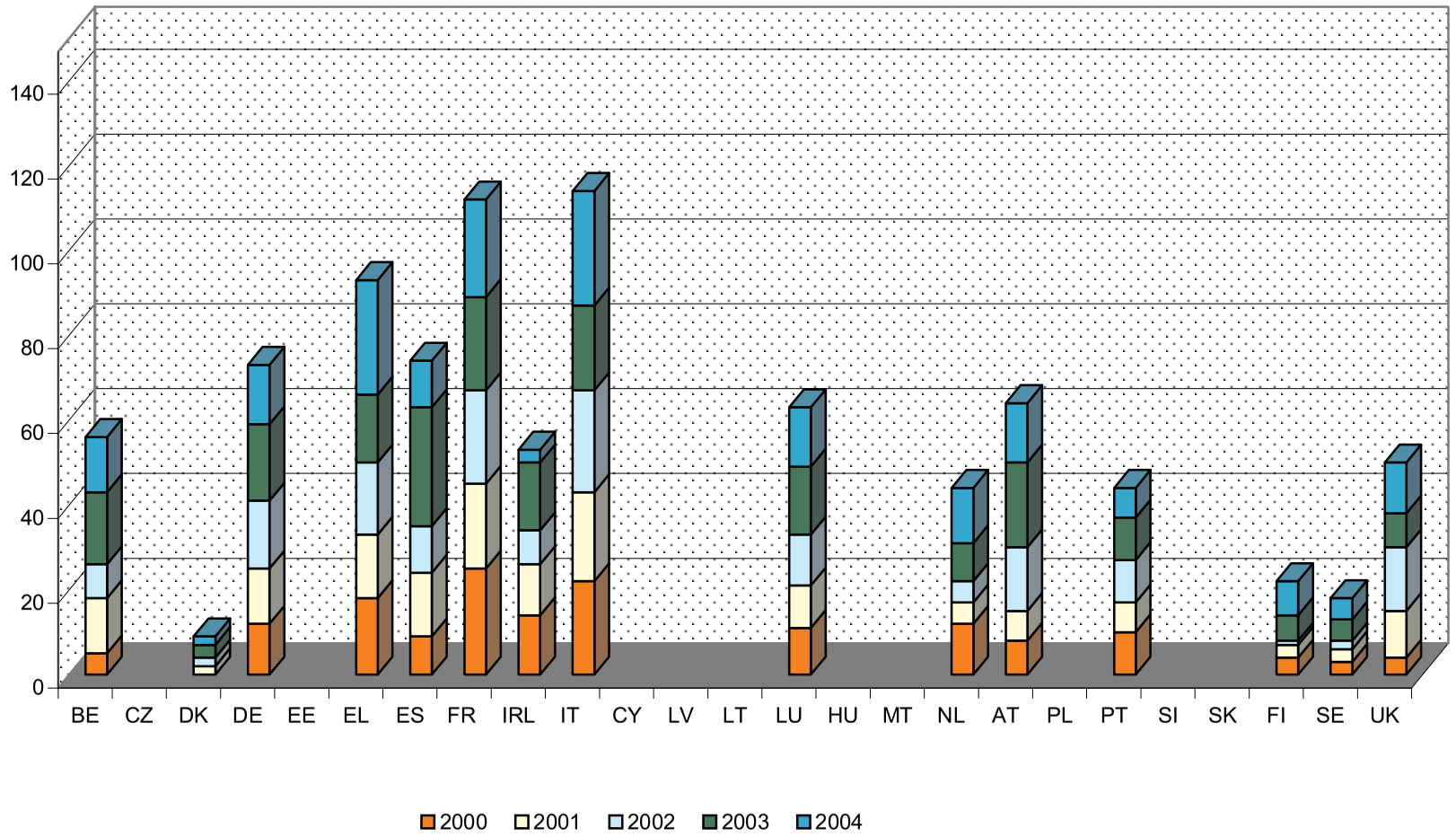
11. New cases[1] – Subject-matter of the action (2004)[2]

	Direct actions	References for a preliminary ruling	Appeals	Appeals concerning interim measures	Total	Special forms of procedure
Accession of new States	2		1	1	4	
Agriculture	22	27	1		50	
Approximation of laws	26	12	2	1	41	
Area of freedom, security and justice	7	5			12	
Brussels Convention		3			3	
Commercial policy		1			1	
Common foreign and security policy			2		2	
Commun Customs Tariff		6	1		7	
Community own resources	2	2			4	
Company law	12	13			25	
Competiton	5	9	18	1	33	
Customs union		6			6	
Economic and monetary policy	1				1	
Energy	2				2	
Environment and consumers	40	6		2	48	
European citizenship		4			4	
External relations	1	6	1		8	1
Fisheries policy	7	1			8	
Free movement of capital	1	8			9	
Free movement of goods	2	10			12	
Freedom of establishment	5	11			16	
Freedom of movement for persons	11	12			23	
Freedom to provide services	12	15	1		28	
Industrial policy	11	1			12	
Intellectual property		1	7		8	
Law governing the institutions	7		6	1	14	
Principles of Community law		2			2	
Privileges and immunities	1	1			2	
Regional policy	2		1		3	
Social policy	17	18			35	
Social security for migrant workers		5			5	
State aid	2	19	3		24	
Taxation	3	37			40	
Transport	17	4			21	
EC Treaty	218	245	44	6	513	1
EU Treaty		2			2	
CS Treaty			1		1	
EA Treaty	1	2			3	
Privileges and immunities						1
Procedure			2		2	3
Staff Regulations			5		5	
Others			7		7	4
OVERALL TOTAL	**219**	**249**	**52**	**6**	**526**	**5**

[1] Taking no account of applications for interim measures.

[2] The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the grounds of similarity (one case number = one case).

12. New cases – Actions for failure of a Member State to fulfil its obligations (2000-2004) [1]



	BE	CZ	DK	DE	EE	EL	ES	FR	IRL	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	SI	SK	FI	SE	UK	TOTAL [2]
2000	5			12		18	9	25	14	22				11			12	8		10			4	3	4	157
2001	13		2	13		15	15	20	12	21				10			5	7		7			3	3	11	157
2002	8		2	16		17	11	22	8	24				12			5	15		10			1	2	15	168
2003	17		3	18		16	28	22	16	20				16			9	20		10			6	5	8	214
2004	13		2	14		27	11	23	3	27				14			13	14		7			8	5	12	193

