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OF THE EUROPEAN COMMUNITIES

ANNUAL REPORT 2003

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

Luxembourg 2004

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Foreword

2002 was brought to a close by the events held to celebrate the Court's 50th anniversary which was referred to by my predecessor in the foreword to the Annual Report for 2002. 2004 will be marked by the arrival of Judges and other colleagues from the 10 new Member States.

However, the past year has not been a year of transition. During 2003 the Court took the steps necessary to implement the changes in its operation provided for by the Treaty of Nice which entered into force on 1 February 2003. These changes include the creation of the Grand Chamber, the election of the Presidents of the chambers of five Judges for a period of three years (previously the period was limited to one year) and the possibility of determining cases without an Opinion from the Advocate General where the Court considers that the case raises no new point of law.

The Court has also striven to prepare for enlargement and have offices available for the new judges and other colleagues from the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia. The Court has likewise begun to consider how to adapt its working methods to take account of the increase in the number of Judges from 15 to 25 in May 2004. None of this has prevented the Court from paying close attention to the work carried out by the Convention on the future of Europe.

The main judicial activity of the Court of Justice and the Court of First Instance is summarised, accompanied by statistics, in the pages which follow.

V. Skouris
President of the Court of Justice

Chapter I

The Court of Justice of the European Communities

A – Proceedings of the Court of Justice 2003

by Mr V. Skouris, President of the Court of Justice

1. This part of the annual report provides a survey of the activity of the Court of Justice of the European Communities in 2003. Apart from a brief statistical appraisal (section 2), it presents the main developments in the case-law, arranged as follows:

jurisdiction of the Court and procedure (section 3); general principles and constitutional and institutional cases (section 4); free movement of goods (section 5); common agricultural policy (section 6); freedom of movement for workers (section 7); freedom to provide services (section 8); freedom of establishment (section 9); free movement of capital (section 10); transport policy (section 11); competition rules (section 12); trade protection measures (section 13); trade mark law (section 14); harmonisation of laws (section 15); public procurement (section 16); social law (section 17); environmental law (section 18); justice and home affairs (section 19); external relations (section 20); Brussels Convention (section 21).

This selection covers only 90 of the 455 judgments and orders pronounced by the Court during 2003 and refers only to their essential points. Nor does it include the Opinions of the Advocates General, which are of undeniable importance for a detailed understanding of the issues at stake in certain cases but would increase the length of a report which must necessarily be brief. The full texts of all judgments, opinions and orders of the Court, as well as of the Opinions of the Advocates General, are available in all the official Community languages on the Court's internet site (www.curia.eu.int) and on 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 indicated, to the numbering of the articles of the Treaty on European Union and the EC Treaty established by the Treaty of Amsterdam.

2. As regards statistics, the Court brought 455 cases to a close in 2003 (net figure, that is to say, taking account of joinder). Of those, 308 cases were dealt with by judgments and 147 cases gave rise to orders. These figures show a slight decrease compared with the previous year (466 cases brought to a close). In 2003, 561 new cases arrived at the Court (477 in 2002, gross figures). At the end of 2003, there were 974 cases pending (gross figure) compared with 907 at the end of 2002.

The upward trend in the duration of proceedings did not change this year. References for preliminary rulings and direct actions took approximately 25 months, as compared with 24 months in 2002. The average time taken to deal with appeals was 28 months, compared with 19 months in 2002.

In 2003 the Court made differing degrees of use of the various instruments at its disposal to expedite its treatment of certain cases (priority treatment, the accelerated or expedited procedure, and the simplified procedure). For the second time, the Court made use of the expedited or accelerated procedure, as provided for in Articles 62a and 104a of the Rules of Procedure, this time in an appeal (Case C-39/03 P *Commission* v *Artegodan and Others* [2003] ECR I-7887). Since this instrument allows for the omission of certain stages in the proceedings, it was possible to give judgment within six months of the case being brought. Use of the expedited or accelerated procedure was sought in seven other cases, but the requirement of exceptional urgency laid down in the Rules of Procedure was not satisfied.

Also, the Court made frequent use of the simplified procedure provided for in Article 104(3) of the Rules of Procedure for answering certain questions referred to it for a preliminary ruling. Eleven orders were made on the basis of that provision.

As regards the distribution of cases between the full Court (in all its formations) and Chambers of Judges, the former disposed of almost 25% of the cases brought to a close in 2003, while Chambers of five Judges and Chambers of three Judges disposed of 55% and 20% of the cases respectively.

For further information with regard to the statistics for the 2003 judicial year, the reader is referred to Chapter IV of this report.

3. In the areas of the *jurisdiction* of the Court and *procedure*, two cases concerning references for preliminary rulings (3.1) and one relating to review of the legality of measures (3.2) are of interest.

3.1. In Case C-318/00 *Bacardi-Martini and Cellier des Dauphins* [2003] ECR I-905, the Court held inadmissible a question referred to it to enable the referring court to decide whether the legislation of another Member State is in accordance with Community law. In reaching that conclusion, the Court observed that, when such a question is before it, the Court must display special vigilance and "must be informed in some detail of [the referring court's] reasons for considering that an answer to the questions is necessary to enable it to give judgment" (paragraph 46). The Court pointed out, inter alia, that where the national court has confined itself to repeating the argument of one of the parties, without indicating whether and to what extent it considers that a reply to the question is necessary to enable it to give judgment, and, as a result, the Court does not have the material before it to show that it is necessary to rule on the question referred, that question is inadmissible.

The Court had an opportunity in Case C-300/01 *Salzmann* [2003] ECR I-4899 to clarify its case-law on the admissibility of a reference for a preliminary ruling where the circumstances of the dispute in the main proceedings are confined to a single Member State. The Court pointed out to begin with that the referring court was seeking an

interpretation of Community law for the purpose of determining the scope of rules of national law which refer to it. The Court cited its own case-law in that connection, according to which, first, it is for the national courts alone to determine, having regard to the particular features of each case, both the need to refer a question for a preliminary ruling and the relevance of such a question (Case C-448/98 *Guimont* [2000] ECR I-10663, paragraph 22, and Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch* [2002] ECR I-2157, paragraph 25), and, second, it is only in the exceptional case, where it is quite obvious that the interpretation of Community law sought bears no relation to the facts or the purpose of the main action, that the Court refrains from giving a ruling (Case C-302/97 *Konle* [1999] ECR I-3099, paragraph 33, and Case C-281/98 *Angonese* [2000] ECR I-4139, paragraph 18). However, the Court pointed out that a situation where national law requires that a national be allowed to enjoy the same rights as those which nationals of other Member States would derive from Community law in the same situation does not correspond to such an exceptional case. Moreover, the Court held that "where, in relation to purely internal situations, domestic legislation adopts solutions which are consistent with those adopted in Community law in order, in particular, to avoid discrimination against foreign nationals, it is clearly in the Community interest that, in order to forestall future differences of interpretation, provisions or concepts taken from Community law should be interpreted uniformly, irrespective of the circumstances in which they are to apply" (paragraph 34).

3.2. In judgments delivered on 30 September 2003 in Case C-93/02 P *Biret International* v *Council* (not yet published in the ECR) and Case C-94/02 P *Biret et Cie* v *Council* (not yet published in the ECR), the Court ruled in two appeals against judgments of the Court of First Instance [1] in litigation over prohibitions on imports into the Community of beef and veal from farm animals to which certain substances with hormonal action had been administered.

After outlining its case-law on the conditions under which non-contractual liability on the part of the Community arises (Case C-104/97 P *Atlanta* v *Commission and Council* [1999] ECR I-6983, paragraph 65), the Court stated that, given their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions. According to the Court, it is only where the Community has intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements, that it is for the Court to review the legality of the Community measure in question in the light of the WTO rules.

[1] Case T-174/00 *Biret International* v *Council* [2002] ECR II-17, and Case T-210/00 *Biret & Cie* v *Council* [2002] ECR II-47.

Moreover, noting that the Community has been granted a period for compliance with its obligations in relation to the WTO, the Court pointed out that, for the period prior to expiry of that period, the Community Courts cannot, in any event, carry out a review of the legality of the Community measures in question, particularly not in the context of an action for damages under Article 235 EC, without rendering ineffective the grant of such a period for compliance with the recommendations or decisions of the WTO's dispute settlement body.

4. Of the cases concerning the *general principles of Community law* and those with *constitutional* or *institutional* implications, those relating to fundamental rights (4.1), citizenship of the European Union (4.2), the comitology procedure (4.3), the validity of the OLAF Regulation and its scope (4.4), the right of access of the public to documents (4.5), the scope of interim measures ordered by the national courts (4.6) and the legal basis for two decisions concluding international agreements (4.7) should be noted. Two cases concerning non-contractual liability of the European Community (4.8) and the Member States (4.9) respectively are also of interest.

4.1. Joined Cases C-20/00 and C-64/00 *Booker Aquaculture and Hydro Seafood GSP* [2003] ECR I-7446 concerned the compatibility of Directive 93/53 [2] and certain national measures adopted in implementation of it with the fundamental principle of respect for private property. Neither the directive nor the contested national measures contain any provision concerning compensation for owners affected by a decision on the destruction and slaughter of fish affected by a disease in List I of Annex A to Directive 91/67. [3]

The Court stated, first, that the absence of provisions on compensation for owners whose fish have been destroyed or slaughtered cannot affect the validity of Directive 93/53. The Court recalled that fundamental rights are not absolute rights but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights, in particular in the context of a common organisation of the markets, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights (Case 5/88 *Wachauf* [1989] ECR 2609, paragraph 18; Case C-177/90 *Kühn* [1992] ECR I-35, paragraph 16, and Case C-22/94 *Irish Farmers' Association and Others* [1997] ECR I-1809, paragraph 27). In that regard, the

[2] Council Directive 93/53/EC of 24 June 1993 introducing minimum Community measures for the control of certain fish diseases (OJ 1993 L 175, p. 23).

[3] Council Directive 91/67/EEC of 28 January 1991 concerning the animal health conditions governing the placing on the market of aquaculture animals and products (OJ 1991 L 46, p. 1).

Court pointed out that Directive 93/53 fulfils a double function of enabling the taking of control measures as soon as the presence, on a farm, of a disease is suspected and preventing the spread of the disease, so that the measures which that directive imposes are in conformity with objectives of general interest pursued by the Community. Further, those measures, which are emergency measures, do not deprive farm owners of the use of their fish farms, but, as they enable owners to restock the affected farms as soon as possible, enable them to continue to carry on their activities there. Accordingly, the Court concluded that the minimum measures laid down by the directive do not constitute, in the absence of compensation for affected owners, a disproportionate and intolerable interference impairing the very substance of the right to property.

Second, as regards the measures taken by the United Kingdom in implementation of the directive, the Court cited its case-law according to which "the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules. Consequently, Member States must, as far as possible, apply those rules in accordance with those requirements" (paragraph 88) (see *Wachauf*, cited above, paragraph 19, and Case C-2/92 *Bostock* [1994] ECR I-955, paragraph 16). In the light of the objectives pursued by the directive, the Court held that those measures are not incompatible with the fundamental right to property.

In Joined cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others* [2003] ECR I-4989, the Court interpreted Directive 95/46 [4] in relation to the obligation of public bodies subject to control by the Rechnungshof (Austrian Court of Audit) to communicate to it the salaries and pensions exceeding a certain level paid by them to their employees and pensioners together with the names of the recipients, for the purpose of drawing up an annual report to be made available to the general public.

According to the Court, the provisions of Directive 95/46, in so far as they govern the processing of personal data liable to infringe fundamental freedoms, in particular the right to privacy, must necessarily be interpreted in the light of fundamental rights, which form an integral part of the general principles of law whose observance the Court ensures. In that regard, the Court interpreted the directive in the light of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which, while stating the principle that the public authorities must not interfere with the right to respect for private life, accepts that such an interference is possible where it is in accordance with the law and pursues one or more of the legitimate aims

[4] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31).

specified in Article 8(2), and is "necessary in a democratic society" for achieving that aim or aims.

In accordance with those principles, the Court held that "the collection of data by name relating to an individual's professional income, with a view to communicating it to third parties, falls within the scope of Article 8 of the [ECHR]" (paragraph 73) and that "... the communication of that data to third parties, in the present case a public authority, infringes the right of the persons concerned to respect for private life, whatever the subsequent use of the information thus communicated, and constitutes an interference within the meaning of Article 8 of the [ECHR]" (paragraph 74). In particular, the Court made the point that such interference may be justified only in so far as the wide disclosure not merely of amounts of annual income above a certain threshold but also of the names of the recipients of that income is both necessary for and appropriate to the aim of keeping salaries within reasonable limits, that being a matter for the national courts to examine.

Finally, the Court concluded that, if the national legislation at issue is incompatible with Article 8 of the ECHR, that legislation is also incapable of satisfying the requirements of Directive 95/46, whereas if the national courts were to consider that the provision at issue is both necessary for and appropriate to the public interest objective being pursued, they would then still have to ascertain whether, by not expressly providing for disclosure of the names of the persons concerned in relation to the income received, it complies with the requirement of foreseeability laid down by the case-law of the European Court of Human Rights. In that regard, the Court pointed out that the provisions of the directive at issue are sufficiently precise to be relied on by individuals before the national courts to oust the application of rules of national law which are contrary to those provisions.

4.2. In Case C-148/02 *Garcia Avello* (judgment of 2 October 2003, not yet published in the ECR), the Court gave a preliminary ruling on the interpretation of the provisions of the EC Treaty relating to citizenship of the Union and the principle of non-discrimination in relation to Belgian legislation which, in the case of persons with more than one nationality, including Belgian, gives precedence to the latter. In this case, the national administration had given the applicant's sons a surname in accordance with Belgian legislation as they had dual Belgian and Spanish nationality.

First, the Court outlined its case-law (see, inter alia, Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 82), according to which citizenship of the Union "is destined to be the fundamental status of nationals of the Member States" (paragraph 22) and "enables nationals of the Member States who find themselves in the same situation to enjoy within the scope ratione materiae of the EC Treaty the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for" (paragraph 23) (see Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31, and Case C-224/98 *D'Hoop* [2002] ECR I–6191,

paragraph 28). The Court went on to hold that, although, as Community law stands at present, the rules governing a person's surname are matters coming within the competence of the Member States, the latter must none the less, when exercising that competence, comply with Community law and in particular the Treaty provisions on the freedom of every citizen of the Union to move and reside in the territory of the Member States.

Second, the Court recalled that, according to settled case-law, the principle of non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way. In that regard, the Court observed that, under the national provisions at issue, persons who have, in addition to Belgian nationality, the nationality of another Member State are, as a general rule, treated in the same way as persons who have only Belgian nationality. However, according to the Court, those two categories of person are not in the same situation. The Court pointed out that "in contrast to persons having only Belgian nationality, Belgian nationals who also hold Spanish nationality have different surnames under the two legal systems" (paragraph 35). Moreover, the Court observed that, in the present case, the children concerned are refused the right to bear the surname which results from application of the legislation of the Member State which determined the surname of their father. According to the Court, such a discrepancy in surnames is liable to cause serious inconvenience for those concerned at both professional and private levels and, moreover, the practice at issue cannot be justified either with regard to the principle of the immutability of surnames or with regard to the objective of integration pursued.

4.3. In Case C-378/00 *Commission* v *Parliament and Council* [2003] ECR I-937, the Court had an opportunity to clarify its case-law on comitology. In an action brought by the Commission for annulment of Regulation No 1655/2000 [5] in so far as it makes the adoption of measures for the implementation of the LIFE programme subject to the regulatory procedure under Article 5 of the second comitology decision, [6] the Court considered first the admissibility of the application, stating, by analogy with Case 166/78 *Italy* v *Council* [1979] ECR 2575, paragraph 6, that exercise of the Commission's right to challenge the legality of any measure is not conditional on the position taken by the Commission at the time when the measure in question was adopted.

[5] Regulation (EC) No 1655/2000 of the European Parliament and of the Council of 17 July 2000 concerning the Financial Instrument for the Environment (LIFE) (OJ 2000 L 192, p. 1).

[6] Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184, p. 23).

As to the substance, the Court recalled that, under Article 202 EC, on the basis of which the second comitology decision was adopted, the Council is empowered to lay down principles and rules with which the manner of exercising the implementing powers conferred on the Commission must comply and added that "the scope of the principles and rules which the Council is empowered to lay down in that area is not limited by Article 202 EC to establishing the various procedures to which the Commission's exercise of the implementing powers conferred on it may be subject" (paragraph 41) and those principles and rules may also apply to the methods for choosing between those various procedures. In that regard, the Court observed that the second comitology decision did not intend to make the criteria laid down in Article 2 binding in character. None the less, the legal effect of that provision is that, when the Community legislature departs, in the choice of committee procedure, from the criteria which are laid down in Article 2 of the second comitology decision, it must state the reasons for that choice. In this case the Court held that a declaration by the Council at the time of adoption of the regulation at issue cannot be taken into account for the purpose of determining whether Regulation No 1655/2000 complies with the obligation to state reasons because a declaration adopted by the Council alone cannot in any event serve as a statement of reasons for a regulation adopted jointly by the Parliament and the Council. Moreover, the Court pointed out that a statement which amounts to no more than a reference to the applicable Community instrument does not constitute a sufficient statement of reasons.

4.4. By its judgment in Case C-11/00 *Commission* v *European Central Bank* [2003] ECR I-7215, the Court annulled a decision of the European Central Bank establishing that the Directorate for Internal Audit is solely responsible for administrative investigations within the ECB so far as combating fraud is concerned [7] and thus precludes both the investigative powers conferred on OLAF by Regulation No 1073/1999 [8] and the applicability of the regulation to the ECB.

In reaching that conclusion, the Court confirmed, first, that Regulation No 1073/1999, which, under Article 1(3), applies to "institutions, bodies, offices and agencies established by, or on the basis of, the Treaties" also applies to the ECB, whether or not that circumstance is liable to affect the legality of the regulation.

Second, the Court dismissed the ECB's plea alleging that Regulation No 1073/1999 is illegal. In particular, the Court dismissed a first plea that the regulation at issue had no

[7] Decision 1999/726/EC of the European Central Bank of 7 October 1999 on fraud prevention (ECB/1999/5) (OJ 1999 L 291, p. 36).

[8] 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).

legal basis, stating that the expression "financial interests of the Community" in Article 280 EC "must be interpreted as encompassing not only revenue and expenditure covered by the Community budget but also, in principle, revenue and expenditure covered by the budget of other bodies, offices and agencies established by the EC Treaty" (paragraph 89) and that, accordingly, it also covers the resources and expenditure of the ECB. As for the argument that the regulation undermined the independence of the ECB, the Court pointed out that "neither the fact that OLAF was established by the Commission and is incorporated within the Commission's administrative and budgetary structures on the conditions laid down in Decision 1999/352, nor the fact that the Community legislature has conferred on such a body external to the ECB powers of investigation on the conditions laid down in Regulation No 1073/1999, is per se capable of undermining the ECB's independence" [9] (paragraph 138) and that "the system of investigation set up by Regulation No 1073/1999 is specifically intended to permit the investigation of suspicions relating to acts of fraud or corruption or other illegal activities detrimental to the financial interests of the European Community, without in any way being similar to forms of control which, like financial control, are likely to follow a more rigid pattern" (paragraph 141). Finally, the Court observed that, in adopting the regulation at issue, the legislature did not breach the principle of proportionality as it was entitled, in the exercise of its wide discretion in this area, to take the view that it was necessary to set up a control mechanism which is simultaneously centralised within one particular organ, specialised and operated independently and uniformly with respect to those institutions, bodies, offices and agencies.

In conclusion, the Court held that the decision of the ECB is incompatible with the regulation because it seeks to set up a system for the prevention of fraud which is distinct from and exclusive of that provided for by Regulation No 1073/1999.

It should also be noted that in Case C-15/00 *Commission* v *European Investment Bank* [2003] ECR I-7342, the Court held that Regulations Nos 1073/1999 and 1047/1999 [10] also covered the EIB. As a consequence, the Court annulled the decision of the Management Committee of the EIB of 10 November 1999 concerning cooperation with OLAF which excluded the application of those regulations and established a separate system for the prevention of fraud peculiar to the EIB.

4.5. By Case C-41/00 P *Interporc* v *Commission* [2003] ECR I-2125, the Court dismissed an appeal brought against the judgment by which the Court of First Instance

[9] Commission Decision 1999/352/EC, ECSC, Euratom of 28 April 1999 establishing the European Anti-fraud Office (OLAF) (OJ 1999 L 136, p. 20).

[10] Council Regulation (Euratom) No 1074/1999 of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (OJ 1999 L 136, p. 8).

partially dismissed Interporc's action for annulment of the Commission Decision refusing it access to certain documents held by the Commission of which the Commission was not the author (Case T-92/98 *Interporc* v *Commission* [1999] ECR II-3521). The Commission's refusal was based, inter alia, on the authorship rule, as provided for by the code of conduct adopted by that institution. [11] That rule establishes that where a document held by an institution was not written by that institution, any application for access must be sent direct to the author of the document.

First, the Court rejected a plea by the applicant that the authorship rule is void on the ground that it infringes the principle of transparency as a rule of law of a higher order. On that point, the Court held that the Court of First Instance had correctly applied the case-law of the Court (Case C-58/94 *Netherlands* v *Council* [1996] ECR I-2169, paragraph 37), in holding that "so long as the Community legislature has not adopted general rules on the right of public access to documents held by the Community institutions, the institutions must take measures as to the processing of such requests by virtue of their power of internal organisation, which authorises them to take appropriate measures in order to ensure their internal operation in conformity with the interests of good administration" (paragraph 40) and that "so long as there was no rule of law of a higher order according to which the Commission was not empowered, in Decision 94/90, to exclude from the scope of the Code of Conduct documents of which it was not the author, the authorship rule could be applied" (paragraph 41).

Next, the Court cited its case-law, according to which "the aim pursued by Decision 94/90 as well as being to ensure the internal operation of the Commission in conformity with the interests of good administration, is to provide the public with the widest possible access to documents held by the Commission, so that any exception to that right of access must be interpreted and applied strictly" (paragraph 48) (see Joined Cases C-174/98 P and C-189/98 P *Netherlands and Van der Wal* v *Commission* [2000] ECR I-1, paragraph 27). It concluded that "under the Code of Conduct adopted by Decision 94/90, a strict interpretation and application of the authorship rule imply that the Commission must verify the origin of the document and inform the person concerned of its author so that he can make an application for access to that author" (paragraph 49).

4.6. The Court had an opportunity in Case C-213/01 P *T. Port* v *Commission* [2003] ECR I-2319, to clarify the scope of the interim legal protection that national courts are authorised to grant to individuals. In this case, a company which imported fruit and vegetables brought an appeal against a judgment of the Court of First Instance (Case T-52/99 *T. Port* v *Commission* [2001] ECR II-981) in which it was held that it could not ask to be taken into account in determining its reference quantity the quantity of

[11] Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents (OJ 1994 L 46, p. 58).

bananas a national court authorised it to release for free circulation, on payment of the customs duties of ECU 75 per tonne.

First, the Court held that interim measures ordered in interlocutory proceedings are granted only pending the final decision in the main proceedings, and without prejudice to that decision and that, moreover, they may themselves be challenged, and may be set aside or varied pending that decision. It concluded that customs duties determined provisionally in interlocutory proceedings are not necessarily the customs duties which are applicable on the day on which customs import formalities are completed, proof of payment of which operators must provide in order to demonstrate that the quantities of bananas which they wish to have included in the calculation of the reference quantity have actually been imported. In that regard the Court stressed that "the interim legal protection which national courts are authorised to grant to individuals in accordance with the case-law of the Court of Justice must not have the effect of creating a definitive factual framework which cannot be challenged subsequently" (paragraph 21).

4.7. By Case C-211/01 *Commission* v *Council* (judgment of 11 September 2003, not yet published in the ECR), the Court annulled Decisions 2001/265 [12] and 2001/266 [13] concerning the conclusion of agreements between the European Community and Bulgaria and Hungary respectively, establishing certain conditions for the carriage of goods by road and the promotion of combined transport. Because those agreements contained provisions relating to the principle of equal treatment in the area of road vehicle taxation, they were concluded on the basis of Articles 71 EC and 93 EC. However, the Court held that the aspect of the agreements which concerns the harmonisation of fiscal laws is, in the light of their aim and their content, only secondary and indirect in nature compared with the transport policy objective which they pursue and, consequently, held that "the Council should have used Article 71 EC alone, in conjunction with Article 300(3) EC, as the legal basis for the decisions" concluding the agreements (paragraph 50). The Court therefore annulled the contested decisions, while declaring that the effects of the decisions were to be maintained until new measures had been adopted.

12 Council Decision 2001/265/EC of 19 March 2001 concerning the conclusion of the agreement between the European Community and the Republic of Bulgaria establishing certain conditions for the carriage of goods by road and the promotion of combined transport (OJ 2001 L 108, p. 4).

13 Council Decision 2001/266/EC of 19 March 2001 concerning the conclusion of the agreement between the European Community and the Republic of Hungary establishing certain conditions for the carriage of goods by road and the promotion of combined transport (OJ 2001 L 108, p. 27).

4.8. In Case C-472/00 P *Commission* v *Fresh Marine Company* [2003] ECR I-7577, the Court ruled in an appeal against a decision of the Court of First Instance of 24 October 2000 in Case T-178/98 *Fresh Marine* v *Commission* [2000] ECR II-3331 that an unlawful measure had been adopted such as to entail the non-contractual liability of the European Community. In this case the Commission, after initially exempting a Norwegian company from definitive anti-dumping and countervailing duties and accepting its undertaking to adhere to a minimum price, had then imposed provisional duties on that company on the ground that analysis of the report submitted by it suggested that that undertaking was not observed. The company complained that the Commission had manipulated the report and sent it an amended version on the basis of which the Commission concluded that there was no longer any reason to believe that the undertaking had been broken.

In its analysis of the conditions to be met for a right to damages to arise, the Court observed that the decisive test for finding that a breach of Community law is sufficiently serious is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion and pointed out that where that institution has only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach

The Court therefore analysed the limits to which the Commission's discretion was subject in this case. In so doing it found that the provisional and countervailing duties were imposed on Fresh Marine on the basis of Article 8(10) of the basic anti-dumping Regulation No 384/96 [14] and Article 13(10) of Regulation No 2026/97 [15] on protection against subsidised imports from countries not members of the European Community respectively. Those provisions, while granting the Commission the power to impose provisional anti-dumping and countervailing duties, require at the same time that there be reason to believe that the undertaking to adhere to a minimum price has been breached and that the decision imposing such duties be taken on the basis of the best information available. Accordingly, the Court concluded that the Commission's conduct must be regarded as a sufficiently serious breach of a rule of Community law satisfying one of the conditions for the incurring of non-contractual liability by the Community where it imposes such duties solely on the basis of the analysis of a report by the exporting company concerned which gave reason to believe that that company had complied with its undertaking to adhere to a minimum price, but which the Commission had amended on its own initiative, without taking the precaution of asking the company

[14] Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1).

[15] Council Regulation (EC) No 2026/97 of 6 October 1997 on protection against subsidised imports from countries not members of the European Community (OJ 1997 L 288, p. 1).

what impact its unilateral action might have on the reliability of the information with which the company had provided it.

4.9. Case C-224/01 *Köbler* (judgment of 30 September 2003, not yet published in the ECR) concerns a German national who, having worked as an ordinary professor in an Austrian University for 10 years and having applied for the special length-of-service increment normally paid to professors with 15 years' experience exclusively at Austrian universities, argued that he had completed the requisite length of service if the duration of his service in universities of other Member States of the European Community were taken into consideration. After it had referred a question on this point for a preliminary ruling the Austrian court took account of the judgment in Case C-15/96 *Schöning-Kougebetopoulou* [1998] ECR I-47, according to which the provisions of Community law on freedom of movement for workers within the Community preclude a clause in a collective agreement applicable to the public service of a Member State which provides for promotion on grounds of seniority for employees of that service after eight years' employment in a salary group determined by that agreement without taking any account of previous periods of comparable employment completed in the public service of another Member State. The Austrian court then withdrew the question it had referred for a preliminary ruling and, without referring a second question to the Court of Justice, confirmed that the refusal of the application of the person concerned was justified, on the ground that the special length-of-service increment was a loyalty bonus which objectively justified a derogation from the Community law provisions on freedom of movement for workers. The German national then brought an action for damages before the referring court for breach of Community law.

In its preliminary ruling the Court confirmed that the principle, stated in particular in Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, where Member States are obliged to make good damage caused to individuals by infringements of Community law for which they are responsible applies in cases where the alleged infringement stems from a decision of a court adjudicating at last instance where the rule of Community law infringed is intended to confer rights on individuals, the breach is sufficiently serious and there is a direct causal link between that breach and the loss or damage sustained by the injured parties. The Court made clear that, as regards the second condition, in order to determine whether the infringement is sufficiently serious when the infringement at issue stems from a decision of a court, the competent national court, taking into account the specific nature of the judicial function, must determine whether that infringement is manifest. Finally, it added that it is for the legal system of each Member State to designate the court competent to determine disputes relating to that reparation.

Although it is generally for the national courts to consider the abovementioned criteria, the Court took the view that it had available to it all the materials enabling it to establish whether the conditions necessary for liability of the Member State concerned to be incurred were fulfilled. As regards the existence of a sufficiently serious breach, it held that an infringement of Community law does not have the requisite manifest character

for liability under Community law to be incurred by a Member State for a decision of one of its courts adjudicating at last instance, where, first, Community law does not expressly cover the point of law at issue, no reply was to be found to that question in the Court's case-law and that reply was not obvious, and, second, that infringement was not intentional but is the result of an incorrect reading of a judgment of the Court.

5. On the subject of the *free movement of goods* the judgments of the Court to be noted concern the scope of the protection afforded to the name "chocolate" (5.1), the scope of the concept of selling arrangements within the meaning of the decision in *Keck and Mithouard* (5.2), the protection of protected designations of origin (5.3), a demonstration which caused the blocking of a major transit route in Austria (5.4), registration duty on second-hand cars imported into Denmark (5.5), the prohibition on the sale of medicines in Germany from another Member State via the internet (5.6) and the failure to implement certain directives in Gibraltar (5.7).

5.1. In two judgments concluding proceedings for failure to fulfil obligations, in Case C-12/00 *Commission* v *Spain* [2003] ECR I-459 and Case C-14/00 *Commission* v *Italy* [2003] ECR I-513, the Court considered whether the Spanish and Italian legislation prohibiting cocoa and chocolate products to which vegetable fats other than cocoa butter have been added, and which are lawfully manufactured in Member States which authorise the addition of those fats, from being marketed under the name "chocolate" used in the Member State of production, and requiring the use of the term "chocolate substitute" for their marketing, is consistent with the principle of free movement of goods.

In those two cases, the Court considered first whether Directive 73/241 [16] brought about total harmonisation. In the light of its previous case-law (inter alia, Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857 and Case C-191/99 *Kvaerner* [2001] ECR I-4447), it held that Directive 73/241 was not intended to regulate definitively the use of vegetable fats other than cocoa butter in the cocoa and chocolate products to which it refers. Both the wording and the scheme of the directive indicate that it lays down a common rule, that is, the prohibition on adding to chocolate fat preparations not derived exclusively from milk, and establishes in Article 10(1) free movement for products which comply with that rule, while permitting Member States in Article 14(2)(a) to adopt national rules authorising the addition of vegetable fats other than cocoa butter to cocoa and chocolate products manufactured within their territory.

[16] Council Directive 73/241/EEC of 24 July 1973 on the approximation of the laws of the Member States relating to cocoa and chocolate products intended for human consumption (OJ 1973 L 228, p. 23).

As regards the applicability of Article 28 EC to the prohibition laid down by the legislation at issue, the Court took the view that cocoa and chocolate products containing fats not authorised by the common rule but whose manufacture and marketing under the name "chocolate" are authorised in certain Member States cannot be deprived of the benefit of free movement of goods solely on the ground that other Member States require within their territory that cocoa and chocolate products be manufactured according to the common rule in the directive (Case C-3/99 *Ruwet* [2000] ECR I-8749, Case 8/74 *Dassonville* [1974] ECR 837 and Case 120/78 *REWE-Zentral* [1979] ECR 649 ("*Cassis de Dijon*")). In Case C-12/00, the Court cited Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097 and Case C-470/93 *Mars* [1995] ECR I-1923, to dismiss the objection of the Spanish Government that its national legislation constitutes a selling arrangement. As the requirements at issue relate to the labelling and packaging of the products in question they do not come under the exception referred to in *Keck and Mithouard*. In Case C-14/00 the Court also dismissed the argument that the application of Article 28 EC would effectively discriminate against national producers, on the basis of the judgments in Case 98/86 *Mathot* [1987] ECR 809 and in Case C-448/98 *Guimont* [2000] ECR I-10663.

As regards the compatibility of the legislation at issue with Article 28 EC, the Court observed that such legislation is likely to impede trade between Member States (Case 182/84 *Miro* [1985] ECR 3731, Case 298/87 *Smanor* [1988] ECR 4489, Case 286/86 *Deserbais* [1988] ECR 4907 and *Guimont*, cited above). It compels the traders concerned to adjust the presentation of their products according to the place where they are to be marketed and consequently to incur additional packaging costs and adversely affect the consumer's perception of the products. Moreover, the inclusion in the label of a neutral and objective statement informing consumers of the presence in the product of vegetable fats other than cocoa butter would be sufficient to ensure that consumers are given correct information. The Court concluded that the obligation to change the sales name of those products which is imposed by the Italian legislation does not appear to be necessary to satisfy the overriding requirement of consumer protection and that the legislation at issue is incompatible with Article 28 EC.

5.2. In Case C-416/00 *Morellato* (judgment of 18 September 2002, not yet published in the ECR) the Court ruled on the compatibility with Articles 28 EC and 30 EC of Italian legislation prohibiting the sale of bread obtained by completing the baking of partly baked bread, whether deep-frozen or not, if that bread has not been packaged by the retailer prior to sale. In considering the question, the Court had first to determine whether such requirements constituted selling arrangements which are not likely to hinder trade between Member States within the meaning of its judgment in *Keck and Mithouard*. In that regard, it recalled that, according to that judgment, the need to alter the packaging or the labelling of imported products prevents such requirements from constituting selling arrangements. Accordingly, national legislation which prohibits a product that is lawfully manufactured and marketed in another Member State from being put on sale in the first Member State without being subjected to new packaging of a specific type that complies with the requirements of that legislation cannot be held

to concern such selling arrangements. The Court held, however, that in this case the requirement for prior packaging laid down in the legislation at issue did not make it necessary to alter the product since it related only to the marketing of the bread which results from the final baking of pre-baked bread. Such a requirement is thus in principle such as to fall outside the scope of Article 28 EC provided that it does not in reality constitute discrimination against imported products. If that were so, it would not be possible, in the absence of any evidence of a risk to health, to justify such an obstacle under the derogation authorised by Article 30 EC for reasons relating to the protection of the health and life of humans.

5.3. In Case C-108/01 *Consorzio del Prosciutto di Parma* [2003] ECR I-5121 and Case C-469/00 *Ravil* [2003] ECR I-5053, the Court had an opportunity to expand its case-law on the scope of the protection conferred by protected designations of origin ("PDO") for agricultural products and foodstuffs under Regulations No 2081/92 [17] and No 1107/96 [18] by ruling as to whether certain requirements for the processing of such products are consistent with Article 29 EC. The question was whether, in the first case, a requirement that a product protected by the PDO "Parma Ham" be sliced and packaged in the region of production, and in the second, a requirement that a product bearing the PDO "Grana Padano" be grated in the region of production were consistent with Article 29 EC.

In both cases the Court found that Article 4(1) of Regulation No 2081/92 makes eligibility to use a PDO subject to the product's compliance with a specification, that that specification contains the detailed definition of the protected product and determines both the extent of the obligations to be complied with for the purposes of using the PDO and the extent of the right protected against third parties. It concluded that Regulation No 2081/92 did not preclude the use of a PDO from being subject to the condition that operations such as the slicing, grating and packaging of the product take place in the region of production, where such conditions are laid down in the specification.

As to whether such requirements are consistent with Article 29 EC, the Court followed its earlier case-law, inter alia the judgments in Case C-209/98 *Sydhavnens Sten & Grus* [2000] ECR I-3743, Case C-114/96 *Kieffer and Thill* [1997] ECR I-3629 and Case C-169/99 *Schwarzkopf* [2001] ECR I-5901, observing, first, that Article 29 EC prohibits

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

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

all measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade, in such a way as to provide a particular advantage for national production or for the domestic market of the State in question. Accordingly, the condition that slicing, grating and packaging operations be carried out in the region of production constitutes a measure having equivalent effect to a quantitative restriction on exports within the meaning of Article 29 EC.

The Court went on to observe, second, that designations of origin fall within the scope of industrial and commercial property rights. They are intended to guarantee that the product bearing them comes from a specified geographical area and displays certain particular characteristics. The requirement for the slicing, grating and packaging to be carried out in the region of production, in particular, is intended to allow the persons entitled to use the PDO to keep under their control one of the ways in which the product appears on the market and to thereby safeguard its quality and authenticity and consequently the reputation of the PDO. Since "Parma ham" and "Grana Padano" are consumed in large quantities in sliced and grated form respectively, slicing, grating and packaging constitute important operations, while checks performed outside the region of production would provide fewer guarantees of the quality and authenticity of the product. Therefore, the requirement for slicing, grating and packaging in the region may be regarded as justified. The Court concluded that Article 29 EC did not preclude such a requirement.

However, the Court held, third, that the principle of legal certainty required that the condition in question be brought to the knowledge of third parties by adequate publicity in Community legislation, which could have been done by mentioning that condition in Regulation No 1107/96. Failing that, such a condition could not be relied on against them before a national court. In its judgment in *Grana Padano*, however, the Court made clear that the principle of legal certainty does not preclude that condition from being regarded by the national court as capable of being relied on against operators who carried on the activity of grating and packaging the product in the period prior to the entry into force of Regulation No 1107/96, should that court consider that during that period the contested condition was applicable in its legal order by virtue of a bilateral convention [19] and capable of being relied on against those concerned by virtue of the national rules on publicity.

5.4. Again on the subject of the free movement of goods, Case C-112/00 *Schmidberger* [2003] ECR I-5659 supplemented and refined the solutions reached in Case C-265/95 *Commission* v *France* [1997] ECR I-6959. The Court observed first, that the fact that

[19] Convention of 28 April 1964 between the French Republic and the Italian Republic on the protection of designations of origin, indications of provenance and names of certain products.

the competent authorities of a Member State did not ban a demonstration which resulted in the complete closure of a major transit route for almost 30 hours on end is capable of restricting intra-Community trade in goods and must, therefore, be regarded as constituting a measure of equivalent effect to a quantitative restriction which is, in principle, incompatible with the obligations arising from Articles 28 EC and 29 EC, read together with Article 10 EC, unless that failure to ban can be objectively justified. In assessing whether there was any such objective justification in this case, the Court took account of the objective pursued by the Austrian authorities in authorising the demonstration in question and held that it was to respect the fundamental rights of the demonstrators to freedom of expression and freedom of assembly, which are enshrined in and guaranteed by the ECHR and the Austrian Constitution. Given that fundamental rights form an integral part of the general principles of law the observance of which the Court ensures, their protection is, according to the Court, a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods.

For the Court, the question whether the facts before the referring court are consistent with respect for fundamental rights raises the question of the need to reconcile the requirements of the protection of fundamental rights in the Community with those arising from a fundamental freedom enshrined in the Treaty and, more particularly, the question of the respective scope of freedom of expression and freedom of assembly and of the free movement of goods, given that they are both subject to restrictions justified by public interest objectives. In considering whether the restrictions on intra-Community trade are proportionate in the light of the objective pursued, that is the protection of fundamental rights, the Court points out differences in the facts of this case (*Schmidberger*) and those of *Commission* v *France*, cited above, in which the Court held that France had failed to fulfil its obligations under Article 28 EC in conjunction with Article 10 EC, and under the common organisations of the markets in agricultural products, by failing to adopt all necessary and proportionate measures in order to prevent the free movement of fruit and vegetables from being obstructed by actions by private individuals, such as the interception of lorries transporting such products and the destruction of their loads, violence against lorry drivers and other threats. The Court found that, in the present case, unlike in the case just cited, the demonstration at issue took place following authorisation, the obstacle to the free movement of goods resulting from that demonstration was limited, the purpose of that public demonstration was not to restrict trade in goods of a particular type or from a particular source, various administrative and supporting measures were taken by the competent authorities in order to limit as far as possible the disruption to road traffic, the isolated incident in question did not give rise to a general climate of insecurity such as to have a dissuasive effect on intra-Community trade flows as a whole, and, finally, taking account of the Member States' wide margin of discretion, in the present case the competent national authorities were entitled to consider that an outright ban on the demonstration at issue would have constituted unacceptable interference with the fundamental rights of the demonstrators to gather and express peacefully their opinion

in public. The imposition of stricter conditions concerning both the site and the duration of the demonstration in question could have been perceived as an excessive restriction, depriving the action of a substantial part of its scope. According to the Court, although an action of that type usually entails inconvenience for non-participants, such inconvenience may in principle be tolerated provided that the objective pursued is essentially the public and lawful demonstration of an opinion. The Court concluded that the fact that the Austrian authorities did not, in the circumstances, ban a demonstration is not incompatible with Articles 28 EC and 29 EC, read together with Article 10 EC.

5.5. In Case C-383/01 *De Danske Bilimportører* [2003] ECR I-6065 the Court considered, in the light of its judgment in Case C-47/88 *Commission* v *Denmark* [1990] ECR I-4509 which concerned registration duty on imported second hand cars, whether the very high amount of duty on registration in Denmark of new cars constitutes a measure having an effect equivalent to a quantitative restriction on imports prohibited under Article 28 EC which may be justified under Article 30 EC. The Court ruled out that classification. It first recalled its decision in Case C-234/99 *Nygård* [2002] ECR I-3657, paragraph 17, that provisions relating to charges having equivalent effect and those relating to discriminatory internal taxation cannot be applied together. It then found that the charge at issue was manifestly of a fiscal nature as it was charged not by reason of the vehicle crossing the frontier of the Member State which introduced it but upon first registration of the vehicle in the territory of that State, and that it had, therefore, to be examined in the light of Article 90 EC. The Court pointed out that it was not relevant, as held in Case 90/79 *Commission* v *France* [1981] ECR 283, paragraph 14, that the charge is in fact imposed solely on imported new vehicles, because there is no domestic production. Further, it recalled that, according to the judgment in *Commission* v *Denmark*, cited above, Article 90 EC cannot be invoked against internal taxation imposed on imported products where there is no similar or competing domestic production and that it does not provide a basis for censuring the excessiveness of the level of taxation which the Member States might adopt for particular products, in the absence of any discriminatory or protective effect, and concluded that the duty at issue is not covered by the prohibitions laid down in Article 90 EC. Finally, the Court took the view that the reservation it expressed in the judgment in *Commission* v *Denmark*, cited above, to the effect that such duty cannot be fixed at a level such that the free movement of goods within the common market would be impeded, is not applicable in this case. The figures communicated to it do not in any way show that the free movement of that type of goods between Denmark and the other Member States is impeded. It concluded that the Danish registration duty has not ceased to be internal taxation, within the meaning of Article 90 EC, and cannot be classified as a measure having equivalent effect to a quantitative restriction, for the purposes of Article 28 EC.

5.6. In Case C-322/01 *Deutscher Apothekerverband* (judgment of 11 December 2002, not yet published in the ECR), the Court considered whether a prohibition on the importation and retail sale of medicinal products by mail order or over the internet from

pharmacies in other Member States is consistent with Article 28 EC et seq., whether the internet site of such a pharmacy and the description of the medicinal products it contains constitutes advertising of medicinal products prohibited by national, in this case, German, legislation, and the relationship between that legislation and Articles 28 EC and 30 EC.

As regards medicinal products which are subject to, but which have not obtained, authorisation under the provisions of Directive 65/65, [20] the Court considered that the prohibition at issue was consistent with that directive and the question of inconsistency with Article 28 EC and Article 30 EC did not arise. As regards authorised medicinal products, the Court recalled its settled case-law (judgments in "*Cassis de Dijon*" and *Keck and Mithouard*, cited above, and in Case C-368/95 *Familiapress* [1997] ECR I-3689) concerning the relevance of the actual or potential effect of a measure on intra-Community trade to the assessment whether it is consistent with those provisions. In particular, the Court held that the criterion, laid down by the decision in *Keck*, for determining that legislation on selling arrangements does not constitute a measure with equivalent effect to a quantitative restriction, which requires that it must affect in the same manner, in law and in fact, the marketing of both domestic products and those from other Member States, was not fulfilled here. The prohibition at issue is more of an obstacle to pharmacies outside Germany than to those within it. Although there is little doubt that as a result of the prohibition, pharmacies in Germany cannot use the extra or alternative method of gaining access to the German market consisting of end consumers of medicinal products, they are still able to sell the products in their dispensaries. However, for pharmacies not established in Germany, the internet provides a more significant way to gain direct access to the German market. A prohibition which has a greater impact on pharmacies established outside German territory could impede access to the market for products from other Member States more than it impedes access for domestic products. The prohibition in question is, therefore, a measure having an effect equivalent to a quantitative restriction for the purposes of Article 28 EC.

Second, as regards the justification of the prohibition in the light of Article 30 EC, the Court held that the only plausible arguments are those relating to the need to provide individual advice to the customer and to ensure his protection when he is supplied with medicines and to the need to check that prescriptions are genuine and to guarantee that medicinal products are widely available and sufficient to meet requirements. None of those reasons can provide a valid basis for the absolute prohibition on the sale by mail-order of non-prescription medicines, as the "virtual" pharmacy provides customers with an identical or better level of services than traditional pharmacies. On the other

[20] 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 1965-66, p. 24).

hand, for prescription medicines, such control could be justified in view of the greater risks which those medicines may present and the system of fixed prices which applies to them and which forms part of the German health system. The need to be able to check effectively and responsibly the authenticity of doctors' prescriptions and to ensure that the medicine is handed over either to the customer himself, or to a person to whom its collection has been entrusted by the customer, is such as to justify a prohibition on mail-order sales. Article 30 EC may, therefore, be relied on to justify such a prohibition. The same arguments apply where medicinal products are imported into a Member State in which they are authorised, having been previously obtained by a pharmacy in another Member State from a wholesaler in the importing Member State.

As regards the compatibility with Community law of prohibitions on advertising of medicines sold by mail order, the judgment declared that such prohibitions cannot be justified for medicines which can only be supplied by pharmacies but which are not subject to prescription.

5.7. Case C-30/01 *Commission* v *United Kingdom* (judgment of 23 September 2003, not yet published in the ECR) concerned an action against the United Kingdom for failure to fulfil its obligations, seeking a declaration that it had failed to implement, as regards Gibraltar, certain directives adopted on the basis of Articles 94 EC and 95 EC. The Court, upholding the argument of the United Kingdom, stated that "the exclusion of Gibraltar from the customs territory of the Community implies that neither the Treaty rules on free movement of goods nor the rules of secondary Community legislation intended, as regards free circulation of goods, to ensure approximation of the laws, regulations and administrative provisions of the Member States pursuant to Articles 94 EC and 95 EC are applicable to it" (paragraph 59). The Court added that although failure to apply the directives at issue to Gibraltar may endanger the consistency of other Community policies, that fact cannot lead to the extension of the territorial scope of those directives beyond the limits imposed by the Treaty and by the United Kingdom Act of Accession.

6. Four cases concerning the *common agricultural policy* are of interest in the context of this report.

On the subject of health policy and emergency measures to combat bovine spongiform encephalopathy, in its judgment in Case C-393/01 *France* v *Commission* [2003] ECR I-5405, the Court annulled Commission Decision 2001/577 [21] setting the date on which dispatch from Portugal of bovine products under the Date-Based Export Scheme may commence by virtue of Article 22(2) of Decision 2001/376. The Court held that the Commission did not first carry out the verifications required so as to ensure adequate

[21] Commission Decision 2001/577/EC of 25 July 2001 (OJ 2001 L 203, p. 27).

safety in the operation of that scheme applicable to the products referred to in Article 11 of Decision 2001/376, [22] and thereby infringed Article 21, in conjunction with Article 22, of that decision.

The Court had an opportunity, in its judgment in Case C-305/00 *Schulin* [2003] ECR I-3525, to give a preliminary ruling on the interpretation of the sixth indent of Article 14(3) of Council Regulation (EC) No 2100/94 on Community plant variety rights [23] and Article 8 of Commission Regulation (EC) No 1768/95 implementing rules on the agricultural exemption provided for in Article 14. [24] According to the Court, those provisions cannot be construed as meaning that the holder of a Community plant variety right can require a farmer to provide the information specified in those provisions where there is no indication that the farmer has used or will use, for propagating purposes in the field, on his own holding, the product of the harvest obtained by planting, on his own holding, propagating material of a variety other than a hybrid or synthetic variety which is covered by that right and belongs to one of the agricultural plant species listed in Article 14(2) of Regulation No 2100/94.

In Case C-137/00 *Milk Marque and National Farmers' Union* (judgment of 9 September 2003, not yet published in the ECR) the Court was able to clarify its case-law on the application of national competition rules in the context of the common organisation of the market in milk and dairy products. In the main proceedings, a farmers' cooperative had contested the decisions of the United Kingdom competition authorities, alleging that, in asserting jurisdiction over the activities of the members of the cooperative and in recommending and taking steps to prevent them from obtaining a higher price for the milk produced by their members, they had acted contrary to various provisions of Community law.

The Court, having stated that the common organisations of the markets in agricultural products are not a competition-free zone, pointed out that, in accordance with settled case-law (Case 14/68 *Walt Wilhelm and Others* [1969] ECR 1, and Joined Cases 253/78, 1/79 to 3/79 *Giry and Guerlain and Others* [1980] ECR 2327), Community competition law and national competition law apply in parallel, since they consider

22 Commission Decision 2001/376/EC of 18 April 2001 concerning measures made necessary by the occurrence of bovine spongiform encephalopathy in Portugal and implementing a date-based export scheme (OJ 2001 L 132, p. 17).

23 Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ 1994 L 227, p. 1).

24 Commission Regulation (EC) No 1768/95 of 24 July 1995 implementing rules on the agricultural exemption provided for in Article 14(3) of Regulation (EC) No 2100/94 (OJ 1995 L 173, p. 14).

restrictive practices from different points of view. In that regard, it stated that that case-law can be applied in the area of the common organisation of the market in milk and dairy products where, as a result, the national authorities in principle retain jurisdiction to apply their national competition law.

Next, the Court considered the limits of that jurisdiction, and, observing that Article 36 EC gives precedence to the objectives of the common agricultural policy over those in relation to competition policy, made clear that the measures adopted by the national authorities must not produce effects which are likely to impede the functioning of the mechanisms provided for by that common organisation. With regard to the measures at issue, the Court held that the mere fact that the prices charged by a dairy cooperative were already lower than the target price for milk before those authorities intervened is not sufficient to render the measures taken by them in relation to that cooperative in application of national competition law unlawful under Community law. Furthermore, according to the Court, such measures may not compromise the objectives of the common agricultural policy as set out in Article 33(1) EC. In any event, the Court made clear that the national competition authorities are under an obligation to ensure that any contradictions between the various objectives laid down in Article 33 EC are reconciled where necessary, without giving any one of them so much weight as to render the achievement of the others impossible.

Second, the Court held that the essential function of the target price provided for by Article 3(1) of Regulation No 804/68 [25] is to define, at Community level, the desirable point of equilibrium between the objective of ensuring a fair standard of living for the agricultural community on the one hand, and that of ensuring that supplies reach consumers at reasonable prices on the other does not preclude the national competition authorities from using that price for the purposes of investigating the market power of an agricultural undertaking, by comparing variations in actual prices with the target price.

Next, the Court held that the Treaty rules on the free movement of goods do not preclude the competent authorities of a Member State from prohibiting, pursuant to their national competition law, a dairy cooperative which enjoys market power from entering into contracts with undertakings, including undertakings established in other Member States, for the processing, on its behalf, of milk produced by its members. In reaching that conclusion, the Court recalled, first, that Article 28 EC is intended to prohibit all measures which are capable of hindering intra-Community trade, but that none the less a Member State is entitled to take measures to prevent certain of its nationals, under cover of freedoms created by the Treaty, from wrongfully evading the application of their national legislation. Consequently, according to the Court, restrictive

[25] Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organisation of the market in milk and milk products (OJ, English Special Edition 1968 (I), p. 176).

measures concerning goods which have been exported for the sole purpose of being reimported in order to circumvent measures adopted under national competition law do not constitute measures having equivalent effect to a quantitative restriction on imports within the meaning of Article 28 EC. Second, the Court stated that Article 29 EC concerns national measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade, in such a way as to provide a particular advantage for national production or for the domestic market of the State in question. The Court observed that that is not the case with regard to measures which are designed to limit anti-competitive practices engaged in by just one agricultural cooperative and apply indistinctly to processing contracts entered into with undertakings established in one Member State and those entered into with undertakings established in other Member States.

Finally, the Court held that Article 12 EC and the second subparagraph of Article 34(2) EC do not preclude the adoption of measures such as the prohibition on the conclusion of contracts for milk processing on its own account imposed on a dairy cooperative which enjoys market power and exploits that position in a manner contrary to the public interest, even though large vertically-integrated dairy cooperatives are permitted to operate in other Member States. Whilst, on the one hand, it is true that Article 12 EC prohibits every Member State from applying its competition law differently on grounds of the nationality of the parties concerned, the fact remains that Article 12 EC is not concerned with any disparities in treatment which may result, for persons and undertakings subject to the jurisdiction of the Community, from divergences existing between the laws of the various Member States, so long as the latter affect all persons subject to them, in accordance with objective criteria and without regard to their nationality. The mere fact that there are vertically-integrated cooperatives in other Member States is not sufficient to establish that the adoption of those measures amounts to discrimination on grounds of nationality. On the other hand, the Court held that the second subparagraph of Article 34(2) EC which prohibits all discrimination in the context of the common agricultural policy, is merely a specific expression of the general principle of equal treatment.

By Case C-239/01 *Germany* v *Commission* (judgment of 30 September 2003, not yet published in the ECR), the Court annulled Article 5(5) of Regulation No 690/2001 [26] in so far as that provision requires each Member State concerned to finance 30% of the price of the meat purchased under that regulation. The Court reached that conclusion on the basis of the findings that, first, the disputed provision requires each Member State concerned to finance a portion of the market support measures introduced by the

[26] Commission Regulation (EC) No 690/2001 of 3 April 2001 on special market support measures in the beef sector (OJ 2001 L 95, p. 8).

contested regulation and that, second, Regulation No 1258/1999 [27] does not contain any provision expressly authorising the Commission to derogate from the principle flowing from the basic legislation that all Community support measures in the beef and veal sector must be exclusively financed by the Community.

7. In the field of *freedom of movement for workers*, the Court ruled in cases concerning posts for masters of vessels entailing participation in the exercise of powers conferred by public law (7.1), a loyalty bonus (7.2), the interpretation of Article 7(2) of Regulation No 1612/68 (7.3), access to the hospital managers' corps of the French civil service (7.4), a national of a third country married to a British national (7.5), a temporarily employed national of a Member State (7.6) and the interpretation of the first indent of Article 3(2) of Regulation No 1251/70 (7.7).

7.1. In its judgments of 30 September 2003 in Case C-47/02 *Anker and Others* (not yet published in the ECR) and Case C-405/01 *Colegio de Oficiales de la Marina Mercante Española* (not yet published in the ECR) the Court had to interpret Article 39(4) EC in relation to provisions of German and Spanish law requiring nationality of the flag State for employment as master of a vessel used in small-scale maritime shipping and for employment as master and chief mate on merchant navy ships.

Observing, first, that the concept of public service within the meaning of that article covers posts which involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities, the Court went on to consider the posts at issue in this case.

It held that the national rights concerned conferred on those holding them rights connected to the maintenance of safety and to the exercise of police powers, which go beyond the requirement merely to contribute to maintaining public safety by which any individual is bound, and certain auxiliary duties in respect of the registration of births, marriages and deaths, which cannot be explained solely by the requirements entailed in commanding the vessel. It pointed out that the fact that masters are employed by a private natural or legal person is not, as such, sufficient to exclude the application of that article since it is established that, in order to perform the public functions which are delegated to them, masters act as representatives of public authority in the service of the general interests of the flag State. However, it pointed out that the scope of the derogation from the principle of freedom of movement for workers in the case of employment in the public administration must be limited to what is strictly necessary for safeguarding the general interests of the Member State concerned, which would not be

[27] Council Regulation (EC) No 1258/1999 of 17 May 1999 on the financing of the Common agricultural policy (OJ 1999 L 160, p. 103).

imperilled if rights under powers conferred by public law were exercised only sporadically, indeed exceptionally, by nationals of other Member States. Therefore, the Court concluded that Article 39(4) EC must be construed as allowing a Member State to reserve for its nationals the posts at issue only if the rights under powers conferred by public law granted to persons holding such posts are in fact exercised on a regular basis and do not represent a very minor part of their activities.

7.2. In *Köbler*, cited above (see paragraph 4.9), the Court had an opportunity to interpret Article 39 EC and Article 7(1) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [28] in relation to legislation of a Member State allowing the grant by that State, as employer, of a special length-of-service increment to university professors who have carried on that profession for at least 15 years with a university in that State. Although the Court, in *Schöning-Kougebetopoulou*, cited above, had already had to interpret those articles in relation to a bonus in respect of seniority, it had not yet ruled on their interpretation in relation to the grant of a loyalty bonus.