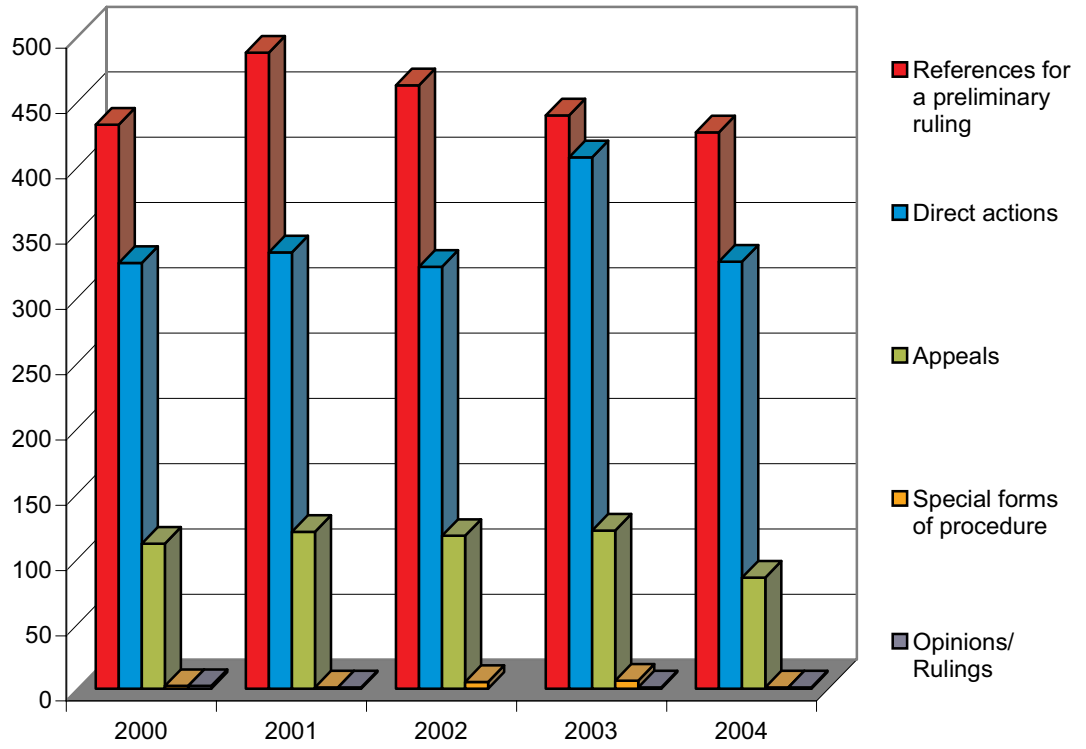
[1] The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the grounds of similarity (one case number = one case).

The actions covered are actions under Articles 93, 169, 170, 171 and 225 of the EC Treaty (now Articles 88 EC, 226 EC, 227 EC, 228 EC and 298 EC), Articles 141 EA, 142 EA and 143 EA and Article 88 CS.

[2] Of which one action was brought under Article 170 of the EC Treaty (now Article 227 EC).

Cases pending as at 31 December

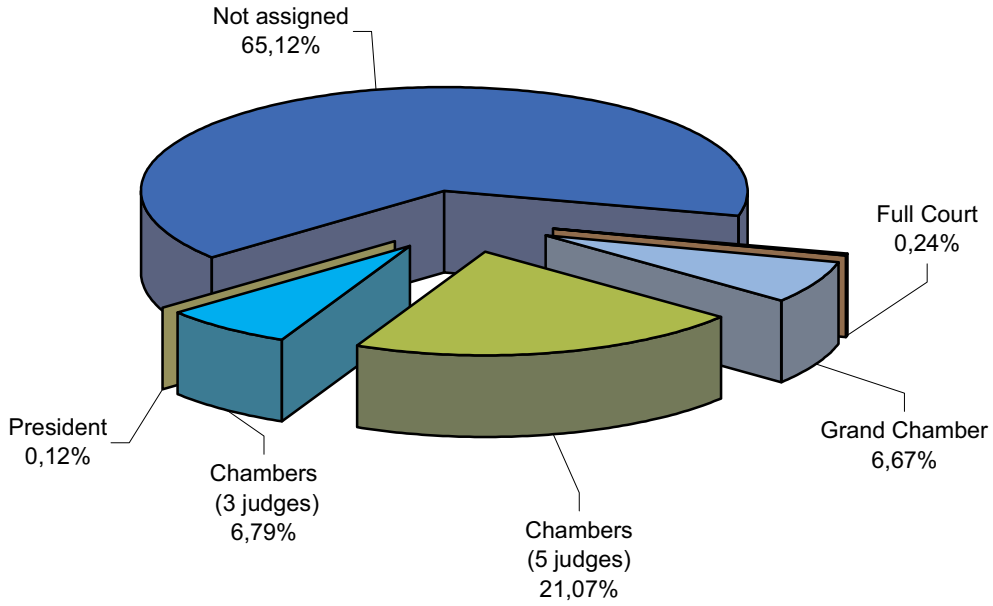
13. Nature of proceedings (2000-2004) [1]



	2000	2001	2002	2003	2004
References for a preliminary ruling	432	487	462	439	426
Direct actions	326	334	323	407	327
Appeals	111	120	117	121	85
Special forms of procedure	2	1	5	6	1
Opinions/ Rulings	2	1		1	1
Total	**873**	**943**	**907**	**974**	**840**

[1] The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the grounds of similarity (one case number = one case).

14. Cases pending as at 31 December – Bench hearing actions (2004)[1]



	Direct actions	References for a preliminary ruling	Appeals	Other proceedings	Total
Not assigned	236	256	55		547
Full Court	1			1	2
Grand Chamber	10	34	12		56
Chambers (5 judges)	49	113	14	1	177
Chambers (3 judges)	31	23	3		57
President			1		1
Total	**327**	**426**	**85**	**2**	**840**

[1] The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the grounds of similarity (one case number = one case).

General trend in the work of the Court (1952-2004)

15. New cases and judgments

Year	New cases[1]						Judgments[2]
	Direct actions[3]	References for a preliminary ruling	Appeals	Appeals concerning interim measures and interventions	Total	Applications for interim measures	
1953	4				4		
1954	10				10		2
1955	9				9	2	4
1956	11				11	2	6
1957	19				19	2	4
1958	43				43		10
1959	47				47	5	13
1960	23				23	2	18
1961	25	1			26	1	11
1962	30	5			35	2	20
1963	99	6			105	7	17
1964	49	6			55	4	31
1965	55	7			62	4	52
1966	30	1			31	2	24
1967	14	23			37		24
1968	24	9			33	1	27
1969	60	17			77	2	30
1970	47	32			79		64
1971	59	37			96	1	60
1972	42	40			82	2	61
1973	131	61			192	6	80
1974	63	39			102	8	63
1975	62	69			131	5	78
1976	52	75			127	6	88
1977	74	84			158	6	100
1978	147	123			270	7	97
1979	1218	106			1324	6	138
1980	180	99			279	14	132
1981	214	108			322	17	128
1982	217	129			346	16	185
1983	199	98			297	11	151
1984	183	129			312	17	165
1985	294	139			433	23	211
1986	238	91			329	23	174
1987	251	144			395	21	208
1988	193	179			372	17	238
1989	244	139			383	19	188
1990[4]	221	141	15	1	378	12	193
1991	142	186	13	1	342	9	204
1992	253	162	24	1	440	5	210

1993	265	204	17		486	13	203
1994	128	203	12	1	344	4	188
1995	109	251	46	2	408	3	172
1996	132	256	25	3	416	4	193
1997	169	239	30	5	443	1	242
1998	147	264	66	4	481	2	254
1999	214	255	68	4	541	4	235
2000	199	224	66	13	502	4	273
2001	187	237	72	7	503	6	244
2002	204	216	46	4	470	1	269
2003	278	210	63	5	556	7	308
2004	220	249	52	6	527	3	375
Total	**7528**	**5293**	**615**	**57**	**13493**	**339**	**6465**

[1] Gross figures; special forms of procedure are not included.

[2] Net figures.

[3] Including opinions of the Court.

[4] Since 1990 staff cases have been brought before the Court of First Instance.

16. General trend in the work of the Court (1952-2004) –

New references for a preliminary ruling (by Member State per year)[1]

	BE	CZ	DK	DE	EE	EL	ES	FR	IRL	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	SI	SK	FI	SE	UK	Benelux 2	Total
1961																	1										1
1962																	5										5
1963														1			5										6
1964										2							4										6
1965				4				2									1										7
1966																	1										1
1967	5			11				3						1			3										23
1968	1			4				1		1							2										9
1969	4			11				1						1													17
1970	4			21				2		2							3										32
1971	1			18				6		5				1			6										37
1972	5			20				1		4							10										40
1973	8			37				4		5				1			6										61
1974	5			15				6		5							7								1		39
1975	7		1	26				15		14				1			4								1		69
1976	11			28				8	1	12							14								1		75
1977	16		1	30				14	2	7							9								5		84
1978	7		3	46				12	1	11							38								5		123
1979	13		1	33				18	2	19				1			11								8		106
1980	14		2	24				14	3	19							17								6		99
1981	12		1	41				17		11				4			17								5		108
1982	10		1	36				39		18							21								4		129
1983	9		4	36				15	2	7							19								6		98
1984	13		2	38				34	1	10							22								9		129
1985	13			40				45	2	11				6			14								8		139
1986	13		4	18		2	1	19	4	5				1			16								8		91
1987	15		5	32		17	1	36	2	5				3			19								9		144
1988	30		4	34			1	38		28				2			26								16		179

	BE	CZ	DK	DE	EE	EL	ES	FR	IRL	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	SI	SK	FI	SE	UK	Benelux 2	Total
1989	13		2	47		2	2	28	1	10				1			18			1					14		139
1990	17		5	34		2	6	21	4	25				4			9			2					12		141
1991	19		2	54		3	5	29	2	36				2			17			3					14		186
1992	16		3	62		1	5	15		22				1			18			1					18		162
1993	22		7	57		5	7	22	1	24				1			43			3					12		204
1994	19		4	44			13	36	2	46				1			13			1					24		203
1995	14		8	51		10	10	43	3	58				2			19	2		5				6	20		251
1996	30		4	66		4	6	24		70				2			10	6		6			3	4	21		256
1997	19		7	46		2	9	10	1	50				3			24	35		2			6	7	18		239
1998	12		7	49		5	55	16	3	39				2			21	16		7			2	6	24		264
1999	13		3	49		3	4	17	2	43				4			23	56		7			4	5	22		255
2000	15		3	47		3	5	12	2	50							12	31		8			5	4	26	1	224
2001	10		5	53		4	4	15	1	40				2			14	57		4			3	4	21		237
2002	18		8	59		7	3	8		37				4			12	31		3			7	5	14		216
2003	18		3	43		4	8	9	2	45				4			28	15		1			4	4	22		210
2004	24		4	50		18	8	21	1	48				1	2		28	12		1			4	5	22		249
Total	495		104	1414		92	153	676	45	844				57	2		610	261		55			38	50	396	1	5293

[1] Article 177 of the EC Treaty (now Article 234 EC), Article 35 (1) EU, Article 41 CS, Article 150 EA, 1971 Protocol.

[2] Case C-265/00 Campina Melkunie.

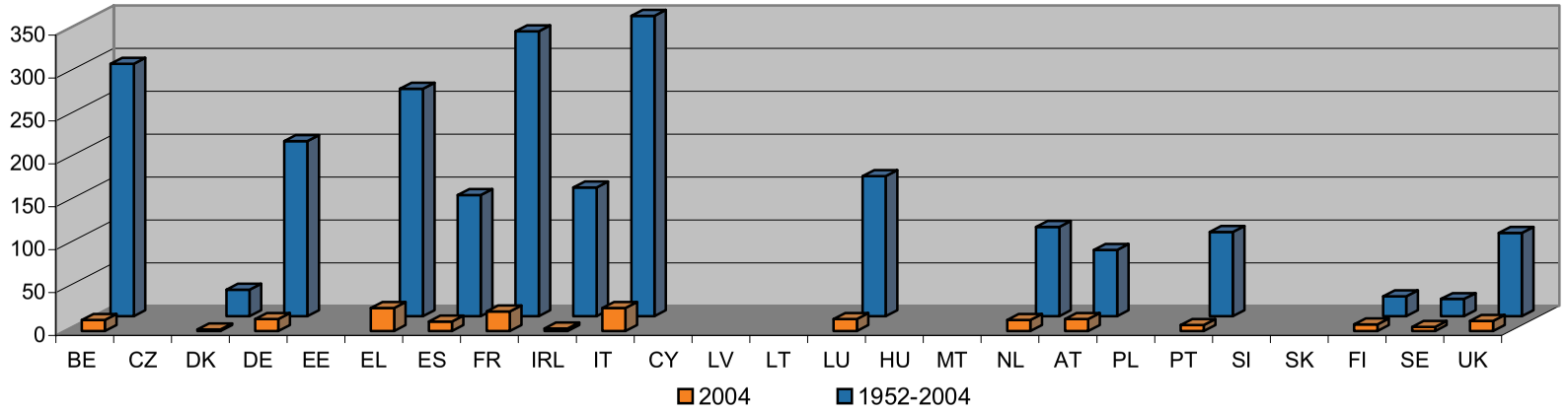
17. General trend in the work of the Court (1952-2004) – New references for a preliminary ruling (by Member State and by court or tribunal)

			Total
Belgium	Cour de cassation	61	
	Cour d'arbitrage	2	
	Conseil d'État	35	
	Other courts or tribunals	397	495
Czech Republic	Nejvyššího soudu		
	Nejvyšší správní soud		
	Ústavní soud		
	Other courts or tribunals		
Denmark	Højesteret	19	
	Other courts or tribunals	85	104
Germany	Bundesgerichtshof	89	
	Bundesverwaltungsgericht	65	
	Bundesfinanzhof	219	
	Bundesarbeitsgericht	16	
	Bundessozialgericht	69	
	Staatsgerichtshof des Landes Hessen	1	
	Other courts or tribunals	955	1414
Estonia	Riigikohus		
	Other courts or tribunals		
Greece	Άρειος Πάγος	4	
	Συμβούλιο της Επικρατείας	21	
	Other courts or tribunals	67	92
Spain	Tribunal Supremo	12	
	Audiencia Nacional	1	
	Juzgado Central de lo Penal	7	
	Other courts or tribunals	133	153
France	Cour de cassation	70	
	Conseil d'État	28	
	Other courts or tribunals	578	676
Ireland	Supreme Court	14	
	High Court	15	
	Other courts or tribunals	16	45
Italy	Corte suprema di Cassazione	82	
	Consiglio di Stato	48	
	Other courts or tribunals	714	844
Cyprus	Ανώτατο Δικαστήριο		
	Other courts or tribunals		
Latvia	Augstākā tiesa		
	Satversmes tiesa		
	Other courts or tribunals		
Lithuania	Konstitucinis Teismas		
	Lietuvos Auksciausiasis		
	Vyriausiasis administracinis Teismas		
	Other courts or tribunals		
Luxembourg	Cour supérieure de justice	10	
	Conseil d'État	13	
	Cour administrative	5	
	Other courts or tribunals	29	57
Hungary	Legfelsöbb Bíroság		
	Other courts or tribunals	2	2
Malta	Constitutional Court		
	Court of Appeal		
	Other courts or tribunals		
Netherlands	Raad van State	45	
	Hoge Raad der Nederlanden	131	
	Centrale Raad van Beroep	42	
	College van Beroep voor het Bedrijfsleven	118	
	Tariefcommissie	34	
	Other courts or tribunals	240	610

Austria	Verfassungsgerichtshof	4	
	Oberster Gerichtshof	53	
	Bundesvergabeamt	23	
	Verwaltungsgerichtshof	42	
	Vergabekontrollsenat	3	
	Other courts or tribunals	136	261
Poland	Sad Najwyzszy		
	Naczelny Sąd Administracyjny		
	Trybunał Konstytucyjny		
	Other courts or tribunals		
Portugal	Supremo Tribunal Administrativo	31	
	Other courts or tribunals	24	55
Slovenia	Vrhovno sodišče		
	Vstavno sodišče		
	Other courts or tribunals		
Slovakia	Ústavný Súd		
	Najvyšší súd		
	Other courts or tribunals		
Finland	Korkein hallinto-oikeus	12	
	Korkein oikeus	7	
	Other courts or tribunals	19	38
Sweden	Högsta Domstolen	5	
	Marknadsdomstolen	3	
	Regeringsrätten	15	
	Other courts or tribunals	27	50
United Kingdom	House of Lords	31	
	Court of Appeal	31	
	Other courts or tribunals	334	396
Benelux	Cour de justice/Gerechtshof [1]	1	1
Total			**5293**

[1] Case C-265/00 Campina Melkunie.