The Court held, first, that by precluding, for the purpose of the grant of the special length-of-service increment for which it provides, any possibility of taking into account periods of activity completed in another Member State, such a regime is likely to impede freedom of movement for workers. As, under national law, the increment at issue constituted a bonus seeking to reward the loyalty of professors of universities in the Member State to their sole employer, namely that State, the Court considered, therefore, whether the fact that it constitutes a loyalty bonus may be deemed under Community law to indicate that it is dictated by a pressing public-interest reason capable of justifying the obstacle. Although it cannot be excluded that an objective of rewarding workers' loyalty to their employers in the context of policy concerning research or university education constitutes a pressing public-interest reason, the Court held that the obstacle which it entails clearly cannot be justified in the light of such an objective. It concluded that the above provisions of Community law relating to freedom of movement for workers are to be interpreted as meaning that they preclude such an increment which constitutes a loyalty bonus.

7.3. In Case C-466/00 *Kaba* [2003] ECR I-2219 the Court was able to supplement its judgment in Case C-356/98 [2000] ECR I-2623 delivered in the same matter. In the first judgment, the Court had held that legislation which authorises spouses of migrant workers who are nationals of a Member State to remain indefinitely in another Member State only if they have resided in the territory of that State for four years, but which requires residence of only 12 months for the grant of those rights to the spouses of

[28] 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).

persons who are settled in that Member State, which persons are not subject to any restriction on the period for which they may remain there, does not constitute discrimination contrary to Article 7(2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community. [29] Asked to rule as to whether its reply would have been different had the Court taken into consideration the fact that the respective situation of those two categories of person in national law are, according to the referring tribunal, comparable in all respects except with regard to the period of prior residence which is required for the purpose of being granted indefinite leave to remain in the Member State in question. The Court replied in the negative. Inasmuch as the right of residence of a migrant worker who is a national of another Member State is subject to the condition that the person remains a worker or, where relevant, a person seeking employment, unless he or she derives that right from other provisions of Community law, his situation is not comparable to that of a person who, under the national legislation of a Member State, is not subject to any restriction regarding the period for which he or she may reside within the territory of that Member State and need not, during his or her stay, satisfy any condition comparable to those laid down by the provisions of Community law granting nationals of a Member State a right of residence in another Member State. As the rights of residence of these two categories of persons are not in all respects comparable, the same holds true with regard to the situation of their spouses, particularly so far as concerns the question of the duration of the residence period on completion of which they may be given indefinite leave to remain in the United Kingdom.

7.4. In Case C-285/01 *Burbaud* (judgment of 9 September 2003, not yet published in the ECR) the Court gave a preliminary ruling in a case concerning a Portuguese national who was refused admission to the hospital managers' corps of the French civil service on the ground that it was first necessary to pass the entrance examination of the École nationale de la santé publique (the French National School of Public Health "the ENSP").

The Court first analysed whether the duties performed by the members of that corps fell within the scope of Directive 89/48 [30] on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration and held that confirmation of passing the ENSP final examination can be regarded as a diploma. Its equivalence to the qualification awarded by the Lisbon School must, therefore, be ascertained by the national court. The Court held that, if it transpires that the diplomas are awarded on completion of

29 Ibid.

30 Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration (OJ 1989 L 19, p. 16).

equivalent education or training, the directive precludes the French authorities from making the access of a Portuguese national to the profession of manager in the hospital public service subject to the condition that she complete the ENSP course and pass its final examination. The specific features of that method of recruitment which do not allow for account to be taken of specific qualifications in the field of hospital management of candidates who are nationals of other Member States place them at a disadvantage which is liable to dissuade them from exercising their rights, as workers, to freedom of movement. While such an obstacle to a fundamental freedom guaranteed by the Treaty may be justified by an objective in the general interest, such as selection of the best candidates in the most objective conditions possible, it is a further condition that that restriction does not go beyond what is necessary to achieve that objective. The Court found that requiring candidates who are properly qualified to pass the ENSP entrance examination has the effect of downgrading them, which is not necessary to achieve the objective pursued and which cannot therefore be justified in the light of the Treaty provisions. It therefore concluded that such an examination was incompatible with the EC Treaty.

7.5. Case C-109/01 *Akrich* (judgment of 23 September 2003, not yet published in the ECR) concerned a Moroccan national who was deported twice from the United Kingdom, returned there illegally and married a British citizen. He was again deported to Dublin in 1997, where his wife had been settled since June 1997 and had been employed from August 1997 to June 1998. Relying on its judgment in Case C-370/90 *Singh* [1992] ECR I-4265, according to which Community law requires a Member State to grant leave to enter and reside in its territory to the spouse of a national of that State who has gone, with that spouse, to another Member State in order to work there as an employed person as envisaged by Article 39 EC and returns to establish himself or herself as envisaged by Article 43 EC in the territory of the State of which he or she is a national. Mr Akrich applied to the United Kingdom authorities for entry clearance as the spouse of a person settled in the United Kingdom. The Court pointed out that Community law, and, specifically, Regulation No 1612/68 on freedom of movement for workers [31] covers only freedom of movement within the Community and that it is silent as to the rights of a national of a non-Member State, who is the spouse of a citizen of the Union, in regard to access to the territory of the Community. In order to benefit from the right to settle with that citizen of the Union, that spouse must, according to the Court, be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating. The Court stated that the same applied where a citizen of the Union, married to a national of a non-Member State returns to the Member State of which he or she is a national in order to work there as an employed person.

[31] See footnote 28.

As regards, next, the question of the abuse with which Mr and Mrs Akrich are charged in that their move to Ireland was no more than a temporary absence deliberately designed to manufacture a right of residence for Mr Akrich and thereby to evade the provisions of the United Kingdom's national legislation, the Court recalled that the motives of a citizen seeking work in a Member State are not relevant in assessing the legal situation of the couple at the time of their return to the Member State of origin. Such conduct cannot constitute an abuse even if the spouse did not, at the time when the couple installed itself in another Member State, have a right to remain in the Member State of origin. The Court considered that there would be an abuse if Community rights were invoked in the context of marriages of convenience entered into in order to circumvent the national immigration rules. The Court observed, finally, that where the marriage is genuine and where, on the return of the national of a Member State married to a national of a third country to his State of origin where the spouse does not enjoy Community rights, not having resided lawfully on the territory of another Member State, the authorities of the State of origin must none the less take account of the right to respect for family life under Article 8 of the Convention on Human Rights.

7.6. Case C-413/01 *Ninni-Orasche* (judgment of 6 November 2003, not yet published in the ECR) concerned a national of a Member State who worked for a temporary period of two and a half months in the territory of another Member State, of which he is not a national, and then applied for a study grant from that Member State. The question therefore arose whether that national could be considered to have acquired the status of a worker within the meaning of Article 39 EC.

Having observed that the concept of "worker" has a specific Community meaning and must not be interpreted narrowly, the Court pointed out that the fact that employment is of short duration cannot, in itself, exclude that employment from the scope of Article 39 EC. Employment such as that at issue can confer the status of a worker provided that the activity performed as an employed person is not purely marginal and ancillary. It is for the national court to carry out the examinations of fact necessary in order to determine whether that is so in the case before it. Factors relating to the conduct of the person concerned before and after the period of employment are not relevant in establishing the status of worker within the meaning of Article 39 EC.

In the same case, the Court held that a Community national who has the status of a migrant worker for the purposes of Article 39 EC, is not voluntarily unemployed, within the meaning established by the relevant case-law of the Court, solely because his contract of employment, from the outset concluded for a fixed term, has expired.

7.7. In case C-257/00 *Givane* [2003] ECR I-345, the Court was called upon to interpret the first indent of Article 3(2) of Regulation No 1251/70 on the right of workers to

remain in the territory of a Member State after having been employed in that State,[32] which provides that the members of the family of a worker who died during his working life before acquiring the right to remain in the territory of the host Member State are entitled to remain there permanently if that worker had continuously lived in the territory of the Member State for at least two years. The Court ruled that the two-year period of continuous residence must immediately precede the worker's death.

8. On the *freedom to provide services*, the Court ruled amongst other things on discriminatory Italian charges for access to museums (8.1), the requirement for prior authorisation of the reimbursement of medical costs incurred in a Member State other than the State of affiliation (8.2 and 8.3), difference in treatment in relation to complementary retirement insurance policies taken out in different Member States (8.4), the prohibition, without prior authorisation, of certain activities concerning the taking of bets across national borders (8.5 and 8.6) and the limitation of the reimbursement of the fees of lawyers established in other Member States to the amount prescribed by the fee scales applicable to domestic lawyers (8.7).

8.1. First, the Court held, in Case C-388/01 *Commission* v *Italy* [2003] ECR I-721, that Italian legislation whereby local authorities or decentralised national ones reserved reduced-price access to museums and monuments for persons, aged over 60 or 65, who were Italian nationals or residents within the territory of the authorities managing the cultural installation in question, to the exclusion of tourists from other Member States and non-residents who satisfied the same objective age conditions, was incompatible with Articles 12 EC and 49 EC. The Court followed its previous case-law, particularly Case C-45/93 *Commission* v *Spain* [1994] ECR I-911, in which it held that national legislation on access to museums in a Member State which discriminates against foreign tourists alone is prohibited by Articles 12 EC and 49 EC. Referring to its judgments in Case C-3/88 *Commission* v *Italy* [1989] ECR 4035 and Case C-224/97 *Ciola* [1999] ECR I-2517, the Court reiterated that the principle of equality of treatment prohibits not only obvious discrimination based on nationality but also all forms of hidden discrimination, as in the case of a measure which risks operating primarily to the detriment of nationals of other Member States.

Moreover, neither the need to preserve the coherence of the tax system nor the considerations of an economic nature put forward by the Italian government fell within the exceptions allowed by Article 46 EC in circumstances where there was no direct link between taxation of any kind and the application of preferential rates for admission to the museums and public monuments. Nor, finally, could a Member State plead conditions existing within its own legal system in order to justify its failure to comply with obligations arising under Community law.

[32] Regulation (EEC) No 1251/70 on the right of workers to remain in the territory of a Member State after having been employed in that State (OJ L 142, p. 24).

8.2. Case C-385/99 *Müller-Fauré and van Riet* [2003] ECR I-4509 follows Cases C-120/95 *Decker* [1998] ECR I-1831, C-158/96 *Kohll* [1998] ECR I-5473, and C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, but differs from *Decker* and *Kohll* in that it reasons in the context of national social security legislation based on the system of benefits in kind, whereas the former judgments dealt with the question whether it was in conformity with Community law to require prior authorisation in order to be able to reimburse a socially insured person in respect of medical costs incurred in a Member State other than that of affiliation in the context of a social security system based on the reimbursement of health costs incurred by affiliated persons.

Müller-Fauré and van Riet begins by confirming the position in principle expressed in *Smits and Peerbooms* to the effect that national legislation which makes repayment of medical expenses incurred in a Member State other than that of affiliation subject to a requirement of prior authorisation, issued only in the case of medical necessity, constitutes an obstacle to the freedom to provide services.

Subsequently, in order to establish whether or not such legislation was objectively justified, the judgment distinguishes between hospital care and non-hospital care.

Concerning hospital care, making it subject to prior acceptance of financial responsibility by the national social security system in cases where such care was provided in a Member State other than that of affiliation was, in the Court's view, a measure both reasonable and necessary so as not to compromise the planning of such care operated through the system of health service agreements (*Smits and Peerbooms*). That planning is designed both to ensure that there is sufficient and permanent accessibility to a balanced range of high-quality hospital treatment and to control costs, preventing, as far as possible, any wastage of financial, technical and human resources. The Court did, however, go on to hold that, for the system of prior authorisation to be capable of operating, the conditions placed on the granting of such authorisation must be justified and satisfy the requirement of proportionality. Similarly, a scheme of prior administrative authorisation could not legitimise discretionary decisions taken by the national authorities which were liable to negate the effectiveness of Community law provisions on the freedom to provide services. Such a scheme therefore had to be based on objective, non-discriminatory criteria which were known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it was not used arbitrarily (*Smits and Peerbooms*). Finally, still following *Smits and Peerbooms*, the Court held that a condition that treatment must be necessary may be justified under Article 49 EC provided that is interpreted as meaning that prior authorisation may be refused only where treatment which is the same or equally effective for the patient can be obtained without undue delay, within the State of affiliation, from an establishment with which the insured person's sickness insurance fund has an agreement.

Concerning non-hospital care, the Court held that the information in the documents brought before it for assessment did not demonstrate that removing the requirement for prior authorisation would cause cross-border movements of patients so large as seriously to undermine the financial stability of the social security system and thereby threaten the overall level of public health protection. Furthermore, such care is generally provided near to the place where the patient resides, in a cultural environment which is familiar to him and which allows him to build up a relationship of trust with the doctor treating him. Those factors were likely to limit any possible financial impact on the national social security system in question of removing the requirement for prior authorisation in respect of care provided in foreign practitioners' surgeries. Bearing in mind that it was for the Member States alone to determine the extent of the sickness cover available to insured persons, and finding that, in this case, the actual amount in respect of which reimbursement was sought was relatively small (paragraph 106), the Court concluded that removing the requirement for prior authorisation issued by sickness funds to their insured persons, so as to enable them to benefit from such healthcare provided in a Member State other than the State of affiliation, was not likely to undermine the essential features of the sickness insurance scheme in question. The system requiring such prior authorisation was therefore incompatible with Article 59 EC.

8.3. Some of the assessments made in that judgment are repeated in Case C-56/01 *Inizan* (judgment of 23 October 2003, not yet published in the ECR). That judgment ruled as to whether the system established by Article 22(1)(c)(i) and (2) of Regulation No 1408/71,[33] requiring that the competent social security institution give prior authorisation before assuming financial responsibility for benefits in kind provided to the affiliated person on its behalf by the institution of the place of stay or residence situated in a Member State, and also making the grant of such authorisation subject to conditions, was compatible with Articles 49 and 50 EC.

Having reaffirmed the conditions under which, in accordance with the judgments in *Kohll*, *Smits and Peerbooms* and *Müller-Fauré and Van Riet*, Article 49 EC precludes a system of prior authorisation established by national legislation, the Court held that, given that that provision did not in any way prevent the reimbursement by Member States of costs incurred on the occasion of care provided in another Member State, even in the absence of prior authorisation, and that the competent national institution cannot refuse such authorisation where the two conditions in the second paragraph of the latter are met, Article 22 of Regulation No 1408/71 contributes to facilitating the free movement of socially insured persons.

[33] 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 (OJ, English Special Edition 1971 (II), p. 416), as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1).

The judgment then examined the compatibility of the conditions for granting prior authorisation, to which national legislation makes reimbursement of care costs incurred in a Member State other than the affiliated person's State of residence subject, with Article 22(1)(c)(i) and (2) of Regulation No 1408/71 and Articles 49 EC and 50 EC.

Concerning Regulation No 1408/71, the Court observed that, amongst those conditions, the one stipulating that the treatment which the patient intends to undergo in a Member State other than that in which he resides must not be capable of being given to him within the time normally necessary for obtaining the treatment in question in the Member State of residence taking account of his current state of health and the probable course of the disease is not fulfilled whenever it appears that an identical course of treatment, or one with the same degree of effectiveness for the patient, may be obtained in time in the Member State of residence. In assessing whether that is the case, the competent institution is required to take into account all the circumstances of each particular case, paying due regard not only to the medical situation of the patient at the time authorisation is applied for and, where appropriate, to the degree of his pain or the nature of his handicap, which might, for example, make it impossible or excessively difficult to work, but also to his previous history (*Smits and Peerbooms* and *Müller-Fauré and van Riet*).

Concerning Articles 49 EC and 50 EC, the judgment repeated the findings in *Smits and Peerbooms* and *Müller-Fauré and van Riet*. It thus held that those findings do not preclude legislation of a Member State which, first, makes reimbursement of the cost of hospital care provided in a Member State other than that in which the insured person's sickness fund is established conditional upon prior authorisation by that fund and, secondly, makes the grant of that authorisation subject to the condition that it be established that the insured person could not receive within the territory of the Member State where the fund is established the treatment appropriate to his condition. However, authorisation may be refused on that ground only if treatment which is the same or equally effective for the patient can be obtained without undue delay in the territory of the Member State in which he resides.

8.4. The judgment in Case C-422/01 *Skandia and Ramstedt* [2003] ECR I-6817, ruled on the compatibility with Article 49 EC of Swedish legislation which provided that, in order to be capable of being regarded as an old-age insurance and thus conferring entitlement to immediate deduction from an employer's taxable income of contributions paid in respect of such insurance, an insurance policy had to be taken out with an insurer established in Sweden, whereas, if taken out with an insurer of another Member State, it was regarded as a capital life assurance policy, conferring a right to deduction only at the time of payment of the pension to the employee in question. The Court found that the disadvantage to the employer in financial terms in the postponement of the right to deduction introduced a difference in tax treatment incompatible with Article 49 EC. That difference was liable both to dissuade Swedish employers from taking out complementary pension insurance with companies established in a Member State other than Sweden and to dissuade those companies from offering their services

on the Swedish market. None of the justifications for that system put forward by the Swedish government, concerning coherence of the tax system, the effectiveness of tax controls, the need to preserve the tax base and competitive neutrality were accepted by the Court.

8.5. Case C-243/01 *Gambelli* (judgment of 6 November 2003, not yet published in the ECR), ruled that Italian legislation which made it punishable as a criminal offence, without a concession or licence from the State, to collect, accept, register or transmit proposed bets, particularly on sporting events via the internet, was contrary to Articles 43 EC and 49 EC. The judgment referred to the fact that the participation of nationals of a Member State in a lottery operated in another Member State relates to a "service" within the meaning of Article 50 EC, and transposed the case-law concerning services which a provider offered by telephone to potential recipients established in other Member States and provided by him without moving from the Member State in which he was established (Case C-384/93 *Alpine Investments* [1995] ECR I-1141) to services offered by internet. The prohibition on receiving such services and the prohibition on intermediaries facilitating the provision of betting services on sporting events organised by a provider established in a Member State other than the one in which those intermediaries did business constituted restrictions on the freedom to provide services. However, moral, religious and cultural factors, and the morally and financially harmful consequences for the individual and society associated with gaming and betting, could serve to justify the existence on the part of the national authorities of a margin of appreciation sufficient to enable them to determine what consumer protection and the preservation of public order require. In order to be justified, those restrictions must be justified by imperative requirements in the general interest, be suitable for achieving the objective which they pursue and not go beyond what is necessary in order to attain it. They must in any event be applied without discrimination.

8.6. Case C-289/03 *Lindman* (judgment of 13 November 2003, not yet published in the ECR) also dealing with the cross-border aspects of games and bets, established that Article 49 EC precludes the legislation of a Member State, in this case Finnish legislation, which provides that winnings arising from games of chance organised in other Member States are regarded as income of the winner which is liable to income tax, whereas gains arising from games of chance organised in the Member State in question are not taxable.

8.7. Case C-289/02 *AMOK* (judgment of 11 December 2003, not yet published in the ECR), considered the question whether Articles 49 EC and 12 EC preclude a national legal practice limiting any claim for reimbursement of the costs of the services of a lawyer of a different Member State in domestic proceedings to the sum of the costs which would have been incurred in the case of representation by a domestic lawyer. The Court noted that the third paragraph of Article 50 EC provides that a person who

provides services across national borders may carry on business in the country where the service is provided "under the same conditions as are imposed by that State on its own nationals", and that that rule was transposed in Directive 77/249 [34] to facilitate the effective exercise by lawyers of freedom to provide services with the exception of "any conditions requiring residence, or registration with a professional organisation, in that State". The Community legislature had therefore taken the view that, apart from the exceptions expressly mentioned, all other conditions and rules in force in the host country might apply to the transfrontier provision of services by a lawyer. The reimbursement of the fees of a lawyer established in a Member State might therefore also be made subject to the rules applicable to lawyers established in another Member State. That solution was, moreover, the only one which complied with the principle of predictability, and thus of legal certainty, for a party which entered into proceedings and thus incurred the risk of having to bear the costs of the other party in the event of being unsuccessful (paragraph 30). The Court observed, however, that the fact that the party which has been successful in a dispute and which has been represented by a lawyer established in another Member State cannot also obtain reimbursement, from the unsuccessful party, of the fees of the lawyer practising before the court seised and to whom the successful party has had recourse, on the ground that such costs are not regarded as being necessary, is liable to make the transfrontier provision by a lawyer of his services less attractive. Such a solution may have a deterrent effect capable of affecting the competitiveness of lawyers in other Member States. Even if the appointment of a lawyer practising before the court seised is a mandatory requirement resulting from harmonisation measures and therefore falls outside the will of the parties, it cannot be inferred therefrom that the additional associated costs must be attributed automatically and in every case to the party which had recourse to the lawyer established in another Member State, irrespective of whether that party has been successful in the dispute. On the contrary, the obligation to have recourse to the services of a lawyer practising before the court seised means that the resulting costs will be necessary for the purposes of appropriate legal representation. The general exclusion of those costs from the amount to be reimbursed by the unsuccessful party would penalise the successful party, with the effect of strongly discouraging parties to legal proceedings from having recourse to lawyers established in other Member States. The freedom of such lawyers to provide their services would thereby be obstructed and the harmonisation of the sector, as initiated by the directive, adversely affected.

9. On the matter of *freedom of establishment*, most noteworthy were a series of judgments on the mutual recognition of university degrees and courses of professional training (9.1 to 9.3), a judgment on the mutual recognition of driving licences issued by other Member States (9.4), and a judgment on the conformity with Community law of an obligation under Netherlands law to describe a company as a "formally foreign company" when registering it in the register of commerce.

[34] Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (OJ 1977 L 78, p. 17).

9.1. The judgment in Case C-110/01 *Tennah-Durez* [2003] ECR I-6239, concerned the part of a doctor's training carried out in Algeria, subsequently recognised in Belgium, and which the person concerned sought to have recognised in France. The Court began by stating that Directive 93/16 [35] to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications establishes automatic and unconditional recognition of certain diplomas, requiring Member States to acknowledge their equivalence without being able to demand that the persons concerned comply with conditions other than those laid down. It went on to draw a distinction between that system and the system laid down by Directive 89/48, [36] where recognition is not automatic but allows Member States to require the person concerned to fulfil additional requirements, including a period of adaptation. Concerning the extent to which medical training may consist of training received in a non-member country, the Court held that the directive did not require all or any particular part of that training to be provided at a university of a Member State or under the supervision of such a university, and that neither did the general scheme of the directive preclude medical training leading to a diploma, certificate or other evidence of a medical qualification eligible for automatic recognition from being received partly outside the Community. According to the Court, what mattered was not where the training had been provided but whether it complied with the qualitative and quantitative training requirements laid down by Directive 93/16. Moreover, responsibility for ensuring that the training requirements, both qualitative and quantitative, laid down by Directive 93/16 were fully complied with fell wholly on the competent authority of the Member State awarding the diploma. A diploma thus awarded amounted to a "doctor's passport" enabling the holder to work as a doctor throughout the European Union, without the professional qualification attested to by the diploma being open to challenge in the host State except in specific circumstances laid down by Community law. Consequently, provided the competent authority in the Member State awarding the diploma was in a position to validate medical training received in a third country and to conclude on that basis that the training duly complied with the training requirements laid down by Directive 93/16, that training could be taken into account in deciding whether to award a doctor's diploma. In that respect, the proportion of the training carried out in a non-member country, and in particular the fact that the major part of the training was received in such a country, is immaterial. In the first place, Directive 93/16 contains no reference or even allusion to such a criterion. Moreover, a requirement for training to have been received mainly within the Community would undermine legal certainty, since such a concept is open to several

35 Council Directive 93/16/EEC of 5 April 1993 to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications (OJ 1993 L 165, p. 1).

36 Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration (OJ 1989 L 19, p. 16).

interpretations. The Court concluded that the training in question could consist, and even mainly consist, of training received in a non-member country, provided the competent authority of the Member State awarding the diploma was in a position to validate the training and to conclude on that basis that it duly served to meet the requirements for the training of doctors laid down by the directive. As for the extent to which national authorities are bound by a certificate certifying conformity of the diploma with the requirements of the directive, the Court held that the system of automatic and unconditional recognition would be seriously jeopardised if it were open to Member States at their discretion to question the merits of a decision taken by the competent institution of another Member State to award the diploma. However, where new evidence cast serious doubt on the authenticity of the diploma presented, or as to its conformity with the applicable legislation, it was legitimate for Member States to require from the competent institution of the Member State which awarded the diploma confirmation of its authenticity.

9.2. In Case C-313/01 *Morgenbesser* (judgment of 13 November 2003, not yet published in the ECR), the Court examined whether Community law precluded the authorities of a Member State from refusing to enrol the holder of a legal diploma obtained in another Member State in the register of persons undertaking the necessary period of practice for admission to the bar solely on the ground that it was not a legal diploma issued or confirmed by a university of the first State. The Court began by ruling that Directives 98/5 [37] and 89/48 did not apply in such a situation. The former did not apply because it concerned only lawyers fully qualified as such in their Member State of origin and did not therefore apply to persons who had not yet acquired the professional qualification necessary to carry out the profession of lawyer. Directive 89/48 did not apply to activities which were limited in time and constituted the practical part of the training necessary for access to the profession of "avvocato", that part not being capable of being described as a "regulated profession" within the meaning of that directive. The judgment went on to find that Community law precluded the authorities of a Member State from refusing to enrol the holder of a legal diploma obtained in another Member State in the register of persons undertaking the necessary period of practice for admission to the bar solely on the ground that it was not a legal diploma issued or confirmed by a university of the first State. Whilst recognition, for academic and civil purposes, of the equivalence of a diploma obtained in one Member State might be relevant, and even decisive, for enrolment with the bar of another Member State (Case 71/76 *Thieffry* [1977] ECR 765), it did not follow that it was necessary to examine the academic equivalence of the diploma relied upon by the person concerned in relation to the diploma normally required of nationals of that State. The diploma of the person concerned, such as, in this case, the maîtrise en droit granted by a French university,

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

had to be taken into account in the context of the assessment of the whole of the training, academic and professional, which that person was able to demonstrate. It was the duty of the competent authority to examine, in accordance with the principles set out in the judgments in Case C-340/89 *Vlassopoulou* [1991] ECR I-2357 and Case C-234/97 *Fernández de Bobadilla* [1999] ECR I-4773, whether, and to what extent, the knowledge certified by the diploma granted in another Member State and the qualifications or professional experience obtained there, together with the experience obtained in the Member State in which the candidate seeks enrolment, must be regarded as satisfying, even partially, the conditions required for access to the activity concerned.

9.3. In Case C-152/02 *Neri* (judgment of 13 November 2003, not yet published in the ECR), the Court held that an Italian administrative practice refusing to recognise post-secondary university diplomas issued by a British university in circumstances where the courses were given in Italy by an educational establishment operating in the form of a capital company in accordance with an agreement between the two establishments was incompatible with Article 43 EC. In the view of the Court, Article 43 EC requires the elimination of restrictions on freedom of establishment, whether they prohibit the exercise of that freedom, impede it or render it less attractive (Case C-145/99 *Commission* v *Italy* [2002] ECR I-2235). Non-recognition in Italy of degrees likely to facilitate the access of students to the employment market is likely to deter students from attending courses and thus seriously hinder the pursuit by the educational establishment concerned of its economic activity in that Member State. Moreover, inasmuch as non-recognition of diplomas relates solely to degrees awarded to Italian nationals, it does not appear suitable for attaining the objective of ensuring high standards of university education. Similarly, precluding any examination and, consequently, any possibility of recognition of degrees does not comply with the requirement of proportionality and goes beyond what is necessary to ensure the objective pursued. It cannot therefore be justified.

9.4. In its judgment in Case C-246/00 *Commission* v *Netherlands* [2003] ECR I-7504, the Court recalled, first, that Article 1(2) of Directive 91/439 [38] lays down the principle of mutual recognition of driving licences issued by the various Member States, and that, according to consistent case-law, that recognition, which must be without any formality "is a precise and unconditional obligation and the Member States have no discretion as to the measures to be adopted in order to comply with the requirement" (paragraph 61). In this case, the Court established that the holder of a driving licence issued by another Member State who has been resident in the Netherlands for over a year is deemed to have committed an offence which is subject to a fine if he drives a vehicle without having registered his driving licence in the Netherlands. In that respect, the Court held that, where registration of a driving licence issued by another Member State becomes

[38] Council Directive 91/439/EEC of 29 July 1991 on driving licences (OJ 1991 L 237, p. 1).

an obligation, that registration must be regarded as constituting a formality and is therefore contrary to Article 1(2) of the directive.

The Court further stated that the measures adopted by a Member State to avail itself of the possibility offered by the directive of applying to the holder of a driving licence issued by another Member State who takes up residence in the Netherlands its national rules on the period of validity of the licences, medical checks and tax arrangements and to enter on the licence the information indispensable for administration must not hinder or make less attractive for Community nationals the exercise of their right to free movement and freedom of establishment and, where they none the less do so, those measures must be applied in a non-discriminatory manner, be justified by imperative reasons of public interest, be appropriate for guaranteeing the attainment of the objective pursued and not go beyond what is necessary to attain that objective.