18. General trend in the work of the Court (1952-2004) – New actions for failure of a Member State to fulfil its obligations [1]



	BE	CZ	DK	DE	EE	EL	ES	FR	IRL	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	SI	SK	FI	SE	UK	Total
2004	13		2	14		27	11	23	3	27				14			13	14		7			8	5	12	**193**
1952-2004	294		31	204		265	141	332	150	498				163			104	77		98			23	20	97	**2497**

The cases brought against Spain include an action under Article 170 of the EC Treaty (now Article 227 EC), brought by Belgium.

The cases brought against France include an action under Article 170 of the EC Treaty (now Article 227 EC), brought by Ireland.

The cases brought against the United Kingdom include three actions under Article 170 of the EC Treaty (now Article 227 EC), one brought by France and two by Spain.

[1] The actions covered are actions under Articles 93, 169, 170, 171 and 225 of the EC Treaty (now Articles 88 EC, 226 EC, 227 EC, 228 EC and 298 EC), Articles 141 EA, 142 EA and 143 EA and Article 88 CS.

B — Statistics concerning the judicial activity of the Court of First Instance

General activity of the Court of First Instance

1. New cases, completed cases, cases pending (1996-2004)

New cases

2. Nature of proceedings (2000-2004)
3. Type of action (2000-2004)
4. Subject-matter of the action (2000-2004)

Completed cases

5. Nature of proceedings (2000-2004)
6. Subject-matter of the action (2004)
7. Bench hearing action (2004)
8. Duration of proceedings in months (2000-2004)

Cases pending as at 31 December of each year

9. Nature of proceedings (2000-2004)
10. Subject-matter of the action (2000-2004)

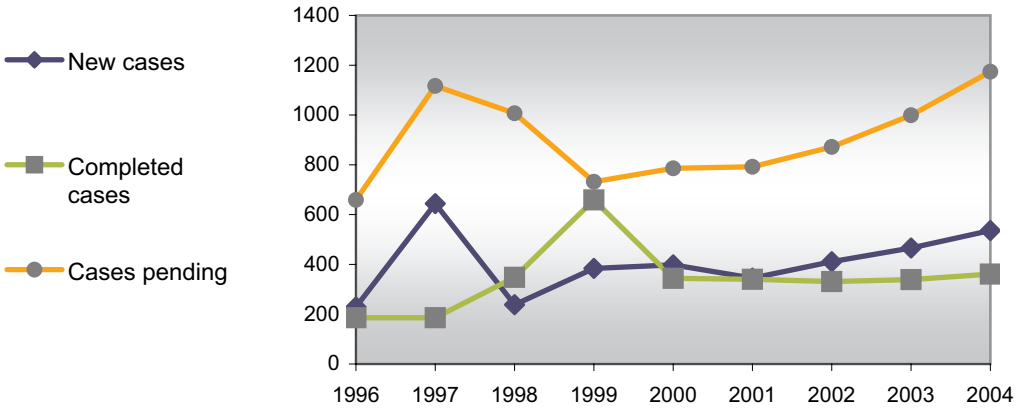
Miscellaneous

11. Decisions in proceedings for interim measures: outcome (2004)
12. Appeals against decisions of the Court of First Instance
13. Results of appeals
14. General trend (1989-2004) – New cases, completed cases, cases pending

General activity of the Court of First Instance

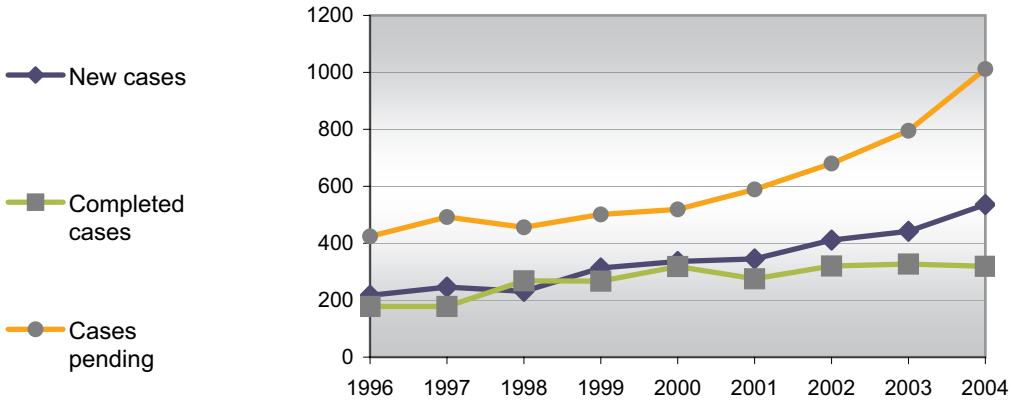
1. New cases, completed cases, cases pending (1996 – 2004)

	1996	1997	1998	1999	2000	2001	2002	2003	2004
New cases	229	644	238	384	398	345	411	466	536
Completed cases	186	186	348	659	344	340	331	339	361
Cases pending	659	1117	1007	732	786	792	872	999	1174



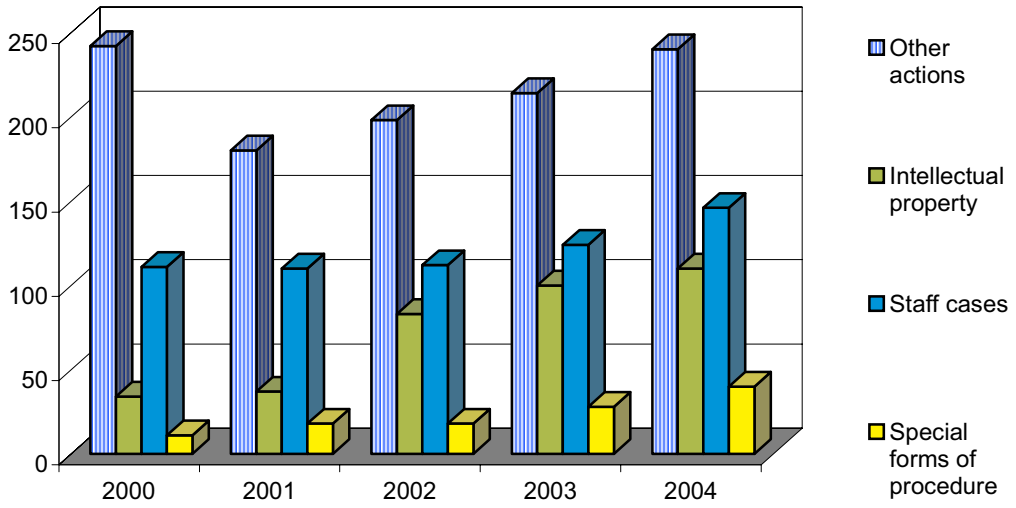
In the above table, the figures include certain groups of identical or related cases (cases concerning milk quotas, customs agents, State aid in the Netherlands for service-stations and State aid in the region of Venice, the restructuring of the fisheries sector, and staff cases). If those sets of cases are excluded, the following figures are obtained:

	1996	1997	1998	1999	2000	2001	2002	2003	2004
New cases	217	246	231	313	336	345	411	442	536
Completed cases	178	178	268	267	318	275	320	327	319
Cases pending	424	492	456	501	519	589	680	795	1012



New cases

2. Nature of proceedings (2000-2004) [1] [2]



	2000	2001	2002	2003	2004
Other actions	242	180	198	214	240
Intellectual property	34	37	83	100	110
Staff cases	111	110	112	124	146
Special forms of procedure	11	18	18	28	40
Total	**398**	**345**	**411**	**466**	**536**

2000: The figures include three cases concerning State aid in the Netherlands for service-stations and 59 cases concerning State aid in the region of Venice.

2003: The figures include 24 cases concerning the restructuring of the fisheries sector.

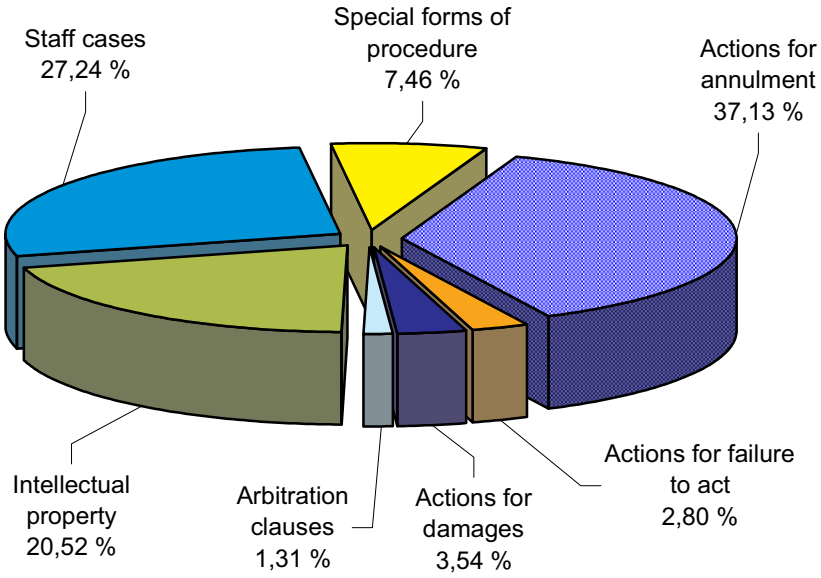
2004: The number relating to other actions includes 48 actions brought by Member States, in consequence of the new areas of jurisdiction allocated to the Court of First Instance since 1 June 2004 by virtue of the amendment of Article 51 of the Statute of the Court of Justice.

[1] The entry 'other actions' in this table and on the following pages refers to all actions brought by natural or legal persons other than actions brought by officials of the European Communities and intellectual property cases.

[2] The following are considered to be 'special forms of procedure' (in this and the following tables): application to set a judgment aside (Article 41 of the EC Statute; Article 122 of the Rules of Procedure of the Court of First Instance); third party proceedings (Article 42 of the EC Statute; Article 123 of the Rules of Procedure); revision of a judgment (Article 44 of the EC Statute; Article 125 of the Rules of Procedure); interpretation of a judgment (Article 43 of the EC Statute; Article 129 of the Rules of Procedure); taxation of costs (Article 92 of the Rules of Procedure); legal aid (Article 94 of the Rules of Procedure); rectification of a judgment (Article 84 of the Rules of Procedure).

3. New cases – Nature of proceedings (2000-2004)

Distribution in 2004



	2000	2001	2002	2003	2004
Actions for annulment	220	134	171	174	199
Actions for failure to act	6	17	12	13	15
Actions for damages	17	21	13	24	19
Arbitration clauses		8	2	3	7
Intellectual property	34	37	83	100	110
Staff cases	110	110	112	124	146
Special forms of procedure	11	18	18	28	40
Total	**398**	**345**	**411**	**466**	**536**

2000: The figures include three cases concerning State aid in the Netherlands for service-stations and 59 cases concerning State aid in the region of Venice

2003: The figures include 24 cases concerning the restructuring of the fisheries sector.

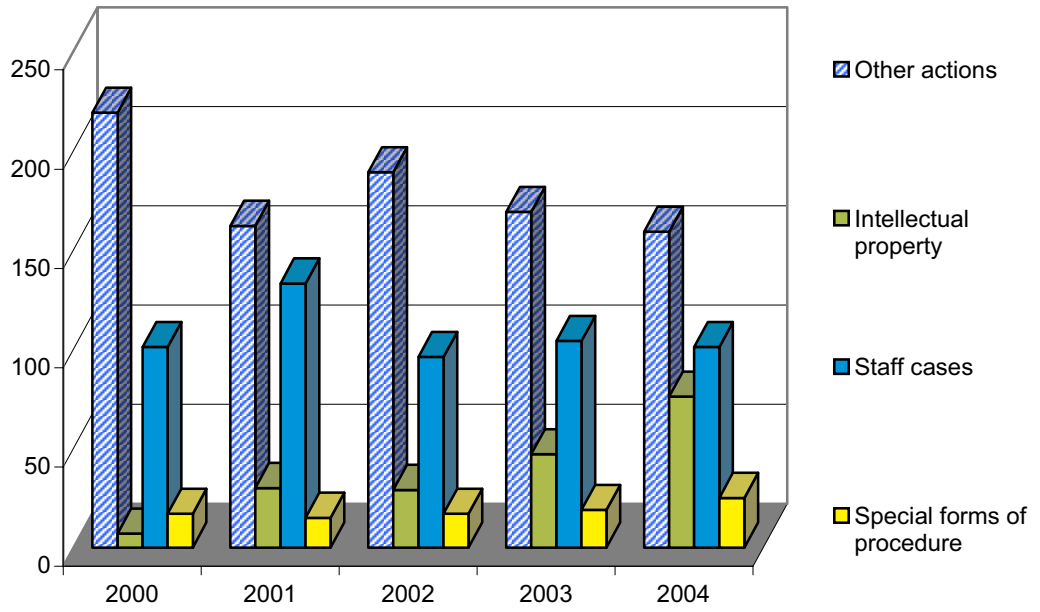
4. New cases – Subject-matter of the action (2000-2004)[1]

	2000	2001	2002	2003	2004
Accession of new States				1	1
Agriculture	23	17	9	11	25
Approximation of laws		2	1	4	1
Arbitration clause		2	1		
Association of the Overseas Countries and Territories	6	6		1	
Commercial policy	8	4	5	6	12
Common Customs Tariff		2	1		1
Common foreign and security policy		6	3	2	4
Company law	4	6	3	3	6
Competition	36	39	61	43	36
Culture	2	1			
Customs union		2	5	5	11
Energy		2		2	
Environment and consumers	14	2	8	13	30
European citizenship	2				
External relations	8	14	8	10	3
Fisheries policy	1	3	6	25	3
Free movement of goods	17	1			1
Freedom of establishment		1			1
Freedom of movement for persons	8	3	2	7	1
Intellectual property	34	37	83	101	110
Justice and home affairs		1	1		
Law governing the institutions	29	12	18	26	33
Regional policy		1	6	7	10
Research, information, education and statistics	1	3	1	3	6
Social policy	7	1	3	2	5
Staff Regulations		1			
State aid	80	42	51	25	46
Taxation			1	5	
Transport		2	1	1	3
Total EC Treaty	**280**	**213**	**278**	**303**	**349**
Competition			1	10	
Iron and steel		2		1	
State aid	1	2	1		
Total CS Treaty	**1**	**4**	**2**	**11**	
Nuclear energy			1		1
Total EA Treaty			**1**		**1**
Staff Regulations	106	110	112	124	146
OVERALL TOTAL	**387**	**327**	**393**	**438**	**496**

[1] Special forms of procedure are not taken into acount in this table.