9.5. Finally, Case C-167/01 *Inspire Art* (judgment of 30 September 2003, not yet published in the ECR) examined whether it was a breach of Articles 43 EC and 48 EC for Netherlands law to require, on the registration in the commercial register of the subsidiary of a company, established in another Member State where it did not genuinely carry on business in order to benefit from less strict rules there than the rules of the State of establishment of the subsidiary, that the company describe itself as a "formally foreign company", thereby entailing obligations additional to those weighing on a company of that kind not obliged to describe itself in that way. The Court held that, even if the Netherlands legislative provision largely complied with Directive 89/666 [39] concerning disclosure requirements in respect of branches opened in a Member State other than the State of establishment (Eleventh Company Law Directive; "the Eleventth Directive"), that compliance did not automatically make the sanctions attached by Netherlands law to non-compliance with those measures compatible with Community law. Article 10 EC requires Member States to take all measures necessary to guarantee the application and effectiveness of Community law, and in particular to ensure that infringements of Community law are penalised in conditions which are analogous to those applicable to infringements of national law of a similar nature and importance and which make the penalty effective, proportionate and dissuasive (Case 68/88 *Commission* v *Greece* [1989] ECR 2965; Case C-326/88 *Hansen* [1990] ECR I-2911; Case C-36/94 *Siesse* [1995] ECR I-3573; Case C-177/95 *Ebony Maritime and Loten Navigation* [1997] ECR I-1111).

The judgment then noted that differences between the laws of the Member States on the subject of the disclosure required in respect of branches might interfere with the

[39] Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State (OJ 1989 L 395, p. 36).

exercise of the right of establishment, and that the harmonisation in relation to such disclosure carried out by the Eleventh Directive was exhaustive. It was therefore contrary to Article 2 of the Eleventh Directive for Netherlands legislation to impose on the branch of a company formed in accordance with the laws of another Member State disclosure obligations not provided for by that directive. Those obligations concern recording in the commercial register the fact that the company is formally foreign, recording in the business register of the host Member State the date of first registration in the foreign business register and information relating to sole members, compulsory filing of an auditor's certificate to the effect that the company satisfies the conditions as to minimum capital, subscribed capital and paid-up share capital, and mention on all documents emanating from the company that it is a formally foreign company.

Concerning Articles 43 EC and 48 EC, the Court stated that the fact that the parent establishment was formed for the purpose of circumventing Netherlands company law does not prevent that company's establishment of a branch in the Netherlands from benefiting from freedom of establishment. The question of the application of those articles is different from the question whether or not a Member State may adopt measures in order to prevent attempts by certain of its nationals improperly to evade domestic legislation (Case C-212/97 *Centros* [1999] ECR I-1459). Mandatory application of the rules of Netherlands company law on minimum capital and directors' liability to foreign companies when they carry on their activities exclusively, or almost exclusively, in the Netherlands, so that creation of a branch in the Netherlands by a company of that kind is subject to certain rules enacted by that State in respect of the formation of a limited-liability company, has the effect of impeding the exercise by those companies of the freedom of establishment conferred by the Treaty. As to the possible existence of justification, the Court held that neither Article 46 EC, nor the protection of creditors, nor combating improper recourse to freedom of establishment, nor safeguarding fairness in business dealings or the efficiency of tax inspections provided any justification for the hindrance to freedom of establishment guaranteed by the Treaty which the provisions of Netherlands legislation in question constituted. Articles 43 EC and 48 EC therefore precluded such national legislation.

10. On the question of *free movement of capital*, four cases are worthy of attention: the first two concern the conditions which two Member States place on the transfer of public holdings in undertakings (10.1), whilst the second two concern, respectively, national legislation on prior authorisation for acquisitions of unbuilt plots and national measures governing the acquisition of real property (10.2 and 10.3).

10.1. Two judgments delivered on 13 May 2003 (Case C-463/00 *Commission* v *Spain* [2003] ECR I-4581 and C-98/01 *Commission* v *United Kingdom* [2003] I-4641 ("*BAA*") form part of the series of judgments on "golden shares", delivered the previous year (Case C-367/98 *Commission* v *Portugal* [2002] ECR I-4731, Case C-483/99 *Commission* v *France* [2002] ECR I-4781, and Case C-503/99 *Commission* v *Belgium* [2002] ECR I-4809). The first examines Spanish legal arrangements for the disposal of public shareholdings in certain undertakings, requiring prior administrative authorisation

for decisions of commercial undertakings concerning the undertaking's winding-up, demerger or merger, the disposal or charging of the assets or shareholdings necessary for the attainment of the undertaking's object, a change in the undertaking's object, and dealings in the share capital which result in the State's shareholding in the undertaking being reduced. The second judgment concerns aspects of the scheme for privatising the British Airports Authority with regard to limiting the possibility of acquiring voting shares in BAA and to the procedure requiring consent to disposal of the company's assets, to the control of subsidiaries and to the company's winding-up. Following the case-law referred to above, the Court rejected the argument that there was no discrimination against nationals of other Member States on the ground that the prohibition laid down in Article 56 EC goes beyond the mere elimination of unequal treatment, on grounds of nationality, as between operators on the financial markets. The restrictions in question affected the position of a person acquiring a shareholding as such and were thus liable to deter investors from other Member States from making such investments and, consequently, affect access to the market. In the *BAA* judgment, the Court further held that the restrictions at issue did not arise as the result of the normal operation of company law, since the Member State acted in its capacity as a public authority. Consequently, the rules at issue constituted a restriction on the movement of capital for the purposes of Article 56 EC, and, by maintaining them in force, the United Kingdom failed to fulfil its obligations under that provision. In *Commission* v *Spain*, having held that there was a restriction on movements of capital (paragraph 62), the Court examined whether there might be a justification for it. In that respect, it confirmed its previous case-law, whereby concerns which might justify the retention by Member States of a degree of influence within undertakings that were initially public and subsequently privatised cannot entitle Member States to plead their own systems of property ownership, referred to in Article 295 EC, by way of justification for obstacles, resulting from privileges attaching to their position as shareholder in a privatised undertaking, to the exercise of the freedoms provided for by the Treaty. Such justification may result only from reasons referred to in Article 58(1) EC or from overriding requirements of the general interest. Furthermore, in order to be so justified, the national legislation had to be suitable for securing the objective which it pursued and must not go beyond what was necessary in order to attain it, so as to accord with the principle of proportionality. That was not the case here. In this case, the Court found that there were no objective, precise criteria sufficient to ensure that the scheme in question did not go beyond what was necessary in order to meet the objective of safeguarding supplies in the event of crisis in the petroleum, telecommunications and electricity sectors, and to ensure that the administrative authorities' particularly broad discretion in this area would remain under control.

10.2. In the case of *Salzmann*, referred to in paragraph 3.1 above, the Court was called upon to examine, first, whether Article 56(1) EC precludes national legislation which makes the purchase of land subject to prior administrative authorisation and provides that, apart from cases where the acquisition is carried out with a view to establishing a holiday home, authorisation is to be granted for acquisitions of unbuilt plots of land where the acquirer has plausibly demonstrated that the plot will, within a reasonable

time, be used in accordance with the local development plan or for public interest, charitable or cultural purposes. Secondly, in the event that such national legislation was precluded, the Court was called upon to determine whether such an authorisation requirement might nevertheless be covered by the derogation provided for in Article 70 of the Act of Accession of Austria. The Court held that, although the legal regime applicable to property ownership is a field of competence reserved for the Member States under Article 295 EC, it is not exempted from the fundamental rules of the Treaty (Case C-302/97 *Konle* [1999] ECR I-3099). Thus, national measures which regulated the acquisition of land for the purposes of prohibiting the establishment of secondary residences in certain areas had to comply with the provisions of the Treaty on the free movement of capital. The prior authorisation procedure restricts, by its very purpose, the free movement of capital (see Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch and Others* [2002] ECR I-2157, paragraph 32), and therefore falls within the scope of the prohibition laid down in Article 56(1) EC. Concerning the question whether such a measure might nevertheless be permitted, provided that it pursued an objective in the public interest, the judgment confirmed the case-law in *Reisch* and *Konle* to the effect that restrictions on the establishment of secondary residences in a specific geographical area, which a Member State imposed in order to maintain, for town and country planning purposes, a permanent population and an economic activity independent of the tourist sector, might be regarded as contributing to an objective in the public interest. However, in so far as it required the acquirer to produce proof of the future use of the land he was acquiring, such a measure allowed the competent administrative authority considerable latitude which might be akin to a discretionary power, with the result that it could be applied in a discriminatory way. The Court found that the condition of proportionality was not fulfilled either. A procedure simply involving a declaration might, if coupled with appropriate legal instruments, make it possible to eliminate the requirement of prior authorisation without undermining the effective pursuit of the aims of the public authorities, with the result that the prior authorisation procedure cannot be regarded as a measure strictly necessary in order to achieve the town and country planning objective pursued by the latter.

10.3. In a case that was essentially similar (Case C-452/01 *Ospelt and Schlössle Weissenberg*, judgment of 23 September 2003, not yet published in the ECR), but concerned a transaction between Liechtenstein nationals concerning a plot situated in Austria and subject to administrative authorisation, the Court reiterated that the scope of national measures governing the acquisition of immovable property had to be assessed in the light of the Treaty provisions on the movement of capital. It went on to hold that rules such as Article 40 of, and Annex XII to, the EEA Agreement, prohibiting the restrictions on capital movements and the forms of discrimination specified in those provisions, are, so far as concerns relations between the States party to the EEA Agreement, identical to those which Community law imposes with regard to relations between the Member States and must therefore be interpreted uniformly within the Member States. It would run counter to that objective as to uniformity of application of the rules relating to free movement of capital within the EEA for a State such as

Austria, which is a party to that Agreement, to be able after its accession to the European Union to maintain legislation restricting that freedom vis-à-vis another State party to that Agreement by basing itself on Article 57 EC. It follows that rules which make transactions relating to agricultural and forestry plots subject to administrative controls must, where a transaction is in issue between nationals of States party to the EEA Agreement, be assessed in the light of Article 40 of and Annex XII to that Agreement, which are provisions that have the same legal scope as the essentially identical provisions of Article 56 EC.

As for whether the provisions on the free movement of capital precluded a prior authorisation procedure for such acquisitions, the Court held that such a procedure might be allowed provided it pursued an objective in the public interest in a non-discriminatory way and was proportionate. In this case, the Court found, first, that discrimination had not been established. Secondly, the national measures in question pursued objectives in the general interest – preserving agricultural communities, maintaining a distribution of land ownership which allowed the development of viable farms and sympathetic management of green spaces and the countryside as well as encouraging a reasonable use of the available land, being objectives corresponding to those of the Common Agricultural Policy – which were capable of justifying restrictions of the freedom of capital movements. Thirdly, concerning the condition of proportionality, the principle of a sytem of prior authorisation cannot be challenged in so far as it seeks to ensure that land intended for agriculture continues to be used in that way under appropriate conditions. However, a condition that the acquirer must, in any event, farm the land himself as part of a holding in which he is also resident goes beyond what is necessary in order to attain the public-interest objectives and should therefore be regarded as incompatible with the freedom of movement of capital.

11. In the area of *transport policy*, reference should first be made to Case C-445/00 *Austria* v *Council* (judgment of 11 September 2003, not yet published in the ECR), concerning the system of ecopoints for heavy goods vehicles in transit across Austria.

The Court first held that the provisions of Regulation No 2012/2000, [40] which were designed to establish on a permanent basis the principle of spreading the reduction in ecopoints over a number of years, were incompatible with Annex 5, point 3, to Protocol No 9 to the Act of Accession of Austria, which provides that, in the event of reduction, the number of ecopoints is to be established for the following year. The Court drew attention to the fact that protocols and annexes to an Act of Accession are provisions of primary law which, unless the Act of Accession provides otherwise, can be suspended,

[40] Council Regulation (EC) No 2012/2000 of 21 September 2000 amending Annex 4 to Protocol No 9 to the 1994 Act of Accession and Regulation (EC) No 3298/94 with regard to the system of ecopoints for heavy goods vehicles transiting through Austria (OJ 2000 L 241, p. 18).

modified or abrogated only in accordance with the procedures laid down for the revision of the original treaties (paragraph 62).

Concerning the provisions of the same regulation for the spreading over the years 2000 to 2003 of the reduction in ecopoints made on account of the transit journey threshold provided for in Article 11 of Protocol No 9 to the Act of Accession of Austria having been exceeded in 1999, the Court held that the Council, faced with a situation in which reliable statistics had been transmitted late by the responsible national authorities, was justified in spreading the reduction in ecopoints beyond the end of the year following that in which the excess was established, as otherwise applying the reduction in ecopoints solely to the remaining months of that year would have had the disproportionate effect of stopping practically all transit traffic of goods by road through Austria, contrary to the fundamental principles of Community law. However, the Court held that to spread the reduction over a number of years would be contrary to the protocol. Moreover, the same illegality affected the provision of the regulation providing for the spreading of ecopoints between Member States.

Finally, when considering the method used in the contested regulation to calculate the reduction in ecopoints, based on the actual level of NO_x emission per heavy goods vehicle, without taking "illegal" journeys into consideration, the Court held that that method complied both with the letter and with the spirit of Protocol No 9 to the Act of Accession of Austria. The protocol is concerned with the average level of NO_x emissions by heavy goods vehicles and not the fictitious calculation of a number of ecopoints. However, the Court held that a method of calculation which consisted in practice of dividing the total number of ecopoints used by the total number of journeys recorded, in circumstances where the total number of ecopoints used took no account of journeys for which the carrier should have used ecopoints but did not do so ("illegal" journeys) even though those "illegal" journeys were included in the total number of journeys made, did not comply with Annex 5, points 2 and 3 of that protocol. In any event, the Court decided that the effects of the annulled provisions of the regulation should be regarded as definitive.

12. Two series of cases are worthy of note in the area of the *competition rules*: the first concerns the rules applicable to undertakings (12.1) and the second concerns State aid (12.2).

12.1. Concerning the first series, mention should be made of four cases.

12.1.1. In Case C-198/01 *Consorzio Industrie Fiammiferi* (judgment of 9 September 2003, not yet published in the ECR), the Court was asked to rule upon the scope of Article 81 EC where undertakings engaged in conduct contrary to Article 81(1) EC and where that conduct was required or facilitated by national legislation which legitimised or reinforced the effects of the conduct, specifically with regard to price-fixing or market-sharing arrangements.

The Court held that, faced with such conduct, a national competition authority, entrusted inter alia with the task of ensuring compliance with 81 EC, was under an obligation to disapply that national legislation. Since that provision, in conjunction with Article 10 EC, imposes a duty on Member States to refrain from introducing measures contrary to the Community competition rules, those rules would be rendered less effective if, in the course of an investigation under Article 81 EC into the conduct of undertakings, the authority were not able to declare a national measure contrary to the combined provisions of Articles 10 EC and 81 EC and if, consequently, it failed to disapply it.

Nevertheless, if the general Community-law principle of legal certainty was not to be violated, the duty of national competition authorities to disapply such an anti-competitive law could not expose the undertakings concerned to any penalties, either criminal or administrative, in respect of past conduct where the conduct was required by the law concerned. The national authority could not therefore impose penalties on the undertakings concerned in respect of past conduct which had been required of them by that national legislation; it could, however, impose penalties on such undertakings in respect of conduct subsequent to the decision finding infringement of Article 81 EC, once that decision had become definitive in their regard.

The Court finally stated that, in any event, the national competition authority may impose penalties on the undertakings concerned in respect of past conduct where the conduct was merely facilitated or encouraged by the national legislation, whilst taking due account of the specific features of the legislative framework in which the undertakings acted. In that respect, when determining the level of the penalty, the conduct of those undertakings could be assessed in the light of the extenuating factor constituted by the national legal framework.

12.1.2. In Case C-338/00 *Volkswagen* v *Commission* (judgment of 18 September 2003, not yet published in the ECR), the Court dismissed the appeal of the Volkswagen Group against the judgment of the Court of First Instance of 6 July 2000 in Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, which in turn partially dismissed the action for annulment of the Commission's decision imposing a fine for infringement of Article 81 EC. In its judgment, the Court reaffirmed, in line with its judgment in Case C-70/93 *Bayerische Motorenwerke* [1995] ECR I-3439, that a measure which was liable to partition the market between Member States could not come under those provisions of Regulation No 123/85 [41] that dealt with the obligations which a distributor may lawfully assume under a dealership contract. Although that

[41] Commission Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 8[8](3) of the EEC Treaty to certain categories of motor vehicle distribution and servicing agreements (OJ 1985 L 15, p. 16), replaced, as from 1 October 1995 by Commission Regulation (EC) No 1475/95 of 28 June 1995 (OJ 1995 L 145, p. 25).

regulation provides manufacturers with substantial means by which to protect their distribution systems, it does not authorise them to adopt measures which contribute to a partitioning of the market.

The Court also considered that the Court of First Instance had correctly applied the case-law (particularly *Bayerische Motorenwerke* and Joined Cases 25/84 and 26/84 *Ford* v *Commission* [1985] ECR 2725) whereby "a call by a motor vehicle manufacturer to its authorised dealers is not a unilateral act which falls outside the scope of Article 81(1) but is an agreement within the meaning of that provision if it forms part of a set of continuous business relations governed by a general agreement drawn up in advance". For a motor manufacturer to implement of policy of supply quotas on dealers with a view to blocking re-exports constitutes not a unilateral measure but an agreement within the meaning of that provision where, in order to impose that policy, the manufacturer uses clauses of the dealership agreement, such as that enabling supplies to dealers to be limited, and thereby influences the commercial conduct of those dealers.

12.1.3. In Case C-170/02 P *Schlüsselvertrag J.S. Moser and Others* v *Commission* (judgment of 25 September 2003, not yet published in the ECR), the Court had to determine an appeal against the order of the Court of First Instance of 11 March 2002 in Case T-3/02 *Schlüsselverlag J.S. Moser and Others v Commission* [2002] ECR II-1473, dismissing as manifestly inadmissible an action for a declaration that, by unlawfully failing to adopt a decision on the compatibility of a concentration with the common market, the Commission had failed to act.

The Court began by stating that the Commission cannot refrain from taking account of complaints from undertakings which are not party to a concentration capable of having a Community dimension. Indeed, the implementation of such a transaction for the benefit of undertakings in competition with the complainants is likely to bring about an immediate change in the complainants' situation on the market or markets concerned. Nor, in the Court's view, could the Commission validly maintain that it was not required to take a decision on the very principle of its competence as supervising authority, when it is solely responsible, under Article 21 of Regulation No 4064/89 [42] on the control of concentrations between undertakings, for taking, subject to review by the Court of Justice, the decisions provided for by that regulation. If the Commission refused to adjudicate formally, at the request of third-party undertakings, on the question whether or not a concentration which has not been notified to it falls within the scope of the regulation, it would make it impossible for such undertakings to take advantage of the procedural guarantees which the Community legislation accords them. The Commission would, at the same time, deprive itself of a means of checking

[42] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1).

that undertakings which are parties to a concentration with a Community dimension comply properly with their obligation to notify. Moreover, the complainant undertakings could not challenge, by means of an action for annulment, a refusal by the Commission to act which, as was stated in the previous paragraph, is likely to do them harm. Finally, nothing justifies the Commission in avoiding its obligation to undertake, in the interests of sound administration, a thorough and impartial examination of the complaints which are made to it. The fact that the complainants do not have the right, under Regulation No 4064/89, to have their complaints investigated under conditions comparable to those for complaints within the scope of Regulation No 17,[43] does not mean that the Commission is not required to consider whether the matter is within its competence and to draw the necessary conclusions. It does not release the Commission from its obligation to give a reasoned response to a complaint that it has specifically failed to exercise its competence.

The Court further found that, in this case, on the date on which the complainants lodged their complaint with the Commission, nearly four months had elapsed since the national authorities' decision approving completion of the transaction. The requirements of legal certainty and of continuity of Community action, which underlie both the fifth paragraph of Article 230 EC and Articles 4, 6 and 10(1), (3) and (6) of Regulation No 4064/89 would be disregarded if the Commission could, pursuant to the second paragraph of Article 232 EC, be requested to make a determination, outside a reasonable period, on the compatibility with the common market of a concentration which was not notified to it. Undertakings could thus lead the Commission to call in question a decision taken by the competent national authorities with regard to a concentration, even after the exhaustion of the possible legal remedies against such decision in the legal system of the Member State concerned. The Court concluded that a period of four months from the time when the competent national authority took its decision on the concentration operation could not be regarded as reasonable. The applicants' action for failure to act was therefore manifestly inadmissible, and the Court dismissed their appeal.

12.1.4. In Case C-462/99 *Connect Austria Gesellschaft für Telekommunikation and Others* [2003] ECR I-5197, two questions were referred for a preliminary ruling in a dispute between an Austrian telecommunications undertaking and the national regulatory authority with responsibility for issuing authorisations for the provision of telecommunications services concerning the allocation to a public undertaking, which already held a licence to provide digital mobile telecommunications services over a frequency band, of additional frequencies in another band without imposing a separate fee.

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

The Court ruled first on a question concerning the interpretation of Article 5a(3) of Council Directive 90/387 [44] on the establishment of the internal market for telecommunications services through the implementation of open network provision. That provides that Member States are to ensure that suitable mechanisms exist at national level under which a party affected by a decision of the national regulatory authority responsible for issuing authorisations for the provision of telecommunications services has a right of appeal to a body independent of the parties involved. However, under a provision of Austrian constitutional law, appeals alleging the unlawfulness of decisions by the Telekom-Control-Kommission, the Austrian regulatory authority, are inadmissible because that provision does not expressly provide for them to be admissible.

The Court held that the requirement for national law to be interpreted in accordance with Directive 90/387 and the requirement that the rights of individuals should be effectively protected requires national courts to determine whether the relevant provisions of their national law provide individuals with a right of appeal against decisions of the national regulatory authority which satisfies the criteria laid down in Article 5a(3) of that directive. If national law cannot be applied so as to comply with the requirements of that article, a national court or tribunal which satisfies those requirements and which would be competent to hear appeals against decisions of the national regulatory authority if it were not prevented from doing so by a provision of national law explicitly excluding its competence is under an obligation to disapply that provision.

The Court then answered the question whether Articles 82 EC and 86(1) EC, Article 2(3) and (4) of Directive 96/2, [45] and Articles 9(2) and 11(2) of Directive 97/13 [46] had to be interpreted as precluding national legislation under which additional frequencies in a frequency band may be allocated to a public undertaking in a dominant position which already holds a licence to provide the same telecommunications services in another band without imposing a separate fee, whereas a new entrant to that market has had to pay a fee to obtain a licence to provide services in the first frequency band. The Court replied in the affirmative.

44 Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision (OJ 1990 L 192, p.1).

45 Commission Directive 96/2/EC of 16 January 1996 amending Directive 90/388/EEC with regard to mobile and personal communications (OJ 1996 L 20, p. 59).

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

The Court also considered, however, that those provisions did not preclude such legislation if the fee imposed on the public undertaking in a dominant position for its licence, including the subsequent allocation without additional payment of additional frequencies, appeared to be equivalent in economic terms to the fee imposed on the new entrant. Concerning, more particularly, the case of Article 2(3) and (4) of Directive 96/2, the Court held that those provisions do not preclude legislation allowing such a limited allocation of additional frequencies after at least three years have elapsed since the grant of the DCS 1800 licence or before the expiry of that period if the capacity of the public undertaking holding a GSM 900 licence to accept new customers has been exhausted despite the use of all commercially viable technical possibilities.

12.2. On the matter of *State aid*, four cases are worthy of note.

12.2.1. The first judgment to note is that in Joined Cases C-83/01 P, C-93/01 P and C-94/01 P *Chronopost, La Poste and French Republic* [2003] ECR I-7018, on an action brought by a trade association of companies offering express courier services against a Commission decision declaring that the logistical and commercial assistance given by the French Post Office (La Poste) to a private company to which it had entrusted the management of its express courier service did not constitute State aid. In its judgment of 14 December 2000 in Case T-613/97 *Ufex and Others* [2000] ECR II-4055, the Court of First Instance annulled that decision on the ground that the Commission should have examined whether those full costs took account of the factors which an undertaking acting under normal market conditions should have taken into consideration when fixing the remuneration for the services provided.

Hearing the case on appeal, the Court considered at the outset that that assessment by the Court of First Instance failed to take account of the fact that an undertaking such as La Poste was in a situation very different from that of a private undertaking acting under normal market conditions. La Poste had had to acquire substantial infrastructures and resources to enable it to carry out its task of providing a service of general economic interest within the meaning of Article 86 EC, even in sparsely populated areas where the tariffs did not cover the cost of providing the service in question. The creation and maintenance of the basic postal network were not in line with a purely commercial approach. The Court then held that the provision of logistical and commercial assistance was inseparably linked to that network, since it consisted precisely in making available that network which had no equivalent on the market.

The Court therefore concluded that, in the absence of any possibility of comparing the situation of La Poste with that of a private group of undertakings not operating in a reserved sector, “normal market conditions”, which are necessarily hypothetical, allowing it to be determined whether the provision by a public undertaking of logistical and commercial assistance to its private-law subsidiary was capable of constituting State aid, had to be assessed by reference to the objective and verifiable elements which were available. The costs borne by La Poste in providing such assistance could

constitute such objective and verifiable elements. On that basis, there could be no question of State aid to the subsidiary if, first, it were established that the price charged properly covered all the additional, variable costs incurred in providing the logistical and commercial assistance, an appropriate contribution to the fixed costs arising from use of the postal network and an adequate return on the capital investment in so far as it was used for the subsidiary's competitive activity and if, secondly, there was nothing to suggest that those factors had been underestimated or fixed in an arbitrary fashion.

12.2.2. The judgment in Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7810, concerns the question whether State aid, within the meaning of the EC Treaty, covers public subsidies to allow the operation of regular urban, suburban or regional transport services. Examining first whether the condition that trade between Member States had to be affected was met, the Court emphasised that the latter did not depend on the local or regional character of the transport services supplied or on the scale of the field of activity concerned. Referring to its case-law describing State aid as an advantage granted to a beneficiary undertaking which the latter would not have obtained under normal market conditions, the Court emphasised that public subsidies such as those referred to above are not caught by Article 87(1) EC where such subsidies are to be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations. The Court defined four conditions which had to be met for such compensation to be regarded as being present. First, the recipient undertaking must be actually required to discharge public service obligations and those obligations must have been clearly defined. Second, the parameters on the basis of which the compensation is calculated must have been established beforehand in an objective and transparent manner. Third, the compensation must not 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. Fourth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed must have been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet 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.

12.2.3. In Joined Cases C-261/01 and C-262/01 *Van Calster and Cleeren and Openbare Slachthuis* (judgment of 21 October 2003, not yet published in the ECR) the Court analysed a number of questions referred for a preliminary ruling in relation to an aid measure which provided for a scheme of charges that formed an integral part of that measure and was intended specifically and exclusively to finance it. It first pointed out that a State aid measure in the narrow sense might not substantially affect trade between Member States and might thus be acknowledged as permissible, whilst the disturbance which it created was increased by a method of financing it which would render the scheme as a whole incompatible with a single market and the common

interest. The Court further considered that where a charge specifically intended to finance aid proved to be contrary to other provisions of the Treaty, for example Articles 23 EC and 25 EC or Article 90 EC, the Commission could not declare the aid scheme of which the charge formed part to be compatible with the common market. Consequently, the method by which an aid is financed could render the entire aid scheme incompatible with the common market. Therefore, examination of an aid measure could not be considered separately from the effects of its method of financing, and the Member State was therefore required in such a case to notify not only the planned aid in the narrow sense, but also the method of financing it.

It follows that, where an aid measure of which the method of financing is an integral part has been implemented in breach of the obligation to notify, national courts must draw all the consequences under their national law concerning both the validity of the measures implementing the aid concerned and the recovery of the financial support granted and therefore, in principle, order reimbursement of charges or contributions levied specifically for the purpose of financing that aid.

12.2.4. Joined Cases C-328/99 and C-399/00 *Italian Republic and SIM 2 Multimedia* v *Commission* [2003] ECR I-4035 concerned, first, the position of a consumer electronics company called Seleco, whose capital was held, inter alia, by Friula, a finance company entirely controlled by the region of Friuli Venezia Giulia, and by Ristruttorazione Elettronica (REL), a company controlled by the Italian Ministry of Industry, Commerce and Craft Trades, and, secondly, the position of the company Multimedia created by Seleco.

The first problem examined by the Court was whether interventions by Friula and REL in the recapitalisation operations of Seleco should be classified as State aid.

Considering first the question whether Friula's operations had been carried out using State resources, the Court held that the financial resources of a private-law company such as Friulia, 87% of which was held by a public authority such as the Region of Friuli Venezia Giulia and which acted under the control of that authority, could be regarded as State resources within the meaning of Article 87(1) EC. The fact that Friulia participated using its own funds was irrelevant in that regard, because for funds to be categorised as State resources it was sufficient that they constantly remain under public control and therefore available to the competent national authorities.

Recalling that, pursuant to the principle that the public and private sectors are to be treated equally, capital placed directly or indirectly at the disposal of an undertaking by the State in circumstances which correspond to normal market conditions cannot be regarded as State aid, the Court considered that it had to be determined whether, in similar circumstances, a private investor of a dimension comparable to that of the bodies managing the public sector could have been prevailed upon to make capital contributions of the same size, having regard in particular to the information available

and foreseeable developments at the date of those contributions. Since that involved a complex economic appraisal, the Court had to limit its review to verifying whether the Commission complied with the relevant rules governing procedure and the statement of reasons, whether the facts on which the contested finding was based were accurately stated and whether there had been any manifest error of assessment or a misuse of powers. In this case, it concluded that the Commission was right to hold that the interventions by REL and Friula in the recapitalisation operations of Seleco did indeed constitute State aid.