Completed cases

5. Nature of proceedings (2000-2004)



	2000	2001	2002	2003	2004
Other actions	219	162	189	169	159
Intellectual property	7	30	29	47	76
Staff cases	101	133	96	104	101
Special forms of procedure	17	15	17	19	25
Total	**344**	**340**	**331**	**339**	**361**

2000: the figures include eight cases concerning milk quotas, 13 cases concerning customs agents and five cases concerning the regrading of officials.

2001: the figures include 14 cases concerning milk quotas and 51 cases concerning the regrading of officials.

2002: the figures include seven cases concerning milk quotas and three cases concerning the regrading of officials.

2003: the figures include four cases concerning milk quotas and eight cases concerning State aid in the Netherlands for service-stations.

2004: the figures include four cases concerning milk quotas and 38 cases concerning State aid in the Netherlands for service-stations.

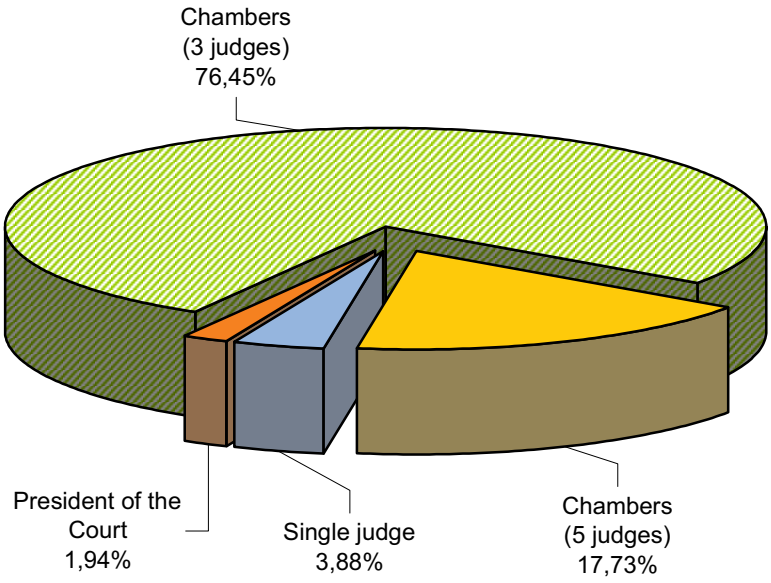
The number relating to other actions includes 1 action brought by a Member State, in consequence of the new areas of jurisdiction allocated to the Court of First Instance since 1 June 2004 by virtue of the amendment of Article 51 of the Statute of the Court of Justice.

6. Completed cases – Subject-matter of the action (2004)[1]

	Judgments	Orders	Total
Agriculture	4	11	15
Approximation of laws		3	3
Arbitration clause	2		2
Commercial policy	1		1
Common foreign and security policy		2	2
Company law		2	2
Competition	22	4	26
Customs union	3		3
Environment and consumers	1	3	4
External relations	4	3	7
Fisheries policy	3	3	6
Free movement of goods	1		1
Freedom of movement for persons		2	2
Intellectual property	47	29	76
Law governing the institutions	3	13	16
Regional policy	1	3	4
Social policy		4	4
State aid	11	43	54
Taxation		1	1
Transport		1	1
Total EC Treaty	**103**	**127**	**230**
Iron and steel	3		3
State aid	1	1	2
Total CS Treaty	**4**	**1**	**5**
Staff Regulations	65	36	101
OVERALL TOTAL	**172**	**164**	**336**

[1] Special forms of procedure are not taken into acount in this table.

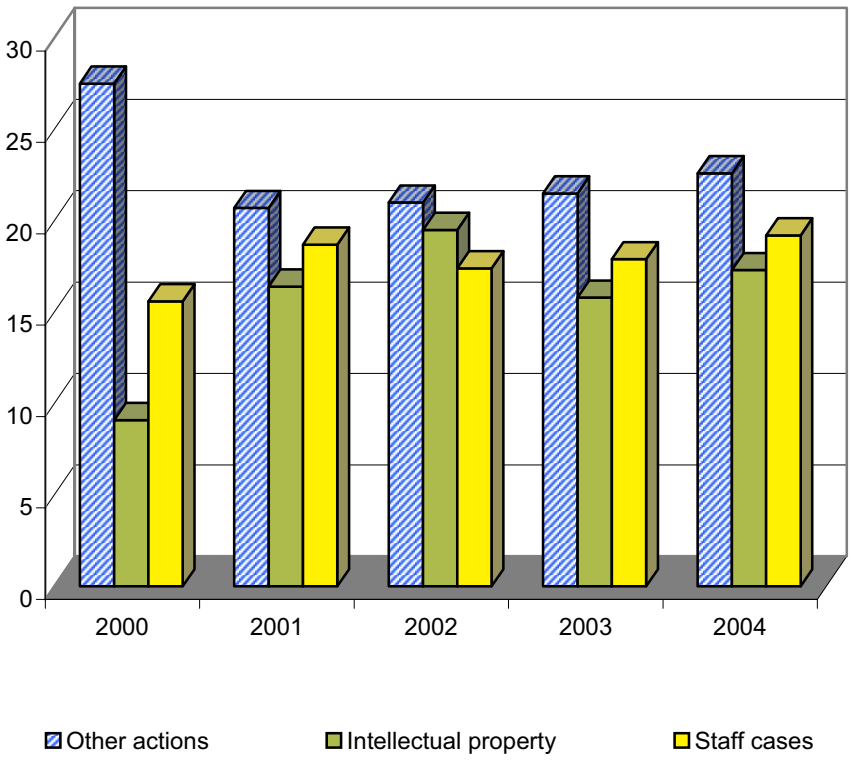
7. Completed cases – Bench hearing action (2004)



	Judgments and Orders
Chambers (3 judges)	276
Chambers (5 judges)	64
Single judge	14
President of the Court	7
Total	**361**

8. Completed cases – Duration of proceedings in months (2000-2004)

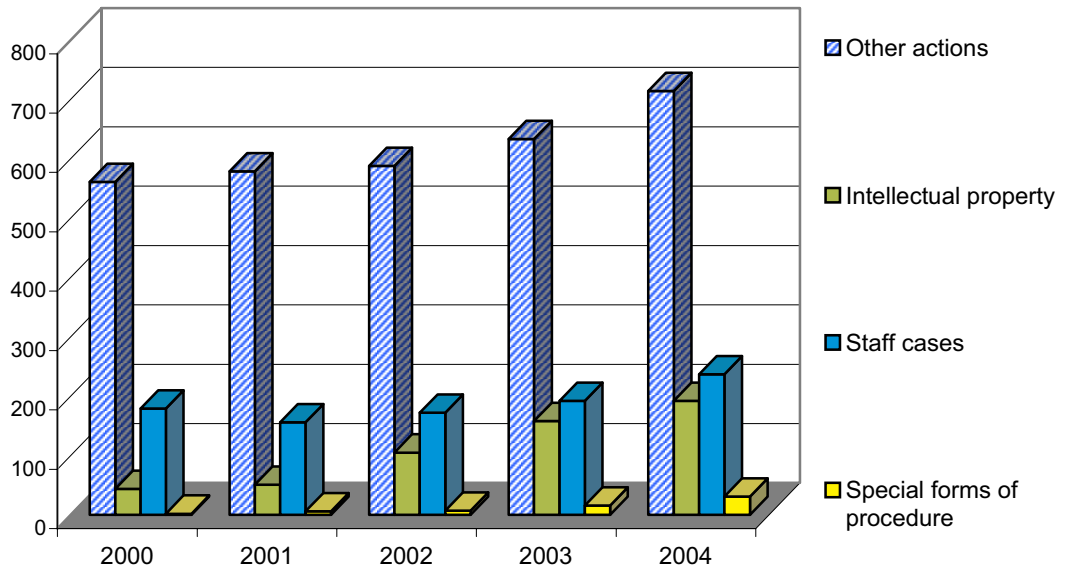
(judgments and orders)



	2000	2001	2002	2003	2004
Other actions	27,5	20,7	21	21,5	22,6
Intellectual property	9,1	16,4	19,5	15,8	17,3
Staff cases	15,6	18,7	17,4	17,9	19,2

Cases pending as at 31 December of each year

9. Nature of proceedings (2000-2004)



	2000	2001	2002	2003	2004
Other actions	561	579	588	633	714
Intellectual property	44	51	105	158	192
Staff cases	179	156	172	192	237
Special forms of procedure	2	6	7	16	31
Total	**786**	**792**	**872**	**999**	**1174**

2000: the figures include 80 cases concerning milk quotas, 74 cases concerning State aid in the Netherlands for service-stations, 59 cases concerning State aid in the region of Venice and 54 cases concerning the regrading of officials.

2001: the figures include 67 cases concerning milk quotas, 73 cases concerning State aid in the Netherlands for service-stations, 59 cases concerning State aid in the region of Venice and three cases concerning the regrading of officials.

2002: the figures include 60 cases concerning milk quotas, 73 cases concerning State aid in the Netherlands for service-stations and 59 cases concerning State aid in the region of Venice.

2003: the figures include 56 cases concerning milk quotas, 65 cases concerning State aid in the Netherlands for service-stations, 59 cases concerning State aid in the region of Venice, and 24 cases concerning the restructuring of the fisheries sector.

2004: the figures include 52 cases concerning milk quotas, 27 cases concerning State aid in the Netherlands for service-stations, 59 cases concerning State aid in the region of Venice, and 24 cases concerning the restructuring of the fisheries sector.

The number relating to other actions includes 47 actions brought by Member States, in consequence of the new areas of jurisdiction allocated to the Court of First Instance since 1 June 2004 by virtue of the amendment of Article 51 of the Statute of the Court of Justice.

10. Cases pending as at 31 December of each year – Subject-matter of the action (2000-2004) [1]

	2000	2001	2002	2003	2004
Accession of new States					1
Agriculture	144	114	95	85	95
Approximation of laws		2	1	4	1
Arbitration clause		2	3	2	
Association of the Overseas Countries and Territories	11	15	9	6	6
Commercial policy	16	15	14	14	25
Common Customs Tariff	3	2	3		1
Common foreign and security policy	3	3	9	11	13
Company law	4	6	5	6	10
Competition	79	96	114	119	129
Culture	2	3	1		
Customs union	33	20	7	10	18
Energy		2	2	4	4
Environment and consumers	15	17	13	17	44
European citizenship	1				
External relations	9	21	23	22	18
Fisheries policy	8	7	8	31	28
Free movement of goods	2	3	1	1	1
Freedom of establishment	5	2			1
Freedom of movement for persons		1	3	2	1
Intellectual property	44	51	105	159	193
Justice and home affairs		1	1		
Law governing the institutions	27	20	27	32	49
Regional policy		1	6	13	19
Research, information, education and statistics	1	4	3	2	8
Social policy	4	3	4	5	6
Staff Regulations	2	2	1		
State aid	176	207	227	226	218
Taxation			1	1	
Transport	1	3	2	1	3
Total EC Treaty	**590**	**623**	**688**	**773**	**892**
Competition	6		1	11	11
Iron and steel	1	2	2	3	
State aid	7	6	3	3	1
Total CS Treaty	**14**	**8**	**6**	**17**	**12**
Law governing the institutions	1			1	1
Nuclear energy					1
Total EA Treaty	**1**			**1**	**2**
Staff Regulations	179	155	171	192	237
OVERALL TOTAL	**784**	**786**	**865**	**983**	**1143**

[1] Special forms of procedure are not taken into account in this table.

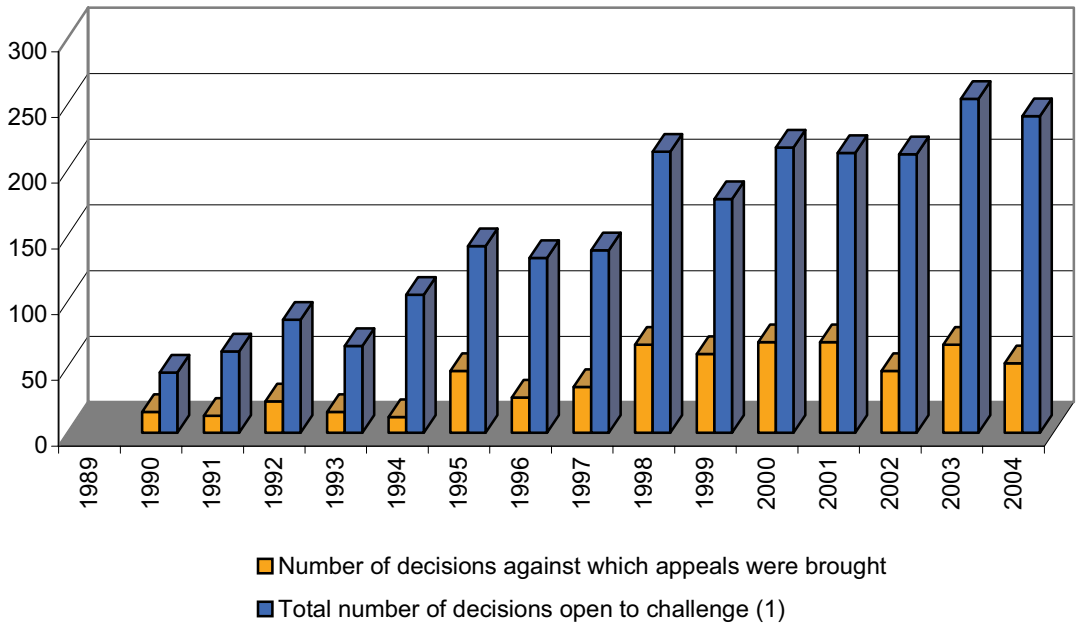
Miscellaneous

11. Decisions in proceedings for interim measures: outcome (2004)

	New applications for interim measures	Applications for interim measures brought to a conclusion	Outcome [1]	
			Dismissed	Granted
State aid	4	4	1	1
Company law	5	3	3	
Competition	1	7	2	2
Environment and consumers	5	6	6	
Fisheries policy	1	1	1	
Law governing the institutions	2	2	1	
Taxation			1	
Total EC Treaty	**18**	**24**	**14**	**3**
Staff Regulations	8	10	7	
OVERALL TOTAL	**26**	**34**	**21**	**3**

[1] Applications for interim measures brought to a conclusion by removal from the register or in respect of which it was decided that there was no need to adjudicate are not counted in this table.