The second problem which drew the Court's attention was that of recovering State aid from Multimedia, the question arising in this case being whether that company should also be considered as having been a beneficiary of the aid. Seleco had effectively created that company, concentrated its most profitable activities in it, and become its sole owner. It had then sold two thirds of the shares it held in Multimedia, the final third having been sold to a private company at a public sale by court order in the context of Seleco's liquidation.

The Court held first that the possibility of a company in economic difficulties taking measures to rehabilitate the business could not be ruled out a priori because of requirements relating to recovery of the aid which was incompatible with the common market. However, if it were permissible, without any condition, for an undertaking experiencing difficulties and on the point of being declared bankrupt to create, during the formal inquiry into the aid granted it, a subsidiary to which it then transfers its most profitable assets before the conclusion of the inquiry, that would amount to accepting that any company may remove such assets from the parent undertaking when aid is recovered, which would risk depriving the recovery of that aid of its effect in whole or in part. In order to prevent the effectiveness of the decision to recover the aid from being frustrated and the market from continuing to be distorted, the Commission might be compelled to require that the recovery not be restricted to the original firm but be extended to the firm which continued the activity of the original firm, using the transferred means of production, in cases where certain elements of the transfer pointed to economic continuity between the two firms.

In this case, however, the Court considered that the statement of reasons on which the contested decision was based was inadequate for the purposes of Article 253 EC, in particular in relation to the alleged irrelevance of the fact that the shares in Multimedia were bought at a price which seemed to be the market price, although that point was also required to be taken into account in the present case. The Commission had assumed that the price of the transfer of the multimedia branch was influenced and dictated by the risk for the parties that they might have to face a proceeding under Article 88(2) EC and eventually repay aid held to be unlawful, but it did not adduce any concrete evidence from which it might be inferred that the sworn expert took account of such a risk in his estimate of the value of the multimedia branch. Similarly, in reply to the Commission's contention that, whatever the price of the sale, it was not relevant in the present case, since it concerned an operation relating to the shares, the Court held

that, whilst it was correct that the sale of shares in a company which is the beneficiary of unlawful aid by a shareholder to a third party does not affect the requirement for recovery, the situation at issue here was different from that case. This case involved the sale of Multimedia shares by Seleco, which created that company, and whose assets benefited from the sales price of the shares. Therefore, it could not be excluded that Seleco retained the benefit of the aid received from the sale of its shares at market price. The Court concluded by annulling the Commission's decision on that point.

13. In the area of *trade protection measures*, two judgments are worthy of note (13.1 and 13.2).

13.1. In Case C-76/01 P *Eurocoton* (judgment of 30 September 2003, not yet published in the ECR), the Court heard an appeal against the decision of the Court of First Instance in Case T-213/97 *Eurocoton and Others* v *Council* [2000] ECR II-3727, dismissing an action for the annulment of the "decision" of the Council of the European Union not to adopt a Commission proposal for a regulation imposing a definitive anti-dumping duty on imports of cotton fabrics from certain non-member countries as inadmissible.

Considering first the question whether or not the measure concerned was open to challenge, the Court held that failure to adopt a proposal submitted by the Commission for a regulation imposing a definitive anti-dumping duty, together with the expiry of the 15-month period prescribed in Article 6(9) of the basic anti-dumping regulation, Regulation No 384/96,[47] which definitively fixed the Council's position in the final phase of the anti-dumping proceeding, bore all the characteristics of a reviewable act within the meaning of Article 230 EC, in that it produced binding legal effects capable of affecting the interests of undertakings which had brought a complaint, at the origin of the anti-dumping inquiry, in the name of Community industry. It therefore annulled the judgment of the Court of First Instance.

Considering next whether the Council, which had not indicated why the proposal for a regulation had been rejected, was in breach of its obligation to state reasons, the Court held that, from the time when under Article 9(4) of the basic antidumping regulation, Regulation No 384/96, the Council imposed a definitive anti-dumping regulation in circumstances where the facts as finally established show that there was dumping and injury caused thereby, and the Community interest called for intervention in accordance with Article 21 of that regulation, compliance with the obligation to state reasons requires the act in question to indicate the absence of dumping or corresponding injury or that the Community interest does not call for intervention on its part. The Court therefore annulled the Council's decision.

47 Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1).

13.2. In Case C-76/00 P *Petrotub and Republica* v *Council* [2003] ECR I-79, the Court heard an appeal seeking the annulment of the judgment of the Court of First Instance in Joined Cases T-33/98 and T-34/98 *Petrotub and Republica v Council* [1999] ECR II-3837 dismissing the application by two companies established in Romania for the annulment of Council Regulation (EC) No 2320/97 imposing definitive anti-dumping duties on imports of certain seamless pipes and tubes of iron or non-alloy steel originating in a number of countries including Romania. [48]

Petrotub first argued that the Court of First Instance had erred in law by holding that the obligation to state reasons was complied with even though the contested regulation contained no explanation as to why, in order to establish the dumping margin, the Council discarded the second symmetrical method in favour of the asymmetrical method.

The Court upheld that argument, holding, first, that it was clear from the actual wording of Article 2(11) of the basic anti-dumping regulation, Regulation No 384/96, [49] that the existence of a dumping margin is normally to be established using one of the two symmetrical methods and that recourse to the asymmetrical method, by way of an exception to that rule, may be had only on the twofold condition that, on the one hand, the pattern of export prices differs significantly among different purchasers, regions or time periods and, on the other hand, the symmetrical methods do not reflect the full degree of dumping being practised. The Court further took the view that it was necessary to take account of Article 2.4.2 of the 1994 Anti-dumping Code [50] in so far as that provision states that an explanation must be provided as to why significant differences in the pattern of export prices as among different purchasers, regions or time periods cannot be taken into account appropriately by the use of the symmetrical methods. The Community adopted the basic regulation in order to satisfy its obligations arising from the 1994 Anti-dumping Code and, by means of Article 2(11) of the basic anti-dumping regulation, Regulation No 384/96, it intended to implement the particular obligations laid down by Article 2.4.2 of that code. The fact that it was not expressly specified in Article 2(11) of the basic regulation that the explanation required by Article 2.4.2 of the 1994 Anti-dumping Code had to be given by the Community

48 Council Regulation (EC) No 2320/97 of 17 November 1997 imposing definitive anti-dumping duties on imports of certain seamless pipes and tubes of iron or non-alloy steel originating in Hungary, Poland, Russia, the Czech Republic, Romania and the Slovak Republic, repealing Regulation (EEC) No 1189/93 and terminating the proceeding in respect of such imports originating in the Republic of Croatia (OJ 1997 L 322, p. 1).

49 Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1).

50 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (OJ 1994 L 336, p. 103).

institution in the event of recourse to the asymmetrical method may be explained by the existence of Article 253 EC. Once Article 2.4.2 is transposed by the Community, the specific requirement to state reasons laid down by that provision can be considered to be subsumed under the general requirement imposed by the Treaty for acts adopted by the institutions to state the reasons on which they are based.

Concerning the appeal by Republica, the Court allowed the appeal on the ground that the Court of First Instance had erred in law by holding that the Council had given, in the contested regulation, an adequate statement of the reasons for its refusal to exclude sales made using compensation from the determination of normal value.

Determination of the normal value constituted one of the essential steps required to prove the existence of any dumping. It followed from the first and third subparagraphs of Article 2(1) of the basic anti-dumping regulation that, in principle, prices between parties which have a compensatory arrangement with each other may not be taken into account in determining normal value, and that there is no exception to this, unless it is determined that those prices are unaffected by the relationship. By merely stating, in the contested regulation, that it had been "found that sales made using compensation were indeed made in the ordinary course of trade", the Council did not satisfy the requirements of the obligation to state reasons. Such a peremptory statement, which amounted to no more than a reference to the provisions of Community law, contained no explanatory element of such a kind as to enlighten the parties concerned and the Community judicature as to the reasons which had led the Council to consider that the prices charged in connection with those sales made using compensation had not been affected by the relationship (paragraph 87) and did not enable the parties concerned to know whether those prices were, by way of exception, correctly taken into consideration for the purpose of calculating normal value, or whether that latter circumstance might constitute a flaw affecting the legality of the contested regulation (paragraph 88).

14. In the field of *trade mark law*, the Court gave a number of judgments on the concept of genuine use of a mark (14.1), the burden of proof of the exhaustion of the right conferred by a mark (14.2), the criteria for assessing the distinctiveness of three-dimensional marks (14.3), the possibility of using a colour as such as a mark (14.4), the concept of a mark consisting exclusively of signs or indications which may serve to designate the characteristics of goods (14.5), the extent of the protection conferred by a mark with a reputation within the meaning of Article 5(2) of Directive 89/104 [51] (14.6), and, finally, the interpretation of Regulation 40/94 [52] on the Community trade mark

[51] 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).

[52] Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1).

concerning the use of the second language before the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) (14.7).

14.1. In its judgment in Case C-40/01 *Ansul* [2003] ECR I-2439 the Court interpreted the concept of "genuine use" of a trade mark in Articles 12(1) and 10(2) of Directive 89/104. It observed to begin with, citing Joined Cases C-414/99 to C-416/99 *Zino Davidoff and Levi Strauss* [2001] ECR I-8691, that it was the Community legislature's intention that the maintenance of rights in a trade mark should be subject to the same condition regarding genuine use in all the Member States, so that the level of protection trade marks enjoy does not vary according to the legal system concerned (paragraph 29), and that that concept must be given a uniform interpretation (paragraph 31). Genuine use is actual use of the mark (paragraph 31) which is not merely token, serving solely to preserve the rights conferred by the mark (paragraph 36). "Use of the mark must therefore relate to goods or services already marketed or about to be marketed and for which preparations by the undertaking to secure customers are under way, particularly in the form of advertising campaigns … Finally, when assessing whether there has been genuine use of the trade mark, regard must be had to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark is real, in particular whether such use is viewed as warranted in the economic sector concerned", giving consideration if appropriate to the nature of the goods or service at issue, the characteristics of the market concerned and the scale and frequency of use of the mark. Use of the mark need not therefore always be quantitatively significant for it to be deemed genuine, and under certain conditions there may also be genuine use of the mark for goods for which it was registered that were sold in the past and are not newly available on the market. That applies inter alia where the proprietor makes use of the mark to sell component parts that are integral to the make-up or structure of the goods, or for goods or services directly connected with the goods previously sold and intended to meet the needs of customers of those goods.

14.2. Case C-244/00 *Van Doren + Q* [2003] ECR I-3051 examined the compatibility with Directive 89/104 and Articles 28 EC and 30 EC of a national provision imposing on a third party who is proceeded against for infringement of the exclusive right to the mark the burden of proving exhaustion of the right conferred by the mark. The Court began by noting that the place where the goods were first marketed was not identified in the case before it, unlike in *Zino Davidoff and Levi Strauss*, in which it had held that the burden of proving the proprietor's consent to the goods being marketed in the EEA, entailing exhaustion of the right conferred by the mark, is on the trader who relies on that consent. The Court pointed out that Articles 5 to 7 of the directive embody a complete harmonisation of the rules relating to the rights conferred by a trade mark. It is apparent from those provisions that the extinction of the exclusive right results either from the consent of the proprietor to goods being placed on the market within the EEA or from their being placed on the market within the EEA by the proprietor himself. It follows that a national rule that the exhaustion of the trade mark right constitutes a plea in defence for a third party against whom the trade mark proprietor brings an action, so

that the conditions for such exhaustion must, as a rule, be proved by the third party who relies on it (paragraph 35), is consistent with those provisions. However, the requirements deriving from Articles 28 EC and 30 EC may mean that that rule needs to be qualified, in particular where it allows the proprietor of the trade mark to partition national markets, as is the case where – as in the main proceedings – the trade mark proprietor markets his products in the EEA using an exclusive distribution system. Where the third party against whom proceedings have been brought succeeds in establishing that there is such a risk if he bears the burden of proof, it is for the proprietor of the trade mark to establish that the products were initially placed on the market outside the EEA by him or with his consent. If such evidence is adduced, it is then for the third party to prove the consent of the proprietor to subsequent marketing of the products in the EEA.

14.3. The judgment in Joined Cases C-53/01 to C-55/01 *Linde and Others* [2003] ECR I-3161 related to the criteria for assessing the distinctiveness of three-dimensional trade marks. The Court noted that a three-dimensional sign may constitute a mark (Case C-299/99 *Philips* [2002] ECR I-5475) if it is capable of being represented graphically and is distinctive. Also according to *Phillips*, the criteria for assessing the distinctiveness of three-dimensional marks are no different from those to be applied to other categories of trade mark. However, under Article 3(1)(e) of Directive 89/104,[53] signs which consist exclusively of the shape which results from the nature of the goods themselves will not be registered. Thus, while neither the scheme of the directive nor the wording of Article 3(1)(b) indicates that stricter criteria than those used for other categories of trade mark ought to be applied when assessing the distinctiveness of a three-dimensional shape of product mark, it is nevertheless true that it may in practice be more difficult to establish distinctiveness in relation to such a mark than to a word or figurative trade mark. That difficulty, which may explain why such a mark is refused registration, does not mean that it cannot acquire distinctive character following the use that has been made of it and thus be registered as a trade mark under Article 3(3) of the directive.

In answer to the question whether Article 3(1)(c) of the directive [54] also has significance for three-dimensional marks consisting of the shape of the product, the Court observed that each of the grounds for refusal listed in that provision is independent of the others and calls for separate examination, so that it also has significance for three-dimensional shape of product marks. As regards, finally, the question whether the general interest of the trade in the preservation of the availability of the shape of the

53 See note 51.

54 Under that provision, trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, or the time of production of the goods or of rendering of the service, or other characteristics of the goods shall not be registered, or if registered shall be liable to be declared invalid.

product should be taken into account if Article 3(1)(e) alone applies to three-dimensional marks, the Court recalled that each of the grounds for refusing registration is to be interpreted in the light of the underlying general interest. The rationale of the grounds for refusing registration laid down in that provision is to prevent trade mark protection from granting its proprietor a monopoly on technical solutions or functional characteristics of a product which a user is likely to seek in the products of competitors. Similarly, Article 3(1)(c) of the directive pursues an aim which is in the public interest, namely preventing such signs or indications from being reserved to one undertaking alone because they have been registered as trade marks. It follows that, when examining the ground for refusing registration in Article 3(1)(c) of the directive in a concrete case, regard must be had to the public interest underlying that provision, which is that all three-dimensional shape of product trade marks which consist exclusively of signs or indications which may serve to designate the characteristics of the goods or service within the meaning of that provision should be freely available to all and, subject always to Article 3(3) of the directive, cannot be registered.

14.4. The judgment in Case C-104/01 *Libertel* [2003] ECR I-3793 examined whether and in what circumstances a colour may constitute a mark within the meaning of Articles 2 and 3 of Directive 89/104. The Court began by finding that a colour is capable of constituting a mark if it is a sign which is capable of graphic representation and of distinguishing the goods or services of one undertaking from those of other undertakings.

In view of the limited number of colours that the relevant public, composed of the average consumer, reasonably well informed and reasonably observant and circumspect, is capable of distinguishing, and of the aim in the public interest pursued by Article 3(1)(c) of Directive 89/104, which requires that the signs and indications descriptive of the categories of goods or services for which registration is sought may be freely used by all (Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee* [1999] ECR I-2779, and *Linde and Others*), registration as trade marks of colours per se would have the effect of creating an extensive monopoly which would be incompatible with a system of undistorted competition, in particular because it could have the effect of creating an unjustified competitive advantage for a single trader (paragraph 54). There is therefore a public interest in not unduly restricting the availability of colours for the other traders who offer for sale goods or services of the same type as those in respect of which registration is sought (paragraph 55), and that interest is relevant in assessing the potential distinctiveness of a given colour as a trade mark.

As to the conditions under which a colour may be regarded as distinctive and so eligible for registration in accordance with Article 3(1)(b) and Article 3(3) of the directive, the Court first recalled the essential function of a trade mark, namely to guarantee the identity of the origin of the marked goods or service to the consumer by enabling him, without any possibility of confusion, to distinguish them from others which have another origin (Case C-39/97 *Canon* [1998] ECR I-5507 and Case C-517/99 *Merz*

& Krell [2001] ECR I-6959). Such distinctiveness without any prior use is inconceivable save in exceptional circumstances, and particularly where the number of goods or services for which the mark is claimed is very restricted and the relevant market very specific. However, that distinctive character may be acquired following the use made of the colour, in particular after the normal process of familiarising the relevant public has taken place. The Court drew two conclusions from all those considerations. First, a colour *per se*, not spatially delimited, may, in respect of certain goods and services, have a distinctive character within the meaning of Article 3(1)(b) and Article 3(3) of the directive, provided that, inter alia, it may be represented graphically in a way that is clear, precise, self-contained, easily accessible, intelligible, durable and objective. The latter condition cannot be satisfied merely by reproducing on paper the colour in question, but may be satisfied by designating that colour using an internationally recognised identification code. Second, a colour may be found to possess distinctive character within the meaning of Article 3(1)(b) and Article 3(3) of the directive, provided that, as regards the perception of the relevant public, the mark is capable of identifying the product or service for which registration is sought as originating from a particular undertaking and distinguishing that product or service from those of other undertakings.

In the light of those findings, the Court also found that the number of goods or services for which registration of a colour as a trade mark is sought is relevant to assessing both the distinctive character of the colour and whether registration is consistent with the general interest described above.

Finally, as regards the question whether the competent registration authority has to carry out an examination in the abstract or by reference to the actual situation in order to assess distinctive character, the Court confirmed that the examination must refer to the actual situation and take account of all the relevant circumstances of the case, including any use which has been made of the sign in respect of which trade mark registration is sought.

14.5. In Case C-191/01 P *Wrigley* (judgment of 23 October 2003, not yet published in the ECR) the Court ruled, on appeal, on the concept of marks which consist exclusively of signs or indications which may serve to designate the characteristics of goods within the meaning of Article 7(1)(c) of Regulation No 40/94,[55] which lays down that registration is to be refused in such a case. In the Court's view, by prohibiting the registration as Community trade marks of such signs and indications, that provision pursues an aim which is in the public interest, namely that descriptive signs or indications relating to the characteristics of goods or services in respect of which registration is sought may be freely used by all. That provision accordingly prevents such signs and indications from being reserved to one undertaking alone because they have been registered as trade marks (*Windsurfing Chiemsee* and *Linde and Others*).

[55] See note 52.

For OHIM to refuse on the basis of that provision to register a trade mark, it suffices that the signs and indications can be used to describe goods or services. A word sign must therefore be refused registration if at least one of its possible meanings designates a characteristic of the goods or services concerned. To consider, as the Court of First Instance did, that the compound "Doublemint" could not be refused registration, because it could not be "characterised as exclusively descriptive", amounted to considering that the provision in question must be interpreted as precluding the registration of trade marks which are "exclusively descriptive" of the goods or services in respect of which registration is sought, or of their characteristics. The Court of First Instance had therefore applied a test which is not laid down by Regulation No 40/94,[56] without ascertaining whether the word at issue could be used by other operators to designate a characteristic of their goods and services, and thereby erred as to the scope of that provision. The Court concluded that OHIM's submission that the contested judgment was vitiated by an error of law was well founded, and set aside the judgment.

14.6. The judgment in Case C-408/01 *Adidas* (judgment of 23 October 2003, not yet published in the ECR), which was given on a reference for a preliminary ruling, ruled on the extent of the protection conferred by a trade mark with a reputation within the meaning of Article 5(2) of Directive 89/104.[57] In answer to the first question, whether transposition of that provision entitles Member States to provide protection for the mark with a reputation in cases where the later mark or sign, which is identical with or similar to it, is intended to be used or is used in relation to goods or services identical with or similar to those covered by the mark, the Court, recalling its judgment in Case C-292/00 *Davidoff* [2003] ECR I-389, stated that, where the sign is used for identical or similar goods or services, a mark with a reputation must enjoy protection which is at least as extensive as where a sign is used for non-similar goods or services. The Member State must therefore grant protection which is at least as extensive for identical or similar goods or services as for non-similar goods or services.

The Court then addressed the question whether the protection conferred by that provision is conditional on a finding of a degree of similarity between the mark with a reputation and the sign such that there exists a likelihood of confusion between them on the part of the relevant section of the public. It recalled that Article 5(2) of the directive establishes, for the benefit of trade marks with a reputation, a form of protection whose implementation does not require the existence of such a likelihood. Article 5(2) applies to situations in which the specific condition of the protection consists of a use of the sign in question without due cause which takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark (Case C-425/98 *Marca Mode* [2000] ECR I-4861). The condition of similarity

56 Ibid.

57 See note 51.

between the mark and the sign requires the existence of elements of visual, aural or conceptual similarity, whereas the infringements referred to in the provision in question, where they occur, are the consequence of a certain degree of similarity between the mark and the sign, by virtue of which the relevant public makes a connection between the sign and the mark, that is to say, establishes a link between them even though it does not confuse them (see, to that effect, Case C-375/97 *General Motors* [1999] ECR I-5421).

As regards, finally, the effect on the question concerning the similarity between the mark with a reputation and the sign of a finding of fact by the national court to the effect that the sign in question is viewed by the public purely as an embellishment, the Court considered that in such circumstances the public, by definition, does not establish any link with a registered mark, with the result that one of the conditions of the protection conferred by Article 5(2) of the directive is then not satisfied.

14.7. Finally, Case C-361/01P *Kik* (judgment of 9 September 2003, not yet published in the ECR) concerned an application for registration of a trade mark filed in Dutch and also indicating Dutch as the second language, Dutch not being one of the five languages of OHIM.

The Court, on appeal, first stated that the Court of First Instance had been right to conclude that Regulation No 40/94 on the Community trade mark [58] cannot be taken, in itself, as in any sense implying differentiated treatment as regards language, given that it in fact guarantees use of the language of the application filed as the language of proceedings. The Court reached that conclusion by finding that, according to Article 115(4) of Regulation No 40/94, the language of proceedings before OHIM is to be the language used for filing the application for a Community trade mark, although the second language chosen by the applicant may be used by OHIM to send him written communications. It follows from that provision that the option of using a second language for written communications is an exception to the principle that the language of proceedings be used, and that the term "written communications" must therefore be interpreted strictly. Since the proceedings comprise all such acts as must be carried out in processing an application, it follows that the term "procedural documents" covers any document that is required or prescribed by the Community legislation for the purposes of processing an application for a Community trade mark or necessary for such processing, be they notifications, requests for correction, clarification or other documents. All such documents must therefore be drawn up by OHIM in the language used for filing the application. In contrast to procedural documents, "written communications", as referred to in the second sentence of Article 115(4) of the regulation, are any communications which, from their content, cannot be regarded as

[58] See note 52.

amounting to procedural documents, such as letters under cover of which OHIM sends procedural documents, or by which it communicates information to applicants.

The Court, going on to analyse the obligation imposed on an applicant for registration of a Community trade mark by Article 115(3) to "indicate a second language which shall be a language of [OHIM] the use of which he accepts as a possible language of proceedings for opposition, revocation or invalidity proceedings", decided that it does not infringe the principle of non-discrimination. The language regime of a body such as OHIM is the result of a difficult process which seeks to achieve the necessary balance between the interests of economic operators and the public interest in terms of the cost of proceedings, but also between the interests of applicants for Community trade marks and those of other economic operators in regard to access to translations of documents which confer rights, or proceedings involving more than one economic operator, such as the opposition, revocation and invalidity proceedings referred to in Regulation No 40/94. Therefore, in determining the official languages of the Community which may be used as languages of proceedings in opposition, revocation and invalidity proceedings, where the parties cannot agree on which language to use, the Council was pursuing the legitimate aim of seeking an appropriate linguistic solution to the difficulties arising from such a failure to agree. Similarly, even if the Council did treat official languages of the Community differently, its choice to limit the languages to those which are most widely known in the European Community is appropriate and proportionate.

15. In the field of *harmonisation of laws*, there were cases concerning the procedure for the maintenance of national measures derogating from a harmonising directive (15.1), misleading advertising (15.2), the protection of personal data (15.3), two cases relating to novel foods and novel food ingredients (15.4), one case concerning authorisation to market medicinal products (15.5), one on national provisions more stringent than those provided for by Directive 97/69 [59] (15.6) and, finally, two cases on the interpretation of Directive 90/435 [60] (15.7.1 and 15.7.2).

15.1. In Case C-3/00 *Denmark* v *Commission* [2003] ECR I-2643 the Court had to rule for the first time on an action brought by a Member State against a refusal by the Commission to approve the maintenance of national measures derogating from a directive adopted under Article 95 EC. In this case, Denmark sought annulment of a Commission decision refusing to approve the national provisions notified concerning

[59] Commission Directive 97/69/EC of 5 December 1997 adapting to technical progress for the 23rd time Council Directive 67/548/EEC on the approximation of the laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances (OJ 1997 L 343, p. 19).

[60] Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 1990 L 225, p 6).

the use of sulphites, nitrites and nitrates in foodstuffs, by derogation from Directive 95/2.[61]

The Court recalled that, under Article 95 EC, the maintenance of already existing national provisions that derogate from a measure for the harmonisation of laws must be justified on grounds of the major needs referred to in Article 30 EC or relating to the protection of the environment or the working environment, whereas the introduction of new national provisions must be based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure. In this case, the Court rejected a plea by the Danish Government alleging a misinterpretation by the Commission of Article 95(4) EC, by finding that the contested decision had considered the possible existence of a situation specific to the Kingdom of Denmark merely as a useful element in assessing what decision to adopt, and had not treated such a situation as a condition of approval for already existing derogating national provisions. The Court none the less considered that "[a] Member State may base an application to maintain its already existing national provisions on an assessment of the risk to public health different from that accepted by the Community legislature when it adopted the harmonisation measure from which the national provisions derogate. To that end, it falls to the applicant Member State to prove that those national provisions ensure a level of health protection which is higher than the Community harmonisation measure and that they do not go beyond what is necessary to attain that objective" (paragraph 64). In this respect, the Court held that "[i]n the light of the uncertainty inherent in assessing the public health risks posed by, inter alia, the use of food additives, divergent assessments of those risks can legitimately be made, without necessarily being based on new or different scientific evidence" (paragraph 63).

15.2. In Case C-44/01 *Pippig Augenoptik* [2003] ECR I-3095 four questions were referred to the Court for a preliminary ruling on the interpretation of Directive 84/450 as amended by Directive 97/55.[62] In the main proceedings, an undertaking was asking the national court to order a competitor to desist from comparative advertising.

The Court noted, first, that in order for there to be comparative advertising, it is sufficient for there to be a statement referring even by implication to a competitor or to

61 European Parliament and Council Directive No 95/2/EC of 20 February 1995 on food additives other than colours and sweeteners (OJ L 61, p. 1).

62 Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (OJ 1984 L 250, p. 17), as amended by Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising (OJ 1997 L 290, p. 18).

the goods or services which he offers (Case C-112/99 *Toshiba Europe* [2001] ECR I-7945, paragraphs 30 and 31). In the context of the directive, it is not therefore necessary to establish distinctions in the legislation between the various elements of comparison, that is to say the statements concerning the advertiser's offer, the statements concerning the competitor's offer, and the relationship between those two offers. In this respect, the Court pointed out that the directive, which exhaustively harmonised the conditions under which comparative advertising is lawful in the Member States, precludes the application to comparative advertising of stricter national provisions on protection against misleading advertising, as far as the form and content of the comparison is concerned.

As regards compliance with the conditions under which comparative advertising is lawful, the Court held that "whereas the advertiser is in principle free to state or not to state the brand name of rival products in comparative advertising, it is for the national court to verify whether, in particular circumstances, characterised by the importance of the brand in the buyer's choice and by a major difference between the respective brand names of the compared products in terms of how well known they are, omission of the better-known brand name is capable of being misleading" (paragraph 56). Next, the Court stated that Article 3a(1) of the directive does not preclude compared products from being bought through different distribution channels. Moreover, the Court added that, where the conditions for the lawfulness of comparative advertising are complied with, that provision does not preclude an advertiser from carrying out a test purchase with a competitor before his own offer has even commenced, nor does it prevent comparative advertising, in addition to citing the competitor's name, from reproducing its logo and a picture of its shop front. Finally, the Court said that a price comparison does not entail the discrediting of a competitor, either on the grounds that the difference in price between the products compared is greater than the average price difference or by reason of the number of comparisons made.

15.3. In Case C-101/01 *Lindqvist* (judgment of 6 November 2003, not yet published in the ECR) the Court gave a preliminary ruling on the interpretation of Directive 95/46.[63] The main proceedings concerned criminal proceedings against a Swedish national, who was accused of unlawfully publishing on her internet site personal data on a number of people working with her on a voluntary basis in a parish of the Swedish Protestant Church.

As regards the application of the directive to the case, the Court held that the act of referring, on an internet page, to various persons and identifying them by name or by other means constitutes "the processing of personal data wholly or partly by automatic means" within the meaning of Directive 95/46. The Court added that such processing of

63 See note 4.

personal data for the purpose of charitable or religious activities does not fall within any of the exceptions to the application of the directive set out in Article 3.

The Court then turned to the concept of "transfer [of data] to a third country" within the meaning of Article 25 of the directive, and noted that Chapter IV of the directive contains no provision concerning use of the internet. Consequently, given the state of development of the internet at the time when the directive was drawn up, one cannot presume that the Community legislature intended the expression "transfer [of data] to a third country" to cover prospectively the case where an individual in a Member State "loads personal data onto an internet page which is stored with his hosting provider which is established in that State or in another Member State, thereby making those data accessible to anyone who connects to the internet, including people in a third country" (paragraph 71).

As regards the compatibility of the directive with the general principle of freedom of expression or with other rights and freedoms corresponding to the right enshrined in Article 10 of the ECHR, the Court stated that, while the directive does not in itself bring about a restriction of that principle, it is for the national authorities and courts responsible for applying the national legislation implementing Directive 95/46 to ensure a fair balance between the rights and interests in question, including the fundamental rights protected by the Community legal order.

In conclusion, the Court held that measures taken by the Member States to ensure the protection of personal data must be consistent both with the provisions of Directive 95/46 and with its objective of maintaining a balance between the free movement of personal data and the protection of private life. However, nothing prevents a Member State from extending the scope of the national legislation implementing the provisions of Directive 95/46 to areas not included in the scope thereof provided that no other provision of Community law precludes it.

It may be noted, next, that in *Österreichischer Rundfunk and Others* (see point 4.1) the Court recalled that Directive 95/46 [64] had been adopted on the basis of Article 95 EC, and consequently that its applicability "cannot depend on whether the specific situations at issue in the main proceedings have a sufficient link with the exercise of the fundamental freedoms guaranteed by the Treaty, in particular, in those cases, the freedom of movement of workers. A contrary interpretation could make the limits of the field of application of the directive particularly unsure and uncertain, which would be contrary to its essential objective of approximating the laws, regulations and administrative provisions of the Member States in order to eliminate obstacles to the functioning of the internal market deriving precisely from disparities between national legislations" (paragraph 42).

64 Ibid.

15.4. Case C-236/01 *Monsanto Agricoltura Italia and Others* (judgment of 9 September 2003, not yet published in the ECR) gave the Court an occasion to give a preliminary ruling on the interpretation and validity of various provisions of Regulation No 258/97 concerning novel foods.[65] The main proceedings concerned an action brought by undertakings involved in the development of genetically modified food plants for use in agriculture against a preventive measure adopted by the Italian authorities suspending the trade in and use of certain transgenic products in Italy. The Italian authorities considered, inter alia, that the foods the applicants wished to market, for which they had made use of the simplified procedure under Article 5 of Regulation No 258/97, were not "substantially equivalent" to existing foods, so that the use of that procedure was not appropriate.

The Court, first, interpreted the concept of substantial equivalence, holding that the concept does not preclude novel foods which display differences in composition that have no effect on public health from being considered substantially equivalent to existing foods. The Court further said that the concept of substantial equivalence does not in itself involve a safety assessment, but rather constitutes an approach for comparing the novel food with its conventional counterpart in order to determine whether it should be subject to a risk assessment as regards, in particular, its unique composition and properties. The Court held, consequently, that "the absence of substantial equivalence does not necessarily imply that the food in question is unsafe, but simply that it should be subject to an assessment of its potential risks" (paragraph 77), and concluded that "the mere presence in novel foods of residues of transgenic protein at certain levels does not preclude those foods from being considered substantially equivalent to existing foods and, consequently, use of the simplified procedure for placing those novel foods on the market" (paragraph 84). However, the Court stated that that is not the case where the existence of a risk of potentially dangerous effects on human health can be identified on the basis of the scientific knowledge available at the time of the initial assessment, and that it is for the national court to determine whether that condition is satisfied.

Second, the Court ruled on the effect of the validity of the use of the simplified procedure on the power of the Member States, by virtue of the precautionary principle, to adopt measures such as those at issue in the main proceedings. In this respect, the Court stated that, since the simplified procedure does not imply any consent by the Commission, a Member State is not required to challenge the lawfulness of such a consent before adopting such measures. As regards protective measures adopted by a Member State under the safeguard clause, the Court said that they may not properly be based on a purely hypothetical approach to risk, founded on mere suppositions which are not yet scientifically verified. Such measures, said the Court, can be adopted only if they are based on a risk assessment which is as complete as possible in the

65 Regulation (EC) No 258/97 of the European Parliament and of the Council of 27 January 1997 concerning novel foods and novel food ingredients (OJ 1997 L 43, p. 1).

particular circumstances of an individual case, which indicate that those measures are necessary in order to ensure that novel foods do not present a danger for the consumer. As to the burden of proof on the Member State concerned, the Court stated that, while the reasons put forward by the Member State, such as result from a risk assessment, cannot be of a general nature, the Member State none the less, in the light of the limited nature of the initial safety analysis of novel foods under the simplified procedure and of the essentially temporary nature of measures based on the safeguard clause, satisfies the burden of proof if it relies on evidence which indicates the existence of a specific risk which those novel foods could involve.

In addition, the Court confirmed that the safeguard clause constitutes a specific expression of the precautionary principle, and that the conditions for the application of that clause must therefore be interpreted having due regard to this principle. Consequently, such protective measures may be taken even if it proves impossible to carry out as full a scientific risk assessment as possible in the particular circumstances of a given case because of the inadequate nature of the available scientific data, and presuppose that the risk assessment available to the national authorities provides specific evidence which, without precluding scientific uncertainty, makes it possible reasonably to conclude on the basis of the most reliable scientific evidence available and the most recent results of international research that the implementation of those measures is necessary in order to avoid novel foods which pose potential risks to human health being offered on the market.

Finally, the Court found no factor such as to affect the validity of Article 5 of Regulation No 258/97 as regards the possibility of using the simplified procedure notwithstanding the presence of residues of transgenic protein in novel foods. In particular, after observing that if dangers for human health or the environment are identifiable, the simplified procedure may not be used, and a more comprehensive risk assessment under the normal procedure is then required, the Court held that the provision at issue is sufficient to ensure a high level of protection of human health and the environment. As to compliance with the precautionary principle and the principle of proportionality, the Court observed that the simplified procedure applies only to certain novel foods, when the condition of substantial equivalence is satisfied, and that the recognition in advance of substantial equivalence may subsequently be reassessed by means of various procedures at both national and Community level.

15.5. In *Commission* v *Artegodan and Others* the Court upheld a judgment of the Court of First Instance in which it had annulled decisions of the Commission concerning the withdrawal of authorisations to market medicinal products for human use containing certain anorectics.[66] The Court observed, in particular, that the Court of First Instance

66 Joined Cases T-74/00, T-76/00, T-83/00 to T-85/00, T-132/00, T-137/00 and T-141/00 *Artegodan and Others* v *Commission* [2002] ECR II-4945.

had been right to hold that the Commission lacked jurisdiction to adopt the contested decisions. It was common ground that they had been adopted solely on the basis of Article 15a of Directive 75/319,[67] which applies only to marketing authorisations which have been granted in accordance with the provisions of Chapter III of that directive, whereas the marketing authorisations whose withdrawal was ordered by the decisions at issue had initially been granted under purely national procedures. The Court then ruled that the amendment of certain terms of the initial marketing authorisations by decision of the Commission in 1996 could not amount to an authorisation granted in accordance with the provisions of Chapter III of Directive 75/319.

15.6. Still in the field of harmonisation of laws, the Court ruled in Case C-512/99 *Germany v Commission* [2003] ECR I-845, an action for annulment, on the temporal effect of Article 95 EC in connection with a dispute challenging the introduction by the German Government of national provisions which were more stringent than those provided for by Directive 97/69 [68] as regards the classification and labelling of certain carcinogenic fibres. The applicant Government submitted that its application for a derogation from the provisions of the directive, submitted on the basis of Article 100a(4) of the EC Treaty (now, after amendment, Article 95 EC) which was applicable at the material time, should have been decided on that basis, whereas the Commission had rejected it on the basis of Article 95(6) EC. It also argued that the Commission had breached its duty of cooperation under Article 10 EC and had misinterpreted the conditions of application in Article 95(5) EC.

The Court observed that the Treaty of Amsterdam had amended the chapter relating to the approximation of laws without introducing transitional provisions (paragraph 38) and that the legal rules laid down in Article 100a of the EC Treaty differ from those laid down in Article 95 EC. Unlike Article 100a of the EC Treaty, Article 95 EC distinguishes between national provisions already in place prior to harmonisation and those which a Member State seeks to introduce: the former must be justified on grounds of the major needs referred to in Article 30 EC or relating to the protection of the environment or the working environment, while the latter must be based on new scientific evidence relating to those questions. The procedure for authorisation of the derogation starts with the notification of the application to the Commission and ends with the Commission's final decision. No new legal situation can be established before the final step in that procedure has been taken; it is only then that, through approval or rejection by the Commission, a measure likely to affect the earlier legal situation arises (Case C-319/97 *Kortas* [1999] ECR I-3143). Since, moreover, in the absence of transitional provisions,

67 Second Council Directive 75/319/EEC of 20 May 1975 on the approximation of provisions laid down by law, regulation or administrative action relating to proprietary medicinal products (OJ 1975 L 147, p. 13), as amended by Council Directive 93/39/EEC of 14 June 1993 (OJ 1993 L 214, p. 22).

68 See note 59.

new rules apply immediately to the future effects of a situation which arose under the old rules, the contested decision was rightly based on Article 95(6) EC.

As to whether the Commission had complied with its duty of cooperation under Article 10 EC, the Court observed that the applicant Government could not have been unaware of the entry into force of the new provisions on the approximation of laws and was deemed to know that the Commission's decision would necessarily be based on the new legal basis, Article 95 EC. It follows that the Commission was in no way required to inform the Government that the notification of the contested provisions would be assessed in the light of that provision.

Finally, in the Court's view, the Commission had not misinterpreted the conditions of application in Article 95(5) EC. Among those conditions, which are cumulative, the German Government had failed to notify the reasons for the adoption of the contested provisions, as required by Article 95(5) EC.

15.7. Two judgments, in Case C-168/01 *Bosal* (judgment of 18 September 2003, not yet published in the ECR) and Case C-58/01 *Océ van der Grinten* (judgment of 25 September 2003, not yet published in the ECR) interpreted Directive 90/435 [69] on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.

15.7.1. In *Bosal* the Court held that that directive, interpreted in the light of Article 43 EC, precludes a national provision which, when determining the tax on the profits of a parent company established in one Member State, makes the deductibility of costs in connection with that company's holding in the capital of a subsidiary established in another Member State subject to the condition that such costs be indirectly instrumental in making profits which are taxable in the Member State where the parent company is established. The Court began by noting that Article 4(2) of the directive leaves each Member State the option of providing that any charges relating to such a holding may not be deducted from the taxable profits of the parent company and that that option is not accompanied by any condition. The Court drew an initial conclusion, namely that the national provision implementing that option was compatible with the directive. However, in examining whether the option had been implemented in compliance with Article 43 EC, the Court observed, first, that the condition at issue constituted a hindrance to the establishment of subsidiaries in other Member States, since such subsidiaries do not normally generate profits that are taxable in the Netherlands. Second, the condition went against the directive's objective of eliminating the disadvantage to groups of companies caused by the application of different tax treatment depending on whether a parent company has subsidiaries in the Member State in which it is established or in a different Member State. Similarly, none of the

69 See note 60.

conditions was satisfied which could establish a direct link between the granting of a tax advantage to parent companies established in the Netherlands and the tax system relating to the subsidiaries of parent companies where the latter are established in that Member State, so that the coherence of the tax system could not be relied upon. Finally, the conditions for the application of the principle of the territoriality of tax defined in Case C-250/95 *Futura Participations and Singer* [1997] ECR I-2471 were not satisfied here.

15.7.2. The case in which the second judgment in this field was given, *Océ van der Grinten*, concerned the charge of 5% imposed on the aggregate amount of the dividends paid by the subsidiary resident in the United Kingdom to its parent company resident in the Netherlands and the partial tax credit to which that distribution confers entitlement when profits are distributed in the form of dividends, that charge being provided for by the Convention for the Avoidance of Double Taxation concluded in 1980 between the United Kingdom and the Netherlands. The Court classified the charge, in so far as it is imposed on the dividends distributed by the resident subsidiary to its non-resident parent company, as a withholding tax which is abolished for distributions of profits between companies within the same transnational group by Article 5 of the directive. As far as that part of the charge is concerned, it satisfies the characteristics of a withholding tax, as determined in Case C-375/98 *Epson Europe* [2000] ECR I-4243 and Case C-294/99 *Athinaiki Zithopoiia* [2001] ECR I-6797. Thus, first, it is imposed directly on the dividends in the State in which they are distributed because they form part of the amount chargeable to tax and, second, its chargeable event is the payment of those dividends. In this respect, it is irrelevant that the charge applies subject to the condition that a tax credit is granted, since, in accordance with the above convention, the tax credit is granted in conjunction with the payment of the dividends. Finally, the part of the 5% charge applying to the dividends is proportional to their value or amount. It is irrelevant in this respect that the shareholding parent company ultimately receives an overall amount exceeding the amount of the dividends which are paid to it by its subsidiary. The rate of such a charge need only be set at a higher level in order for that sum to be less than the amount of the dividends paid, whereas the uniform interpretation of Community law cannot depend on the percentage at which the tax in question is set.

On the other hand, the part of the charge applying to the tax credit does not possess the characteristics of a withholding tax on distributed profits, because it is not imposed on the profits distributed by the subsidiary. The tax credit does not constitute income from shares but an instrument designed to avoid double taxation of dividends in the case of cross-border distributions. Moreover, the partial reduction of the tax credit, by virtue of the 5% tax to which it is subject, does not affect the fiscal neutrality of such a distribution because that reduction does not apply to the distribution of dividends and does not diminish their value in the hands of the parent company to which they are paid.

The Court found, however, that Article 7(2) of the Directive allowed the contested charge. First, that provision entitles Member States to derogate from the prohibition in principle of withholding tax on profits distributed by the subsidiary and to tax the distribution of profits in the hands of the parent company where the provision imposing the tax forms an integral part of a body of domestic or agreement-based provisions which are designed to lessen economic double taxation of dividends (which is in principle so in the case of a bilateral convention for the avoidance of double taxation) and relate to the payment of tax credits to the recipients of dividends. Second, the charge at issue, which was established directly in conjunction with payment of a tax credit, was not set at a rate such as to cancel out the effects of that lessening of the economic double taxation of dividends, so that the objective of fiscal neutrality in the directive is not called into question even though the charge constitutes a withholding tax. The Court held, finally, that since Article 7(2) merely enables specific sets of domestic or agreement-based rules to continue to apply where they are consistent with the aim of the directive, the insertion of that provision into the text of the directive must be regarded as a technical adjustment and does not constitute a substantial change requiring consultation of the Parliament and the Economic and Social Committee for a second time. It follows that the validity of the provision cannot be called into question.

16. In the field of *public procurement*, Case C-327/00 *Santex* [2003] ECR I-1877 may be noted. It gave the Court an opportunity to develop its case-law on the compatibility with Directive 89/665 [70] of national rules establishing limitation periods in connection with applications for review of contracting authorities' decisions covered by that directive. In this respect, the Court recalled its case-law (Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 79) according to which the directive in question does not preclude national legislation which provides that any application for review of a contracting authority's decision must be commenced within a time-limit laid down to that effect and that any irregularity in the award procedure relied upon in support of such application must be raised within the same period, if it is not to be out of time, provided that the time-limit in question is reasonable. Applying that case-law, the Court observed that, first, a limitation period of 60 days appears reasonable and, second, that such a period, which runs from the date of notification of the act or the date on which it is apparent that the party concerned became fully aware of it, is also in accordance with the principle of effectiveness. However, the Court said, "the possibility that, in the context of the particular circumstances of the case before the referring court, the application of that time-limit may entail a breach of that principle cannot be excluded" (paragraph 57). In particular, it said, where a contracting authority has rendered impossible or excessively difficult the exercise of the rights conferred by the Community legal order, Directive 89/665 imposes on the competent national courts an

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

obligation to allow as admissible pleas in law alleging that the notice of invitation to tender is incompatible with Community law, which are put forward in support of an application for review of that decision, by availing itself, where appropriate, of the possibility afforded by national law of disapplying national rules on limitation periods, under which, when the period prescribed for bringing proceedings for review of the notice of invitation to tender has expired, it is no longer possible to plead such incompatibility.

17. As regards *social law*, one case concerning social security (17.1), four relating to equal treatment of men and women (17.2), one on the protection of the health and safety of workers (17.3) and two on the safeguarding of workers' rights in the event of transfers of undertakings (17.4) will be noted.

17.1. In Case C-326/00 *IKA* [2003] ECR I-1703 the Court ruled on the interpretation of Regulation No 1408/71 [71] with respect to the funding of hospital treatment received by a pensioner during a stay in another Member State, when the illness in question manifested itself suddenly during that stay, making the provision of treatment immediately necessary. In this respect, the Court noted that Regulation No 1408/71 provides for different rules for pensioners and workers. In particular, that regulation does not subject the funding of care received by pensioners during a stay in another Member State to the condition, which applies to workers, that their "condition necessitates immediate benefits during [the] stay" (paragraph 31). According to the Court, that difference may be explained by a desire on the part of the Community legislature to promote effective mobility of pensioners. The Court added that the right to benefits in kind guaranteed to pensioners by Regulation No 1408/71 cannot be limited solely to cases where the treatment appears necessary because of a sudden illness. In particular, the circumstance that the treatment necessitated by developments in the insured person's state of health during his temporary stay in another Member State may be linked to a pre-existent pathology of which he is aware, such as a chronic illness, cannot suffice to prevent him from enjoying the benefits in kind under Article 31 of Regulation No 1408/71. Finally, the Court stated that Article 31 of Regulation No 1408/71 precludes a Member State from subjecting the enjoyment of the benefits in kind guaranteed by that provision to any authorisation procedure.

As regards the application in practice of the regulation in question, the Court recalled that the principle which applies is that of reimbursement of the costs of the institution of the place of stay by the institution of the place of residence. It stated, however, that where it appears that the institution of the place of stay has wrongly refused to provide

[71] 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 (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), with subsequent amendments.

those benefits in kind and the institution of the place of residence, on being advised of that refusal, has declined to contribute to facilitating the correct application of that provision, it is for the latter institution, without prejudice to the possible liability of the institution of the place of stay, to reimburse directly to the insured person the cost of the treatment he has had to bear. The Court added, moreover, that in that event Regulation No 1408/71 precludes national legislation from subjecting such reimbursement to the obtaining of ex post facto authorisation which is granted only in so far as it is shown that the illness which necessitated the treatment in question manifested itself suddenly during the stay, making that treatment immediately necessary.

17.2. The question whether the limitation of compulsory military service to men is compatible with the principle of equal treatment of men and women in Community law was considered in Case C-186/01 *Dory* [2003] ECR I-2479.

The Court first defined the conditions under which that principle applies to activities relating to the organisation of the armed forces, pointing out that, in the absence of an inherent general exception in the Treaty excluding all measures taken for reasons of public security from the scope of Community law, "[m]easures taken by the Member States in this domain are not excluded in their entirety from the application of Community law solely because they are taken in the interests of public security or national defence" (paragraph 30). The Court observed that Directive 76/207 [72] is applicable to access to posts in the armed forces and that it is for the Court to verify whether the measures taken by the national authorities, in the exercise of their recognised discretion, do in fact have the purpose of guaranteeing public security and whether they are appropriate and necessary to achieve that aim. As the Court said, "decisions of the Member States concerning the organisation of their armed forces cannot be completely excluded from the application of Community law, particularly where observance of the principle of equal treatment of men and women in connection with employment, including access to military posts, is concerned" (paragraph 35). However, the Court stated that Community law does not govern the Member States' choices of military organisation for the defence of their territory or of their essential interests, and that "[i]t is for the Member States, which have to adopt appropriate measures to ensure their internal and external security, to take decisions on the organisation of their armed forces" (paragraph 36; see on this point Case C-273/97 *Sirdar* [1999] ECR I-7403, paragraph 15, and Case C-285/98 *Kreil* [2000] ECR I-69, paragraph 15).

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

Applying those principles, the Court held that the decision of the Federal Republic of Germany to ensure its defence in part by compulsory military service was the expression of such a choice of military organisation to which Community law is not applicable, and that while "[i]t is true that limitation of compulsory military service to men will generally entail a delay in the progress of the careers of those concerned, even if military service allows some of them to acquire further vocational training or subsequently to take up a military career[, n]evertheless, the delay in the careers of persons called up for military service is an inevitable consequence of the choice made by the Member State regarding military organisation and does not mean that that choice comes within the scope of Community law" (paragraphs 40 and 41). The Court added that "[t]he existence of adverse consequences for access to employment cannot, without encroaching on the competences of the Member States, have the effect of compelling the Member State in question either to extend the obligation of military service to women, thus imposing on them the same disadvantages with regard to access to employment, or to abolish compulsory military service" (paragraph 43).

In Case C-187/00 *Kutz-Bauer* [2003] ECR I-2741 the Court interpreted Directive 76/207 [73] in relation to a collective agreement applicable to the public service which allowed male and female employees to take advantage of the scheme of part-time work for older employees. Under that provision, part-time work for older employees was available only until the date on which the person concerned first became eligible for a full retirement pension under the statutory old-age insurance scheme. The Court ruled that the directive precludes a collective agreement which imposes such conditions "where the class of persons eligible for such a pension at the age of 60 consists almost exclusively of women whereas the class of persons entitled to receive such a pension only from the age of 65 consists almost exclusively of men, unless that provision is justified by objective criteria unrelated to any discrimination on grounds of sex" (paragraph 63).

The Court also recalled its case-law according to which a national court which is called upon to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation (Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 24), and stated that "[i]t is equally necessary to apply such considerations to the case where the provision at variance with Community law is derived from a collective agreement. It would be incompatible with the very nature of Community law if the court having jurisdiction to apply that law were to be precluded at the time of such application from being able to take all necessary steps to set aside the provisions of a collective agreement which might constitute an obstacle to the full effectiveness of Community rules" (paragraphs 73 and 74).

73 Ibid.

It may also be noted that in Joined Cases C-4/02 and C-5/02 *Schönheit and Becker* (judgment of 23 October 2003, not yet published in the ECR) the Court held that Article 141 EC precludes legislation which may entail a reduction in the pension of national civil servants who have worked part-time for at least a part of their working life, where that category of civil servants includes a considerably higher number of women than men, unless the legislation is justified by objective factors unrelated to any discrimination on grounds of sex.

The Court also said that national legislation which has the effect of reducing a worker's retirement pension by a proportion greater than that resulting when his periods of part-time work are taken into account cannot be regarded as objectively justified by the fact that the pension is in that case consideration for less work or on the ground that its aim is to prevent civil servants employed on a part-time basis from being placed at an advantage in comparison with those employed on a full-time basis.

In Case C-25/02 *Rinke* (judgment of 9 September 2003, not yet published in the ECR) the Court examined whether the requirement laid down in Directives 86/457 [74] and 93/16 [75] that certain components of the specific training in general medical practice, completion of which confers the right to use the title "general medical practitioner", must be undertaken full-time constitutes indirect discrimination on grounds of sex within the meaning of Directive 76/207, and, if so, how the incompatibility between Directive 76/207, on the one hand, and Directives 86/457 and 93/16, on the other, is to be resolved. The Court noted, to begin with, that the rule that part-time training must include a certain number of periods of full-time training does not constitute direct discrimination. As to whether it involves indirect discrimination against women workers, that is, according to the case-law, whether it works to the disadvantage of a much higher percentage of women than men, unless justified by objective factors unrelated to any discrimination on grounds of sex, the Court observed that, in fact, in the light of the statistical data available to it, the percentage of women working part-time is much higher than that of men working on a part-time basis. The Court therefore examined whether the requirement in question was justified by objective factors independent of any discrimination on grounds of sex. It held that it is. In Article 5(1) of Directive 86/457 and Article 34(1) of Directive 93/16 the Community legislature considered that adequate preparation for the effective exercise of general medical practice requires a certain number of periods of full-time training, both for students in hospitals or clinics and for those in approved medical practices or in approved centres where doctors provide primary care. It was reasonable for the legislature to take the view that that requirement enables doctors to acquire the experience necessary, by following patients' pathological conditions as they may evolve over time, and to obtain sufficient

74 Council Directive 86/457/EEC of 15 September 1986 on specific training in general medical practice (OJ 1986 L 267, p. 26).

75 See note 35.

experience in the various situations likely to arise more particularly in general medical practice.

17.3. Case C-151/02 *Jaeger* (judgment in 9 September 2003, not yet published in the ECR) gave the Court an occasion to refine its case-law on the concept of "working time" within the meaning of Directive 93/104 [76] in the case of doctors who are on call (see Case C-303/98 *Simap* [2000] ECR I-7963). The main proceedings concerned the question whether time spent in the provision of the on-call service ("Bereitschaftsdienst") organised by the city of Kiel in the hospital operated by it should be regarded as working time or as a rest period. The on-call duty was organised in such a way that the doctor in question stayed at the clinic and was called upon to carry out his professional duties as the need arose, and was allocated a room with a bed in the hospital.

The Court found, first, that on-call duty with the requirement of being physically present in the hospital must be regarded as constituting in its totality working time for the purposes of Directive 93/104. The decisive factor, in the Court's view, in considering that the characteristic features of the concept of "working time" were present was that the doctors were required to be present at the place determined by the employer and to be available to the employer in order to be able to provide their services immediately in case of need. The Court said that that conclusion is not altered by the mere fact that the employer makes available to the doctor a room to rest in. Consequently, the directive precludes legislation of a Member State which classifies as rest periods an employee's periods of inactivity in the context of such on-call duty and "has the effect of enabling, in an appropriate case by means of a collective agreement or a works agreement based on a collective agreement, an offset only in respect of periods of on-call duty during which the worker has actually been engaged in professional activities" (paragraph 103).

The Court stated, finally, that "in order to come within the derogating provisions set out in Article 17(2), subparagraph 2.1(c)(i) of the directive, a reduction in the daily rest periods of 11 consecutive hours by a period of on-call duty performed in addition to normal working time is subject to the condition that equivalent compensating rest periods be accorded to the workers concerned at times immediately following the corresponding periods worked. Furthermore, in no circumstances may such a reduction in the daily rest period lead to the maximum weekly working time laid down in Article 6 of the directive being exceeded" (paragraph 103).

17.4. In Case C-4/01 *Martin and Others* (judgment of 6 November 2003, not yet published in the ECR) the Court gave a preliminary ruling on the interpretation of

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

Article 3 of Directive 77/187.[77] The Court explained, first, that rights contingent upon dismissal or the grant of early retirement by agreement with the employer fall within the "rights and obligations" referred to in that provision. In this respect, the Court stated that early retirement benefits and benefits intended to enhance the conditions of such retirement, paid in the event of early retirement arising by agreement between the employer and the employee to employees who have reached a certain age, are not old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes within the meaning of Article 3(3) of the directive.

The Court held, next, that Article 3 of the directive is to be interpreted as meaning that obligations arising upon the grant of early retirement, arising from a contract of employment, an employment relationship or a collective agreement binding the transferor as regards the employees concerned, are transferred to the transferee subject to the conditions and limitations laid down by that article, regardless of the fact that those obligations derive from statutory instruments or are implemented by such instruments and regardless of the practical arrangements adopted for such implementation.

The Court then said that Article 3 of the directive precludes the transferee from offering the employees of a transferred entity terms less favourable than those offered to them by the transferor in respect of early retirement, and those employees from accepting those terms, where those terms are merely brought into line with the terms offered to the transferee's other employees at the time of the transfer, unless the more favourable terms previously offered by the transferor arose from a collective agreement which is no longer legally binding on the employees of the entity transferred, having regard to the conditions set out in Article 3(2).

Finally, the Court held that where, in breach of the public policy obligations imposed by Article 3 of Directive 77/187, the transferee has offered employees of the entity transferred early retirement less favourable than that to which they were entitled under their employment relationship with the transferor and those employees have accepted such early retirement, it is for the transferee to ensure that those employees are accorded early retirement on the terms to which they were entitled under their employment relationship with the transferor.

In Case C-340/01 *Abler and Others* (judgment of 20 November 2003, not yet published in the ECR) the Court pointed out that Directive 77/187 [78] is applicable whenever, in the context of contractual relations, there is a change in the legal or natural person who is

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

78 Ibid.

responsible for carrying on the business and who by virtue of that fact incurs the obligations of an employer vis-à-vis the employees of the undertaking, regardless of whether or not ownership of the tangible assets is transferred. Consequently, the Court held that the directive applies to a situation in which a contracting authority which has awarded the contract for the management of the catering services in a hospital to one contractor terminates that contract and concludes a contract for the supply of the same services with a second contractor, where the second contractor uses substantial parts of the tangible assets previously used by the first contractor and subsequently made available to it by the contracting authority, even where the second contractor has expressed the intention not to take on the employees of the first contractor.