12. Miscellaneous – Appeals against decisions of the Court of First Instance (1989-2004)



	Number of decisions against which appeals were brought	Total number of decisions open to challenge[1]
1989		
1990	16	46
1991	13	62
1992	24	86
1993	16	66
1994	12	105
1995	47	142
1996	27	133
1997	35	139
1998	67	214
1999	60	178
2000	69	217
2001	69	213
2002	47	212
2003	67	254
2004	53	241

[1] Total number of decisions open to challenge – judgments, and orders relating to admissibility, concerning interim measures, declaring that there is no need to give a decision or refusing leave to intervene – in respect of which the period for bringing an appeal expired or against which an appeal was brought.

13. Miscellaneous – Results of appeals

(judgments and orders)

	Appeal dismissed	Decision totally or partially set aside and no referral back	Decision totally or partially set aside and referral back	Removal from the register/no need to adjudicate	Total
Accession of new States	2				**2**
Agriculture	8				**8**
Approximation of laws	1				**1**
Area of freedom, security and justice	1				**1**
Association of the Overseas Countries and Territories	1				**1**
Company law				1	**1**
Competition	5	8		1	**14**
Environment and consumers	3				**3**
External relations	2				**2**
Fisheries policy	2				**2**
Freedom to provide services	3				**3**
Intellectual property	19	1		2	**22**
Law governing the institutions	6	4		1	**11**
Procedure	2				**2**
Social policy	2				**2**
Staff Regulations	9	1	1		**11**
State aid	7			1	**8**
Total	**73**	**14**	**1**	**6**	**94**

14. Miscellaneous – General trend (1989-2004) –

New cases, completed cases, cases pending [1]

	New cases	Completed cases	Cases pending as at 31 December
1989	169	1	168
1990	59	82	145
1991	95	67	173
1992	123	125	171
1993	596	106	661
1994	409	442	628
1995	253	265	616
1996	229	186	659
1997	644	186	1117
1998	238	348	1008
1999	384	659	732
2000	398	344	786
2001	345	340	792
2002	411	331	872
2003	466	339	999
2004	536	361	1174
Total	**5355**	**4182**	

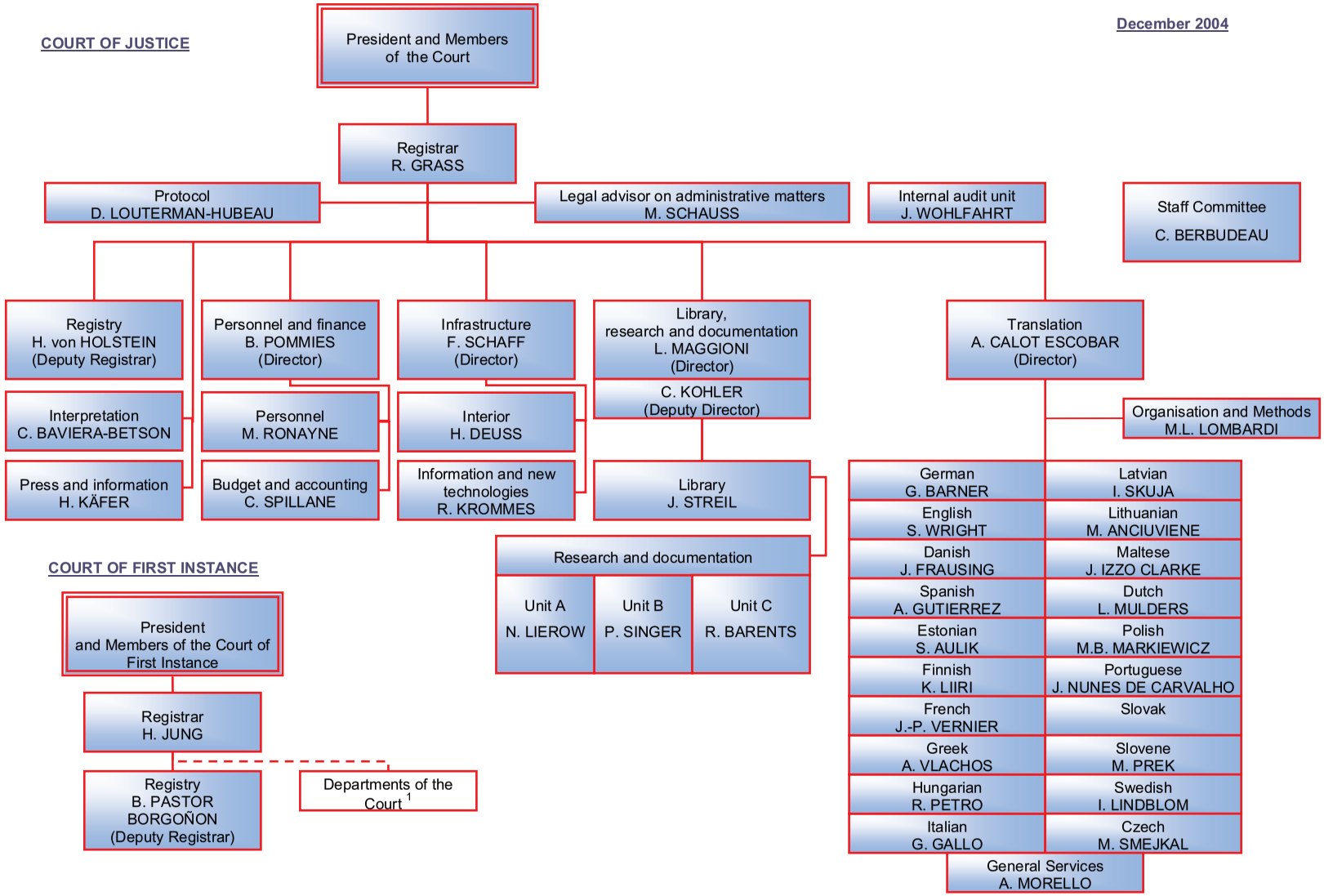
If the groups of identical or related cases are excluded (see '1. New cases, completed cases, cases pending (1996-2004)'), the following figures are obtained:

	New cases	Completed cases	Cases pending
1993	201	106	266
1994	236	128	374
1995	221	210	385
1996	217	178	424
1997	246	178	492
1998	231	268	455
1999	313	267	501
2000	336	318	519
2001	345	275	589
2002	411	320	680
2003	442	327	795
2004	536	319	1012
Total	**3735**	**2894**	

[1] 1989: 153 pending cases referred back by the Court of Justice.
1993: 451 pending cases referred back by the Court of Justice.
1994: 14 pending cases referred back by the Court of Justice.
2004: 22 pending cases referred back by the Court of Justice.

Abridged Organisational Chart

December 2004



[1] Pursuant to Article 52 of the Protocol on the Statute of the Court of Justice, “officials and other servants attached to the Court of Justice shall render their services to the Court of First Instance to enable it to function”.

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Telegraphic address:	CURIA
Fax (Court):	(00352) 4303.2600
Fax (Press and Information Division):	(00352) 4303.2500
Fax (Internal Services Division — Publications Section):	(00352) 4303.2650
The Court on Internet:	www.curia.eu.int

Court of Justice of the European Communities

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