18. In the field of the *environment*, it may be noted that in Case C-182/02 *Ligue pour la protection des oiseaux and Others* (judgment of 16 October 2003, not yet published in the ECR) the Court gave a preliminary ruling on the interpretation of Directive 79/409,[79] in which it held that "Article 9(1)(c) of the directive permits a Member State to derogate from the opening and closing dates for hunting which follow from consideration of the objectives set out in Article 7(4) of the directive" (paragraph 12). In this respect, the Court found that the hunting of wild birds for recreational purposes during the periods mentioned in Article 7(4) of the directive may constitute a judicious use of certain birds in small numbers authorised by Article 9(1)(c) of the directive, as do the capture and sale of wild birds even outside the hunting season with a view to keeping them for use as live decoys or to using them for recreational purposes in fairs and markets.

The Court said, however, that hunting can be authorised under Article 9 only if there is no other satisfactory solution. According to the Court, that condition would not be fulfilled if the sole purpose of the derogation authorising hunting were to extend the hunting periods for certain species of birds in territories which they already frequent during the hunting periods fixed in accordance with Article 7 of the directive. Moreover, the Court pointed out that hunting must be organised so that it is carried out under strictly supervised conditions and on a selective basis and applies only to certain birds in small numbers. As regards the latter condition, the Court held that it "cannot be satisfied if a hunting derogation does not ensure the maintenance of the population of the species concerned at a satisfactory level" (paragraph 17). Finally, the Court stressed that the measures under which hunting is authorised pursuant to Article 9 of the directive must specify the species which are subject to the derogations, the means, arrangements or methods authorised for capture or killing, the conditions of risk and the circumstances of time and place under which such derogations may be granted, the authority empowered to declare that the required conditions obtain and to decide what means, arrangements or methods may be used, within what limits and by whom, and the controls which will be carried out.

[79] Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1).

19. In the field of *justice and home affairs*, the Court ruled for the first time on the interpretation of the Schengen Agreement. In Joined Cases C-187/01 and C-385/01 *Gözütok and Brügge* [2003] ECR I-1345 two questions were referred to the Court for a preliminary ruling concerning the interpretation of the ne bis in idem principle laid down by Article 54 of the Convention implementing the Schengen Agreement ("the CISA") in relation to national procedures under which it is possible for criminal proceedings to be discontinued following a settlement proposed by the prosecuting authorities without the involvement of a court. The Court pointed out that, in such procedures, "the prosecution is discontinued by the decision of an authority required to play a part in the administration of criminal justice in the national legal system concerned" (paragraph 28) and that those procedures, "whose effects as laid down by the applicable national law are dependent upon the accused's undertaking to perform certain obligations prescribed by the Public Prosecutor, [penalise] the unlawful conduct which the accused is alleged to have committed" (paragraph 29). The Court drew the conclusion that, where further prosecution is definitively barred, the person concerned must be regarded as someone whose case has been "finally disposed of" for the purposes of Article 54 of the CISA in relation to the acts which he is alleged to have committed, and that, once the accused has complied with his obligations, the penalty entailed in the procedure whereby further prosecution is barred must be regarded as having been "enforced" for the purposes of Article 54.

Moreover, according to the Court, the fact that no court is involved in such a procedure and that the decision in which the procedure culminates does not take the form of a judicial decision does not cast doubt on that interpretation, since such matters of procedure and form do not impinge on the effects of the procedure. In this respect, the Court pointed out that, in the absence of harmonisation or approximation of the criminal laws of the Member States relating to procedures whereby further prosecution is barred, the ne bis in idem principle, whether it is applied to procedures whereby further prosecution is barred (regardless of whether a court is involved) or to judicial decisions, necessarily implies that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied. Moreover, the application by one Member State of that principle to procedures whereby further prosecution is barred, which have taken place in another Member State without a court being involved, cannot be made subject to a condition that the first State's legal system does not require such judicial involvement either.

Finally, the Court stated that applying Article 54 of the CISA to settlements in criminal proceedings cannot prejudice the rights of the victim of an offence, since the only effect of the ne bis in idem principle, as set out in that provision, is to ensure that a person whose case has been finally disposed of in a Member State is not prosecuted again on the same facts in another Member State, and it does not preclude the victim or any other person harmed by the accused's conduct from bringing a civil action to seek compensation for the damage suffered.

20. In connection with the *external relations of the Community*, one case to be noted is Case C-438/00 *Deutscher Handballbund* [2003] ECR I-4135, relating to the Association Agreement between the Communities and Slovakia.[80] In its judgment the Court held that the first indent of Article 38(1) of that agreement precludes the application to a professional sportsman of Slovak nationality, who is lawfully employed by a club established in a Member State, of a rule drawn up by a sports federation in that State under which clubs are authorised to field, during league or cup matches, only a limited number of players from non-member countries that are not parties to the Agreement on the European Economic Area.

In reaching that conclusion, the Court observed, first, that in its judgment in Case C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049 it had recognised Article 37 of the Association Agreement with the Republic of Poland [81] as having direct effect. Since the wording of the said Article 37 and Article 38 is identical and the two association agreements do not differ in regard to their objectives or the context in which they were adopted, Article 38 must also be recognised as having such effect. Addressing, next, the applicability of that article to a rule laid down by a sporting association, the Court recalled certain points made in its judgment in Case C-415/93 *Bosman* [1995] ECR I-4921, namely that the prohibition of discrimination laid down in the context of the provisions of the EC Treaty on the freedom of movement of workers applies not only to acts of the public authorities but also to rules laid down by sporting associations which determine the conditions under which professional sportsmen can engage in gainful employment. Referring to *Pokrzeptowicz-Meyer*, in which it held that the right to equal treatment established by Article 37 has the same extent as that conferred in similar terms by Article 39 EC on Community nationals, the Court then considered that the interpretation of Article 39 EC adopted in *Bosman* could be transposed to Article 38 of the Association Agreement with Slovakia, and therefore concluded that the latter provision applies to a rule drawn up by a sporting association. Examining, finally, the scope of the principle of non-discrimination set out in Article 38, the Court stated that the prohibition of discrimination on grounds of nationality applies only to workers of Slovak nationality who are already lawfully employed in the territory of a Member State and solely with regard to conditions of work, remuneration or dismissal. However, since the sports rule at issue directly affects participation in league matches of a professional player, in other words the essential object of his activity, it relates to working conditions.

80 Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Slovak Republic, of the other part, concluded and approved on behalf of the Community by Decision 94/909/ECSC, EEC, Euratom of the Council and the Commission of 19 December 1994 (OJ 1994 L 359,, p. 1).

81 First indent of Article 37(1) of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part, concluded and approved on behalf of the Community by Decision 93/743/Euratom, ECSC, EC of the Council and the Commission of 13 December 1993 (OJ 1993 L 348, p. 1).

21. Finally, in the field of the *Brussels Convention* (Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters), only one judgment will be mentioned. This is the judgment in Case C-116/02 *Gasser* (judgment of 9 December 2003, not yet published in the ECR) concerning the interpretation to be given to Article 21 of the Convention, under which, where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established, in two particular cases: first, where the jurisdiction of the court second seised has been claimed under an agreement conferring jurisdiction and, second, where, in general, the duration of proceedings before the courts of the Contracting State in which the court first seised is established is excessively long.

As regards the former case, the Court, having been asked whether the court second seised may, by way of derogation from Article 21, give judgment in the case without waiting for a declaration from the court first seised that it has no jurisdiction, answered that it may not, pointing out that the procedural rule in that article is based clearly and solely on the chronological order in which the courts involved are seised.

As regards the latter case, the Court likewise refused to accept a derogation from the provisions of Article 21, stating that an interpretation whereby the application of that article should be set aside in such a case would be manifestly contrary both to the letter and spirit and to the aim of the Convention.

B – Composition of the Court of Justice

(Order of precedence as at 10 October 2003)

First row, from left to right:
J.N. Cunha Rodrigues, President of Chamber; C. Gulmann, President of Chamber; P. Jann, President of Chamber; V. Skouris, President of the Court; C.W.A. Timmermans, President of Chamber; A. Tizzano, First Advocate General; A. Rosas, President of Chamber.

Second row, from left to right:
F. Macken, Judge; D. Ruiz-Jarabo Colomer, Advocate General; J.-P. Puissochet, Judge; D.A.O. Edward, Judge; F.G. Jacobs, Advocate General; A.M. La Pergola, Judge; P. Léger, Advocate General; R. Schintgen, Judge.

Third row, from left to right:
L.M. Poiares P. Maduro, Advocate General; K. Lenaerts, Judge; C. Stix-Hackl, Advocate General; S. von Bahr, Judge; N. Colneric, Judge; L.A. Geelhoed, Advocate General; R. Silva de Lapuerta, Judge; J. Kokott, Advocate General; R. Grass, Registrar.

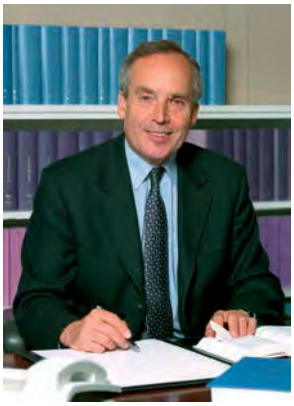
1. The Members of the Court of Justice

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 (1972-1977); 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 (1983-1987); Director of the Centre for International and European Economic Law, Thessaloniki (from 1997); President of the Greek Association for European Law (1992-1994); Member of the Greek National Research Committee (1993-1995); Member of the Higher Selection Board for Greek Civil Servants (1994-1996); 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 (1995-1996); Member of the Scientific Committee of the Ministry of Foreign Affairs (1997-1999); 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.

Gil Carlos Rodríguez Iglesias

Born 1946; Assistant lecturer and subsequently Professor (Universities of Oviedo, Freiburg im Breisgau, Autónoma and Complutense of Madrid, Extremadura and Granada); Professor of Public International Law at Granada; Member of the Supervisory Board of the Max-Planck Institute of International Public Law and Comparative Law, Heidelberg; Doctor honoris causa of the University of Turin, the 'Babes-Bolyai' University of Cluj-Napoca (Romania), the University of Saarland and the University of Oviedo; Honorary Bencher, Gray's Inn (London) and King's Inn (Dublin); Honorary Member of the Society of Advanced Legal Studies (London); Honorary Member of the Academia Asturiana de Jurisprudencia; Judge at the Court of Justice from 31 January 1986; President of the Court of Justice from 7 October 1994 to 6 October 2003.



Francis G. Jacobs, QC

Born 1939; Barrister; Official in the Secretariat of the European Commission of Human Rights; Legal Secretary to Advocate General J.-P. Warner; Professor 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 since 10 March 1992.

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 (1976-1978); Member of the Constitutional Court and President of the Constitutional Court (1986-1987); Minister for Community Policy (1987-1989); elected to the European Parliament (1989-1994); 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

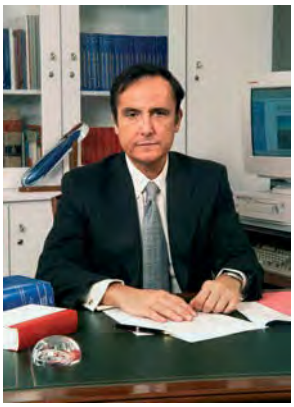
Born 1936; State Counsellor (France); Director, subsequently Director-General, of the Legal Service of the Council of the European Communities (1968-1973); Director-General of the Agence nationale pour l'emploi (1973-1975); Director of General Administration, Ministry of Industry (1977-1979); Director of Legal Affairs at the OECD (1979-1985); Director of the Institut international d'administration publique (1985-1987); Jurisconsult, Director of Legal Affairs in the Ministry of Foreign Affairs (1987-1994); Judge at the Court of Justice since 7 October 1994.

Philippe Léger

Born 1938; A member of the judiciary serving at the Ministry for Justice (1966-1970); 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 (1976-1978); Deputy Director of Criminal Affairs and Reprieves at the Ministry of Justice (1978-1983); Senior Member of the Court of Appeal, Paris (1983-1986); Deputy Director of the Private Office of the Minister for Justice (1986); President of the Regional Court at Bobigny (1986-1993); Head of the Private Office of the Minister for Justice, and Advocate General at the Court of Appeal, Paris (1993-1994); Associate Professor at René Descartes University (Paris V) (1988-1993); 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 (1963-1966); spokesman of the Federal Ministry of Justice (1966-1970) and subsequently appointed to the international affairs department of that Ministry; Adviser to the Justice Committee and spokesman at the Parliament (1973-1978); 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) since 1996; Advocate General at the Court of Justice since 19 January 1995.

Melchior Wathelet

Born 1949; Deputy Prime Minister, Minister for National Defence (1995); Mayor of Verviers; Deputy Prime Minister, Minister for Justice and Economic Affairs (1992-1995); Deputy Prime Minister, Minister for Justice and Small Firms and Traders (1988-1991); Member of the Chamber of Representatives (1977-1995); degrees in law and in economics (University of Liège); Master of Laws (Harvard University, USA); Professor at the Catholic University of Louvain; Judge at the Court of Justice from 19 September 1995 to 6 October 2003.

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.

Siegbert Alber

Born 1936; Member of the Bundestag (1969 to 1980); Member of the Parliamentary Assembly of the Council of Europe and of the Assembly of the Western European Union (WEU) (1970 to 1980); Member of the European Parliament (1977 to 1997); Member, then Chairman (1993 to 1994), of the Committee on Legal Affairs and Citizens' Rights and European Popular Party (EPP) Group Spokesman on Legal Affairs; Chairman of the delegation responsible for relations with the Baltic States and of the Subcommittees on Data Protection and on Poisonous or Dangerous Substances; Vice-President of the European Parliament (1984 to 1992); honorary professor at the Europa-Institut of the University of the Saarland; Advocate General at the Court of Justice from 7 October 1997 to 6 October 2003.

Jean Mischo

Born 1938; studied law and political science (universities of Montpellier, Paris and Cambridge); member of the Legal Service of the Commission and subsequently principal administrator in the private offices of two Members of the Commission; Secretary of Embassy in the Contentious Affairs and Treaties Department of the Ministry of Foreign Affairs of the Grand Duchy of Luxembourg; Deputy Permanent Representative of Luxembourg to the European Communities; Director of Political Affairs in the Ministry of Foreign Affairs; Advocate General at the Court of Justice from 13 January 1986 to 6 October 1991; Secretary General of the Ministry of Foreign Affairs; Advocate General at the Court of Justice from 19 December 1997 to 6 October 2003.

Fidelma O'Kelly Macken

Born 1945; Called to the Bar of Ireland (1972); Legal Advisor, Patent and Trade Mark Agents (1973-1979); Barrister (1979-1995) and Senior Counsel (1995-1998) 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 since 6 October 1999.

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 (1994-1995); 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 (1984-1992); 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 Independent 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 (1964-1977); 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 (1980-1984); Expert on the Human Rights Steering Committee of the Council of Europe (1980-1985); 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 (1966-1969); official of the European Commission (1969-1977); Doctor in Law (University of Leiden); Professor of European Law at the University of Groningen (1977-1989); 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 Adrie Geelhoed

Born 1942; Research Assistant, University of Utrecht (1970-1971); Legal Secretary at the Court of Justice of the European Communities (1971-1974); Senior Adviser, Ministry of Justice (1975-1982); Member of the Advisory Council on Government Policy (1983-1990); various teaching assignments; Secretary-General, Ministry of Economic Affairs (1990-1997); 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 (1985-1988); 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 (1978-1981) and at the Åbo Akademi University (Turku/Åbo) (1981-1996); Director of the latter's Institute for Human Rights (1985-1995); 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.

Koen Lenaerts

Born 1954; lic.iuris, Ph.D. in Law (Katholieke Universiteit Leuven); Master of Laws, Master in Public Administration (Harvard University); Lecturer (1979 to 1983), subsequently Professor of European Law, Katholieke Universiteit Leuven (since 1983); Legal Secretary at the Court of Justice (1984 to 1985); Professor at the College of Europe, Bruges (1984 to 1989); Member of the Brussels Bar (1986 to 1989); 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 from 7 October 2003.

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.

Juliane Kokott

Born 1957; Law studies (Universities of Bonn and Geneva); Law degree (American University, Washington); Doctor in 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 University of 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 in 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 (New University, 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.

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 2003

In 2003 the composition of the Court of Justice changed as follows:

On 6 October 2003, Mr Gil Carlos Rodríguez Iglesias, President of the Court of Justice, Mr Melchior Wathelet, Judge, and Advocates General Siegbert Alber and Jean Mischo left the Court of Justice having completed their terms of office. They were replaced respectively by Ms Rosario Silva de Lapuerta and Mr Koen Lenaerts as Judges and Ms Juliane Kokott and Mr Luís Miguel Poiares Pessoa Maduro as Advocates General.

On 7 October 2003, the Judges elected, from among their number, Mr Vassilios Skouris, Judge, as President of the Court of Justice.

3. Order of precedence

from 1 January to 6 October 2003

G.C. Rodríguez Iglesias, President of the Court
J.-P. Puissochet, President of the Third and Sixth Chambers
M. Wathelet, President of the First and Fifth Chambers
R. Schintgen, President of the Second Chamber
J. Mischo, First Advocate General
C.W.A. Timmermans, President of the Fourth Chamber
F.G. Jacobs, Advocate General
C. Gulmann, Judge
D.A.O. Edward, Judge
A.M. La Pergola, Judge
P. Léger, Advocate General
P. Jann, Judge
D. Ruiz-Jarabo Colomer, Advocate General
S. Alber, Advocate General
V. Skouris, Judge
F. Macken, Judge
N. Colneric, Judge
S. von Bahr, Judge
A. Tizzano, Advocate General
J.N. Cunha Rodrigues, Judge
L.A. Geelhoed, Advocate General
C. Stix-Hackl, Advocate General
A. Rosas, Judge

R. Grass, Registrar

from 10 October to 31 December 2003 [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
D.A.O. Edward, Judge
A. 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

[1] The first order of precedence in 2003 applied until 6 October (when certain Members, including Mr Rodríguez Iglesias, President of the Court, completed their terms of office). The second did not apply until 10 October, the day of the election of the Presidents of the Chambers comprising three Judges.

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)
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)

— 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 2003

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

The statistics relating to the judicial activity of the Court of First Instance in 2003 provide confirmation of a steady increase in the number of new cases (466, compared with 411 in 2002), a lack of change in the number of cases decided (339, compared with 331 in 2002) and, consequently, an increasing number of pending cases.

The increase in the number of cases brought may be observed in every field of litigation. In percentage terms, proceedings falling within two specific areas, namely staff cases and intellectual property cases, account for more than 50% of the proceedings brought before the Court of First Instance (excluding special forms of procedure). With 100 new cases in 2003, as against 83 in 2002, registration of Community trade marks gives rise to an ever increasing number of actions. [1]. But it is staff cases, with 124 new actions this year, which rank first in the activity of the Court of First Instance.

In addition to these data, there is a factor which is not quantifiable but has nevertheless now become apparent: cases brought before the Court of First Instance are becoming more and more complicated and require its Judges to carry out an analysis of ever increasing depth of cases drawn up by specialised lawyers.

The above factors taken together — which have resulted in an increase in the number of pending cases, now verging on the threshold of 1 000 cases — fully justify implementation of some of the reforms to the judicial system made possible by the Treaty of Nice, in particular the possibility of creating judicial panels to hear and determine at first instance certain classes of action or proceeding brought in specific areas (Article 225a EC).

An initial step in this direction has already been taken by the Commission which, in November 2003, submitted a proposal for a Council decision establishing the European Civil Service Tribunal. The legislative procedure is in progress.

The average duration of cases decided in 2003 (excluding staff cases and intellectual property cases) is comparable to that of the previous year, despite the expedited treatment accorded to certain competition cases.

1 It should be noted that as yet no action has been brought challenging a decision of a Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) made in the field of Community designs.

Finally, it may be observed that the number of applications for expedition decreased appreciably, from 25 in 2002 to 13 in 2003. If applications for expedition and applications for interim relief (39 applications for interim relief were lodged in 2003) are taken together, the situation is very similar to that in 2001 when 12 applications for expedition [2] and 37 applications for interim relief were lodged. The existence of emergency cases as a branch of litigation is therefore now established.

Developments in the case-law are set out below. The account is divided into three distinct parts which in turn cover, without seeking to be exhaustive and necessarily reflecting the number of cases decided in each of the fields in question, 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 J). 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.

Certain questions of a procedural nature will, for the first time, 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. Raising of a ground by the Court of its own motion

In Case T-147/00 *Laboratoires Servier* v *Commission* [2003] ECR II-85 (under appeal, Case C-156/03 P), the Court annulled a Commission decision withdrawing marketing authorisation for certain medicinal products, on the basis of a ground relating to a matter of public policy raised by it of its own motion. The Court observed that the lack of competence of an institution which has adopted a contested measure constitutes a ground for annulment for reasons of public policy, which must be raised by the Community judicature of its own motion. The relationship between the power of the Community judicature to raise a ground of its own motion and the existence of a public-policy interest underlying the ground was confirmed in Case T-183/00 *Strabag Benelux* v *Council* [2003] ECR II-135, paragraph 37 (under appeal, Case C-186/03 P), and in

[2] The possibility of ruling on the substance of a case under an expedited procedure has been provided for by the Rules of Procedure of the Court of First Instance since 1 February 2001.

Case T-308/01 *Henkel* v *OHIM — LHS (UK) (KLEENCARE)* (judgment of 23 September 2003, not yet published in the ECR), paragraph 34.

2. Extent of the rights granted to interveners

The Statute of the Court of Justice provides that an application to intervene is to be limited to supporting the form of order sought by one of the parties and the Rules of Procedure of the Court of First Instance state that the intervener is to accept the case as he finds it at the time of his intervention (Article 116(3)). The question arose as to whether a party granted leave to intervene may raise a plea in law not raised by the party whom he supports. In its judgments in Case T-114/02 *BaByliss* v *Commission* [2003] ECR II-1288 ("the *BaByliss* judgment") and Case T-119/02 *Royal Philips Electronics* v *Commission* [2003] ECR II-1442 ("the *Philips* judgment"), the Court answered clearly in the negative, stating that while the intervener may advance arguments which are new or which differ from those of the party he supports, in order that his intervention not be limited to restating the arguments advanced in the application, it cannot be held that those provisions permit him to alter or distort the context of the dispute defined in the application by raising new pleas in law.

3. Costs

It is exceptional for a costs issue to be mentioned in an annual report. However, the message delivered by the Court in Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line and Others* v *Commission* (judgment of 30 September 2003, not yet published in the ECR) ("the *TACA* judgment") is worthy of emphasis in the absence of a binding legal provision limiting the volume of pleadings and documents lodged in support of an action for annulment.

Although the Court in this case granted the application for annulment in part, it ordered each party to bear its own costs on the ground that the length of the applicants' written pleadings needlessly added to the costs of the Commission. The Court stated that the four applications lodged by the applicants and the annexes thereto were unusually long — each application totalled some 500 pages and the annexes made up approximately 100 files — and that the pleas contained in the applications were for the most part unfounded and their number so great as to amount to an abuse.

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".

1. Measures against which an action may be brought

In order to ascertain whether a measure whose annulment is sought is open to challenge, it is necessary (i) to look to its substance and not to its form and (ii) to determine whether it produces legal effects binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position.

It was in the light of those two rules that the Court was led, on a number of occasions, to find that measures were not open to challenge.

First, the Court held that decisions by the Commission to commence legal proceedings against certain American cigarette manufacturers before a federal court in the United States of America did not constitute measures that were open to challenge. In its judgment in Joined Cases T-377/00, T-379/00, T 380/00, T-260/01 and T-272/01 *Philip Morris International and Others* v *Commission* [2003] ECR II-1 (under appeal, Joined Cases C-131/03 P and C 146/03 P), the Court held that a decision to bring court proceedings does not in itself alter the legal position in question, but has the effect merely of opening a procedure whose purpose is to achieve a change in that position through a judgment. While noting that the commencement of legal proceedings may give rise to certain consequences by operation of law, the Court held that their commencement does not in itself determine definitively the obligations of the parties to the case and that that determination results only from the judgment of the court. The Court stated that this finding applies both to proceedings before the Community Courts and to proceedings before courts of the Member States and even of non-member countries, such as the United States.

Second, a case concerned whether a declaration of the President of the European Parliament at the plenary sitting of 23 October 2000 was a measure open to challenge. The declaration stated that, in accordance with Article 12(2) of the Act concerning the election of representatives to the European Parliament by direct universal suffrage,[3] annexed to the Council Decision of 20 September 1976, "the ... Parliament takes note of the notification of the French Government declaring the disqualification of Mr Le Pen from holding office". The Court held that the declaration was not open to challenge. In its judgment of Case T-353/00 *Le Pen v Parliament* [2003] ECR II-1731 (under appeal, Case C-208/03 P), the Court found that the intervention of the European Parliament under the first subparagraph of Article 12(2) of the abovementioned Act was restricted to taking note of the declaration, already made by the national authorities, that the applicant's seat was vacant. The Court accordingly held that the declaration of the President of the European Parliament was not intended to produce legal effects of its own, distinct from those of the decree dated 31 March 2000 of the French Prime Minister stating that the applicant's ineligibility brought to an end his term of office as a representative in the European Parliament.

[3] OJ 1976 L 278, p. 5.

Third, according to Case T-52/00 *Coe Clerici Logistics* v *Commission* (judgment of 17 June 2003, not yet published in the ECR) a letter from the Commission refusing to act on an undertaking's complaint based on Articles 82 EC and 86 EC is not, in principle, a measure against which an action for annulment may be brought. After recalling that the exercise of the Commission's power conferred by Article 86(3) EC to assess the compatibility of State measures with the Treaty rules is not coupled with an obligation on the part of the Commission to take action, the Court held that legal or natural persons who request the Commission to take action under Article 86(3) EC do not, in principle, have the right to bring an action against a Commission decision not to use the powers which it has under that article. The Court concluded in the present case that the applicant was not entitled to bring an action for annulment of the act by which the Commission decided not to use the powers conferred on it by Article 86(3) EC. However, since the applicant relied at the hearing on the judgment in Case T-54/99 *max.mobil* v *Commission* [2002] ECR II-313 (under appeal, Case C-141/02 P), commented upon in the *Annual Report 2002*, the Court added that "if the contested act, in so far as it concerns infringement of Article 82 EC in conjunction with Article 86 EC, must be classified as a decision rejecting a complaint" as referred to in *max.mobil* v *Commission*, the applicant should, as complainant and addressee of that decision, be regarded as entitled to bring his action. In the present case the question as to the admissibility of the action did not affect the outcome of the dispute since the Court held on the merits that the action was unfounded.

Fourth, the orders of the Court of 9 July 2003 in Case T-219/01 *Commerzbank* v *Commission*, not yet published in the ECR, and in Case T-250/01 *Dresdner Bank* v *Commission* and Case T-216/01 *Reisebank* v *Commission*, neither published in the ECR, result from challenges to decisions of the hearing officer taken pursuant to Article 8 of Commission Decision 2001/462/EC, ECSC of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings. [4] By those decisions, several banks which were subject to administrative investigation to establish their participation in an arrangement contrary to Article 81 EC were refused access to information relating to the circumstances which had led to the termination of some of the administrative procedures initiated against other banks also proceeded against by the Commission. In each of the three cases the Court held that the decision of the hearing officer in itself produced only limited effects, characteristic of a preparatory measure in the course of an administrative procedure initiated by the Commission, and could not therefore justify the action being admissible before that procedure had been completed. It followed that any infringement of rights of defence by the refusal capable of rendering the administrative procedure unlawful could properly be pleaded only in an action brought against the final decision finding that Article 81 EC had been infringed.

Finally, in the field of State aid, the Court had the opportunity to clarify the case-law concerning the ability to challenge decisions to initiate the formal investigation procedure envisaged in Article 88(2) EC. In contrast to decisions initiating the formal

4 OJ 2001 L 162, p. 21.

examination procedure in regard to measures that have been provisionally classified as new aid, which have independent legal effects vis-à-vis the final decision for which they are a preparatory step (judgments in Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309, Joined Cases T-269/99, T-271/99 and T-272/99 *Territorio Histórico de Guipúzcoa and Others* v *Commission* [2002] ECR II-4217 and Joined Cases T-346/99, T-347/99 and T-348/99 *Territorio Histórico de Álava and Others* v *Commission* [2002] ECR II-4259; commented upon in the *Annual Report 2002*), the decision initiating the formal examination procedure which gave rise to the order of 2 June 2003 in Case T-276/02 *Forum 187* v *Commission*, not yet published in the ECR, classified the Belgian scheme at issue — the coordination centres scheme — as a scheme of existing aid. After finding that such a decision does not have the independent legal effects deriving from the suspension of measures provided for in Article 88(3) EC in regard to new aid and that the classification of the scheme at issue was provisional in nature, the Court concluded that since the contested decision did not produce any legal effect, it did not constitute a challengeable measure.

2. Legal interest in bringing proceedings

An action for annulment brought by a natural or legal person is admissible only in so far as the applicant has an interest in seeing the contested measure annulled. Although a legal interest in bringing proceedings is not expressly required by Article 230 EC, it is settled case-law that the applicant must prove that he has such an interest in bringing proceedings. The Court of First Instance states that this is an essential and fundamental prerequisite for any legal proceedings (order in Case T-167/01 *Schmitz-Gotha Fahrzeugwerke* v *Commission* [2003] ECR II-1875) and that, in the absence of a legal interest in bringing proceedings, it is unnecessary to examine whether the contested decision is of direct and individual concern to the applicant within the meaning of the fourth paragraph of Article 230 EC (Case T-326/99 *Olivieri* v *Commission and European Agency for the Evaluation of Medicinal Products* (judgment of 18 December 2003, not yet published in the ECR)).

That interest must be a vested and present interest and is assessed as at the date when the action is brought. If the interest which an applicant claims concerns a future legal situation, he must demonstrate that the prejudice to that situation is already certain. Such an interest is not established by an applicant who seeks the annulment of a decision addressed to a Member State ordering it to recover State aid from various companies where, contrary to the applicant's assertions, the decision does not impose any joint and several obligation on him to repay the contested aid (*Schmitz-Gotha Fahrzeugwerke*, cited above).

Nor does an applicant have a legal interest in bringing proceedings where he seeks the annulment of a Commission decision granting marketing authorisation for a medicinal product and it is established that the scientific information forwarded by him to the

European Agency for the Evaluation of Medicinal Products has, first, justified the reopening of the assessment procedure and, second, been examined and taken into account under that procedure (*Olivieri*, cited above).

3. Standing to bring proceedings

An applicant is recognised as having standing to bring proceedings where he shows that he is directly and individually concerned by a contested measure not addressed to him.

It is now well-established that a Community measure is of direct concern to an individual where it directly affects his legal situation and its implementation is purely automatic and results from Community rules alone without the application of other intermediate rules. Several decisions of the Court in 2003 constitute examples demonstrating the application of that settled case-law (order of 6 May 2003 in Case T-45/02 *DOW AgroSciences* v *Parliament and Council*, not yet published in the ECR; the *Philips* judgment; and Case T-243/01 *Sony Computer Entertainment Europe* v *Commission* and in Joined Cases T-346/02 and T-347/02 *Cableuropa and Others* v *Commission* (judgments of 30 September 2003, neither yet published in the ECR)).

The focus will therefore essentially be placed on applicants' individual concern. It will be remembered that, following the judgment of 25 July 2002 in Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677 in which the Court of Justice confirmed its interpretation of the concept of individual concern, the Court of First Instance took account of the Court of Justice's interpretation when it examined whether actions for annulment were admissible and thus no longer followed the different interpretation which it had adopted in its judgment of 3 May 2002 in Case T-177/01 *Jégo-Quéré* v *Commission* [2002] ECR II-2365 (under appeal, Case C-263/02 P) (see the *Annual Report 2002*).

The Court of First Instance has therefore assessed the concept of individual concern 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.

In order to provide a clear account, a distinction will be drawn according to whether the contested measure was genuinely a decision or a measure of general application.

(a) *Decisions*

(a.1) Decisions of approval in the field of concentrations of undertakings

On several occasions the Court declared actions for annulment of decisions approving concentrations brought by legal persons not a party to the concentration to be admissible (the *BaByliss* judgment, Case T-374/00 *Verband der freien Rohrwerke and Others* v *Commission* (judgment of 8 July 2003, not yet published in the ECR) and Case T-158/00 *ARD* v *Commission* (judgment of 30 September 2003, not yet published in the ECR)).

In January 2002 the Commission approved, without opening the second phase of examination, the purchase by SEB of certain elements of Moulinex's business, subject to conditions. BaByliss and Philips challenged that decision before the Court of First Instance. In the *BaByliss* judgment, the Court examined the admissibility of the action and found that the decision, which was not addressed to BaByliss, was none the less of direct and individual concern to it. In this connection, the Court took into account (i) that BaByliss actively participated in the procedure, as evidenced by written and oral contributions provided to the Commission; (ii) that BaByliss was a potential competitor on oligopolistic markets characterised by substantial barriers to entry arising from strong brand loyalty and by the difficulty of access to retail trading; and (iii) that BaByliss was interested in acquiring Moulinex or, at least, some of its assets, as evidenced by several purchase offers. It is thus accepted that a potential competitor of the parties to a concentration is entitled, in certain circumstances, to seek the annulment of a decision of approval in the case of oligopolistic markets.

ARD, a company operating on the free-TV market in Germany, challenged the Commission decision of 21 March 2000 approving subject to conditions, but without opening the second phase, the concentration by which BSkyB acquired, with KVV, joint control of KirchPay TV, a company operating on the pay-TV market in Germany. In *ARD v Commission*, the Court held that ARD, in addition to being directly concerned by the contested decision, was individually concerned by it. In this connection, the Court had regard, first, to the fact that ARD had actively participated in the administrative procedure, since it had been invited by the Commission to submit observations and the observations submitted by it had partly determined the content of the contested decision and the nature of the commitments, and second, to the specific effect on the position of ARD, which was not present on the markets on which the undertaking holding the monopoly saw its position strengthened by the concentration but only on neighbouring upstream or downstream markets.

(a.2) Referrals to national authorities in the field of concentrations of undertakings

Article 9 of Regulation No 4064/89 [5] enables examination of a notified concentration to be referred to the competent authorities of a Member State in certain circumstances. In two judgments, actions for annulment of a decision to refer examination to the national authorities pursuant to that provision were declared admissible. The first case arose from the Commission's decision to refer the concentration between SEB and Moulinex to the French competition authorities so far as concerned the French markets for small electrical household appliances, with a view to the application of national law (the *Philips* judgment). In the second case, examination of the concentration consisting in the merger of Vía Digital and Sogecable was referred to the Spanish authorities (*Cableuropa and Others* v *Commission*, cited above).

It is apparent from these judgments that applicants may be distinguished individually in two sets of circumstances in particular.

First, an applicant is regarded as individually concerned by the decision to refer where it would have been individually concerned by a decision of approval adopted by the Commission without a referral. The Court thus determines whether, had a referral to the national authorities not been made, it would have been open to the applicant to challenge the assessment of the effects of the concentration on the relevant markets in the Member State concerned which the Commission would have carried out. The status of competitor (potential competitor in the *BaByliss* judgment and actual competitor in *Cableuropa and Others* v *Commission*) and the active involvement of the applicant in the course of the procedure preceding the reference are two relevant criteria.

Second, an applicant is regarded as individually concerned by the decision to refer where that decision denies it the benefit of the procedural guarantees granted by Regulation No 4064/89 (Article 18(4)) to third parties with a sufficient interest (*Cableuropa and Others* v *Commission*).

[5] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1).

(b) *Measures of general application*

(b.1) Regulations

In its judgment in *Sony Computer Entertainment Europe* v *Commission*, cited above, the Court declared admissible an action for annulment of a Commission regulation concerning the classification of certain goods in the Combined Nomenclature. The Court acknowledged that, as has been held previously, Commission regulations for the classification of specific goods in the Combined Nomenclature are of general application. None the less it held, relying on a series of factors, that Sony Computer Entertainment Europe was individually concerned by such a regulation since it triggered the administrative procedure which led to the adoption of the regulation concerning the tariff classification of the product imported by it into the Community — the PlayStation®2, it was the only undertaking whose legal position was affected as a result of adoption of the regulation, the regulation focused specifically on the classification of the PlayStation®2 imported by it, there were no other products with identical features at the time when the regulation entered into force, and the applicant was the sole authorised importer of the product into the Community.

(b.2) Directives

Directive 2002/2 [6] introduces new labelling rules for compound feedingstuffs, designed to provide more detailed information on the composition of feedingstuffs. An animal feed undertaking, Établissements Toulorge, sought the annulment of the directive and compensation for the damage allegedly suffered by it. By order in Case T-167/02 *Établissements Toulorge* v *Parliament and Council* [2003] ECR II-1114, the Court dismissed the action for annulment as inadmissible on the ground that the applicant was not individually concerned by the directive.

The Court stated that the legislative nature of directives does not preclude an interested business from being granted standing to challenge the legality of a directive, but nevertheless held that in the present case the applicant had not shown that it was individually concerned by the contested directive. The disclosure of composition formulae of feedingstuffs did not adversely affect the applicant's particular situation but was an obligation owed in identical fashion by all manufacturers of compound feedingstuffs. Accordingly, the Court dismissed the action as inadmissible without examining whether the directive was of direct concern to the applicant.

[6] Directive 2002/2/EC of the European Parliament and of the Council of 28 January 2002 amending Council Directive 79/373/EEC on the circulation of compound feedingstuffs and repealing Commission Directive 91/357/EEC (OJ 2002 L 63, p. 23).

The Court adopted the same reasoning in concluding that the founder of an internet site was not individually concerned by Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector [7] (order of 6 May 2003 in Case T-321/02 *Vannieuwenhuyze-Morin* v *Parliament and Council*, not yet published in the ECR).

(b.3) Decisions

Despite the term used, a "decision" may be considered to be a measure of general application. As was held in the order in *DOW AgroSciences* v *Parliament and Council*, cited above, Decision No 2455/2001/EC of the European Parliament and of the Council of 20 November 2001 establishing the list of priority substances in the field of water policy and amending Directive 2000/60/EC [8] cannot, notwithstanding its title, be considered to constitute a decision within the meaning of the fourth paragraph of Article 230 EC since it was adopted by the Parliament and the Council at the end of the codecision procedure (Article 251 EC) and is of the same general nature as Directive 2000/60, altering the latter's wording by the insertion of an annex.

The order dismisses as inadmissible the action brought by several companies active in the manufacture and marketing of two substances covered by the decision. The Court held that such a decision could not be considered to be of individual concern to the applicants which did not plead breach of an exclusive intellectual property right in respect of the substances listed in the contested measure or of a specific right, did not establish that the decision caused them exceptional damage, and the special position of which did not have to be taken into account by the authors of the measure when adopting it.

C. Competition rules applicable to undertakings

Competition has once again been the source of cases from which much can be learned in the field of the application of Articles 81 EC and 82 EC and in that of concentrations between undertakings.

7 OJ 2002 L 201, p. 37.

8 OJ 2001 L 331, p. 1.

First of all, the lengthy *TACA* judgment, which followed the delivery of the judgments in Case T-395/94 *Atlantic Container Line and Others* v *Commission* [2002] ECR II-875, concerning the Trans-Atlantic Agreement ("the TAA"), see the *Annual Report 2002*; and Case T-86/95 *Compagnie générale maritime and Others* v *Commission* [2002] ECR II-1011, concerning the FEFC Agreement, see the *Annual Report 2002*; Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-927, concerning the FETTCSA Agreement; under appeal, Case C-236/03 P; and the order of 4 June 2003 in Case T-224/99 *European Council of Transport Users and Others* v *Commission*, not yet published in the ECR, closed the series of cases concerning the legality of practices adopted by liner conferences in the light of Council Regulation No 4056/86 laying down detailed rules for the application of Articles 81 EC and 82 EC to maritime transport.[9] By the judgment in *TACA* (an abbreviation of the Transatlantic Conference Agreement, an agreement concluded in July 1994 between 15 shipping companies which were parties to the TAA, several provisions of which had been prohibited by the Commission in its decision of 19 October 1994 [10]), the Court rejected all of the pleas raised by the applicants with respect to infringements of Article 81 EC and allowed in part those concerning infringements of Article 82 EC. Given that there are so many, the important points made in that judgment will be addressed under most of the following headings.

1. Points raised in the case-law on the scope of Articles 81 EC and 82 EC

(a) *Scope ratione personae*

The agreements and practices covered by Articles 81 EC and 82 EC are prohibited only if they have been concluded or implemented by one or more "undertakings". In its judgment in Case T-319/99 *FENIN* v *Commission* [2003] ECR II-360, under appeal, Case C-205/03 P, the Court stated that the concept of "undertaking" does not cover purchases of products which have been made with a view to using those products in connection with a non-economic activity.

FENIN (Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental) is an association of the majority of the undertakings marketing medical goods and equipment in Spain from which the bodies running the national public health system ("the SNS") purchase medical goods and equipment which are

9 Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles [81] and [82] of the Treaty to maritime transport (OJ 1986 L 378, p. 4), Article 1 of which defines liner conference as a group of vessel-operating carriers which provides international liner services for the carriage of cargo on one or more particular routes and which operates under uniform or common freight rates.

10 Commission Decision 94/980/EC of 19 October 1994 relating to a proceeding pursuant to Article [81] of the Treaty (IV/34.446 – Trans-Atlantic Agreement) (OJ 1994 L 376, p. 1).

then used in Spanish hospitals. On 26 August 1999, the Commission rejected a complaint made by FENIN alleging abuse of a dominant position which, according to FENIN, arose from the average delay of 300 days in the settlement of debts by the bodies running the SNS.

In the judgment given on the action for annulment brought by FENIN against the Commission's decision, the Court first of all stated that, in Community competition law, the concept of undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. However, the Court explained that the characteristic feature of an economic activity is the offer of goods and services on a given market and not the business of purchasing them, as such. Consequently, when determining the nature of the purchasing activity, it would be incorrect to dissociate it from the use to which the purchased goods are subsequently put, since the nature of the purchasing activity is to be determined according to whether or not the subsequent use amounts to an economic activity.

The Court went on to point out that, according to the case-law of the Court of Justice, bodies which fulfil an exclusively social function based on the principle of solidarity and which are non profit making are not undertakings (Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637).

Applying those principles to the facts of *FENIN* v *Commission*, the Court found that the SNS is funded by social contributions and that it provides services free of charge to its members on the basis of universal cover, with the result that it operates according to the principle of solidarity. The Court therefore ruled that the bodies of the SNS could not be regarded as undertakings for the purposes of Articles 81 EC and 82 EC either in terms of their management of the SNS or, consequently, in terms of their purchasing activities related to that management. The Court therefore dismissed the action.

(b) *Competition proceedings and reasonable period*

Following a complaint lodged in 1991, the Commission, by decision of 26 October 1999, [11] imposed on Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie ("FEG and TU") fines amounting to EUR 4.4 million and EUR 2.15 million for various infringements of Article 81 EC. More than eight years passed between the lodging of the complaint with the Commission and adoption of the contested decision. During the administrative procedure, FEG and TU objected to the excessive duration of the investigation. Referring to its obligation to adopt decisions in competition matters within a reasonable period (Case C-185/95 P

[11] Commission Decision 2000/117/EC of 26 October 1999 concerning a proceeding pursuant to Article 81 of the EC Treaty – Case IV/33.884 – Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie (FEG and TU) (OJ 2000 L 39, p. 1).

Baustahlgewebe v *Commission* [1998] ECR I-8417 and Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739), the Commission acknowledged in the contested decision that the duration of the administrative procedure had been "considerable" and reduced the level of the fines imposed by EUR 100 000.

Before the Court, FEG and TU submitted that the Commission's infringement of the principle that decisions must be adopted within a reasonable period should lead to annulment of the contested decision or, at the very least, to a further reduction in the level of the fines. The applicants complained that it had been difficult to conduct their defence as a result of the time which had elapsed and the protracted uncertainty of their situation.

By its judgment of 16 December 2003 in Joined Cases T-5/00 and T-6/00 *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission*, not yet published in the ECR, the Court rejected those complaints and held that, while the Commission is under an obligation to adopt its decisions within a reasonable period, the fact that that period is exceeded does not necessarily justify annulment of the decision terminating the procedure. Confirming the "*PVC II*" case-law (Joined Cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, commented on in the *Annual Report 1999*), the Court took the view that the fact that the Commission exceeded a reasonable period could constitute a ground of annulment only where that adversely affected the exercise by the undertakings concerned of their rights of defence. Since the Commission had acknowledged that the period had been excessive, the Court examined whether, in this case, the rights of the defence had been adversely affected. The Court explained that, in order to do so, it was necessary to distinguish between the investigatory phase preceding the statement of objections and the developments after the administrative procedure. Since no accusations were made against the undertakings during the first phase, the extension of that phase could not have adversely affected the rights of the defence. The Court ruled that the second phase, which covered the period of 23 months between the hearing of the parties and the contested decision, was considerable and attributable to the Commission's failure to act.

However, the Court went on to find that the rights of the defence had not been affected by the duration of that phase of the procedure. In that connection, it stated, inter alia, that, so long as the limitation period laid down in Regulation No 2988/74 [12] has not expired, the protraction of the uncertainty alleged by the applicants as regards their

[12] Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1).

situation and as regards the adverse effects on their reputation is inherent in proceedings under Regulation No 17 and does not, in itself, prejudice the rights of the defence.

The Court also dismissed the applications for a reduction in the fines on account of the length of the administrative procedure and, exercising its unlimited jurisdiction, found that the applicants had failed to adduce any factors which could justify a reduction in addition to that already granted by the Commission.

(c) *Article 81 EC*

(c.1) Prohibited agreements

– Horizontal agreements

Horizontal price fixing agreements are expressly prohibited by Article 81(1) EC. The Commission decisions identifying and penalising such agreements were for the most part upheld.

First of all, in the judgment in *CMA CGM and Others* v *Commission*, cited above, the Commission's decision of 16 May 2000 [13] was upheld in so far as it found that the agreement between shipping lines operating on the northern Europe/Far East trade, the Far East Trade Tariff Charges and Surcharges Agreement, which provided that discounts were not to be granted on published rates for charges and surcharges for certain services, constituted an infringement of Article 81(1) EC and Article 2 of Regulation No 1017/68 [14] and that the conditions for an exemption of that agreement under Article 81(3) EC and Article 5 of Regulation No 1017/68 were not satisfied. Only the article of the decision relating to the fines was annulled.

In this connection, it is sufficient to note that the Court, like the Commission before it, took the view that an agreement prohibiting the grant of discounts on charges and surcharges between the members of a liner conference and independent companies must be regarded as a collective horizontal price-fixing agreement prohibited not only by the express wording of Article 81(1)(a) EC and Article 2(a) of Regulation No 1017/68 but also by the spirit of Regulation No 4056/86.

13 Commission Decision 2000/627/EC of 16 May 2000 relating to a proceeding pursuant to Article 81 of the EC Treaty (IV/34.018 – Far East Trade Tariff Charges and Surcharges Agreement (FETTCSA)) (OJ 2000 L 268, p. 1).

14 Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway (OJ, English Special Edition 1968 (I), p. 302).

Moreover, the five judgments of 11 December 2003 in Case T-56/99 *Marlines* v *Commission*, Case T-59/99 *Ventouris* v *Commission*, Case T-61/99 *Adriatica di Navigazione* v *Commission*, Case T-65/99 *Strintzis Lines Shipping* v *Commission* and Case T-66/99 *Minoan Lines* v *Commission*, not yet published in the ECR, essentially uphold the Commission decision of 1998 finding that there was an agreement contrary to Article 81 EC in the sector of maritime transport between Greece and Italy. [15] In that decision, the Commission found that there was a series of agreements and practices fixing the prices for roll on roll off ferry services between the ports of Patras (Greece) and Ancona (Italy) and for transport by truck on the Patras to Bari (Italy) and Patras to Brindisi (Italy) routes. Fines amounting to a total of approximately EUR 9 million were imposed on the seven companies which participated in the infringements. Five of the seven companies penalised by the Commission brought actions for annulment of the decision and for a reduction of the fines. All the actions were dismissed, save in respect of the fines imposed on Ventouris and Adriatica, which were reduced on the ground that the Commission had erred in its assessment of the gravity and scope of the infringements committed by them.

The Court found that the facts on which the Commission had relied had been duly established. Contrary to the claims made by the applicants, the Court found that the anti-competitive conduct in question had not been imposed on them by the Greek authorities and that, therefore, the applicants had not been deprived of the possibility of setting their tariff policy independently. The Court also confirmed that the agreements distorted competition on the common market.

Moreover, the Court took the view that the Commission had not exceeded its powers by carrying out an investigation on the premises of a company other than that to which the investigation decision had been addressed. The Court took account of the fact that the premises were used by the addressee company for the conduct of its business and found that they could be treated as the business premises of the addressee company.

The Court also held that the Commission had been right to impute the actions and initiatives of one company to another company with a distinct legal personality, since those two companies were, respectively, the principal and its trade representative and formed a single economic unit.

– Vertical restrictions

As regards vertical restrictions, the Court annulled two decisions of the Commission in accordance with settled case-law laying down that a unilateral act without the express or tacit participation of another undertaking does not fall within Article 81(1) EC.

15 Commission Decision 1999/271/EC of 9 December 1998 relating to a proceeding pursuant to Article [81] of the EC Treaty – (IV/34.466 – Greek Ferries) (OJ 1999 L 109, p. 24).

First, in its judgment of 3 December 2003 in Case T-208/01 *Volkswagen* v *Commission*, not yet published in the ECR, the Court annulled the Commission decision [16] by which the Commission found that Volkswagen had infringed Article 81 EC by setting the sale price of the new Volkswagen Passat model on the basis of exhortations to its German dealers not to sell that model below the recommended sale price and to grant limited, or even no, discounts to customers.

The Court referred, first of all, to the case-law according to which the Commission may not find that unilateral conduct on the part of a manufacturer, adopted in the context of its contractual relations with its dealers, in reality forms the basis of an anti-competitive agreement if it does not establish the existence of express or implied acquiescence by the dealers in the attitude adopted by the manufacturer.

The Court went on to point out that, in the *Volkswagen* case, the Commission had failed to prove actual acquiescence by the dealers to the requests made by Volkswagen when they had become aware of them. The Commission had taken the view that such proof was unnecessary since, by signing the dealership agreement, the dealers had tacitly agreed to those requests in advance.

Finally, the Court observed that the compatibility with Community competition law of the dealership agreement signed by the dealers was not in dispute. The Court therefore held that the Commission's argument amounted to claiming that a dealer who has signed a dealership agreement which complies with competition law is deemed, upon and by such signature, to have accepted in advance a later unlawful variation of that agreement, even though, by virtue precisely of its compliance with competition law, that agreement could not enable the dealer to foresee such a variation. Since it was not proven that there was a concurrence of wills between Volkswagen and its dealers, the Court annulled the Commission decision imposing a fine of EUR 30.96 million on Volkswagen.

Those same principles were applied again in Case T-368/00 *General Motors Nederland and Opel Nederland* v *Commission* (judgment of 21 October 2003, not yet published in the ECR, under appeal, Case C-551/03 P) but in that case they led only to a reduction in the fine imposed by the Commission.

Opel Nederland, which carries out the sale, import, export and wholesale trade in motor vehicles and associated spare parts of the Opel brand in the Netherlands, concluded dealership agreements with approximately 150 authorised dealers. The Community rules on the distribution of motor vehicles [17] do not permit manufacturers or their

16 Decision 2001/711/EC of 29 June 2001 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/F-2/36.693 – Volkswagen) (OJ 2001 L 262, p. 14).

17 See, in particular, Commission Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article [81](3) of the EC Treaty to certain categories of motor vehicle

importers to prohibit dealers from supplying goods to final consumers, their authorised intermediaries or other dealers who are part of the distribution network of that manufacturer or importer. In accordance with those principles, the Commission, by decision of 20 September 2000, [18] ordered Opel Nederland to pay a fine of EUR 43 million for having adopted a general strategy aimed at restricting or preventing all export sales from the Netherlands, consisting of three measures, namely a restrictive supply policy, a restrictive bonus policy and a direct export ban.

In its judgment, the Court essentially upheld the Commission's decision. However, the Court took the view that the Commission had failed to prove to the requisite legal standard that Opel Nederland had in fact communicated to its dealers the restrictive supply measure previously adopted by its management so that, *a fortiori*, it was likewise not established that that measure had become part of the contractual relations linking Opel Nederland to its dealers.

Conversely, the Court found that the Commission had established to the requisite legal standard that Opel Nederland's restrictive bonus policy had been incorporated into a series of continuous commercial relations governed by a pre-established general agreement and, consequently, was an agreement within the meaning of Article 81(1) EC and that, following the calls made by Opel Nederland, the dealers in question had undertaken not to make any more export sales.

Although the infringement had rightly been treated as "very serious", the Court held that the basic amount of EUR 40 million should be reduced in view of the fact that it had not been established that there was a restrictive supply measure. As a result, the final amount of the fine was fixed at EUR 35 475 000.

In Case T-65/98 *Van den Bergh Foods* v *Commission* (judgment of 23 October 2003, not yet published in the ECR, under appeal, Case C-552/03 P) the Court gave a ruling on the compatibility with Articles 81 EC and 82 EC of agreements under which Van den Bergh Foods ("HB"), the principal manufacturer of ice cream products in Ireland, supplied Irish ice cream retailers with freezer cabinets for ice cream for immediate consumption, on the condition that they be used exclusively for HB ice creams. By decision of 11 March 1998, [19] the Commission found that those agreements infringed Articles 81 EC and 82 EC.

distribution and servicing agreements (OJ 1985 L 15, p. 16), which was replaced, with effect from 1 October 1995, by Commission Regulation (EC) No 1475/95 of 28 June 1995 (OJ 1995 L 145, p. 25).

18 Commission Decision 2001/146/EC of 20 September 2000 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/36.653 – Opel) (OJ 2001 L 59, p. 1).

19 Commission Decision 98/531/EC of 11 March 1998 relating to a proceeding under Articles [81] and [82] of the Treaty (Case Nos IV/34.073, IV/34.395 and IV/35.436 – Van den Bergh Foods Limited) (OJ 1998 L 246, p. 1).

Ruling on a plea alleging manifest errors of assessment and infringement of Article 81(1) EC, the Court found that the exclusivity clause in question was not, in formal terms, an exclusive purchasing obligation since it did not preclude retailers from selling products of HB's competitors, provided that HB's freezers were used exclusively for its products. The Court stated that it therefore had to ascertain, first, whether that clause in fact imposed exclusivity on some sales outlets, then whether the Commission had correctly quantified the degree of foreclosure arising under that clause and, finally, whether the degree of foreclosure was sufficiently high to constitute an infringement of Article 81(1) EC.

Relying on settled case-law, the Court also observed that, in order to assess that degree of foreclosure, it is necessary to examine, first, whether all the similar agreements entered into in the relevant market and the other features of the economic and legal context of the agreements at issue show that those agreements cumulatively have the effect of denying access to that market to new competitors and, second, where that is the case, whether the agreements at issue contribute to the cumulative effect produced (Case C-234/89 *Delimitis* [1991] ECR I-935, paragraphs 23 and 24, and Case T-7/93 *Langnese-Iglo* v *Commission* [1995] ECR II-1533, paragraph 99).

The Court then applied those principles and carried out a detailed analysis of the effects of the clause in question. It found that, among other factors, the provision of a freezer without charge, the popularity of HB's ice cream, the breadth of its range of products and the benefits associated with the sale of them are very important considerations in the eyes of retailers when they consider whether to install an additional freezer cabinet in order to sell a second range of products or whether to terminate their agreement with HB.

The Court also found that a significant proportion of retailers would be prepared to stock a wider range of products if there were no exclusivity clauses in the distribution agreements of ice cream manufacturers.

Finally, the Court observed that, even though the agreements concluded by HB involved only around 40% of all sales outlets on the market, the Commission had taken into consideration the effects on competition of all the agreements concerned, which, taking all manufacturers together, apply in 83% of the sales outlets on the relevant market, so that suppliers wishing to enter into the market might be dissuaded by the need first to acquire a stock of freezers.

The Court concluded that the agreements concluded by HB were liable to have an appreciable effect on competition and contribute significantly to a foreclosure of the market.

(c.2) Exemptions

The conditions for exempting an anticompetitive agreement from prohibition, as assessed by the Commission, were examined by the Court in the judgment in *CMA CGM and Others* v *Commission* and in the *TACA* judgment.

In support of their claim for annulment, CMA CGM and others raised several pleas alleging failure to define or error in the definition of the markets.

The Court observed that a precise definition of all the relevant markets is not necessarily indispensable in determining whether an agreement satisfies the four conditions for the grant of individual exemption laid down by Article 81(3) EC and Article 5 of Regulation No 1017/68. It is true that, in determining whether the fourth condition laid down by Article 81(3)(b) EC and Article 5(b) of Regulation No 1017/68 is met, the Commission must examine whether the agreement in question is liable to eliminate competition in respect of either a substantial part of the products in question or the transport market concerned. However, the four conditions for granting exemption are cumulative and therefore non-fulfilment of only one of those conditions suffices to make it necessary to refuse exemption. The Court therefore held that, since the Commission had established that the first three conditions for the grant of individual exemption were not satisfied and that it was unnecessary to rule on the fourth condition, it was under no obligation to define in advance all the relevant markets in order to establish whether the agreement in question qualified for individual exemption. In order to determine whether the first three conditions are satisfied it is necessary to have regard to the benefits flowing from the agreement, not specifically on the relevant market, but for any market on which the agreement in question might have beneficial effects.

The background to the *TACA* judgment is the conclusion of the Trans-Atlantic Conference Agreement ("the TACA"), by which 15 shipping companies which were parties to the TAA sought to respond to the objections which the Commission had raised against the latter agreement. Two shipping companies which were not involved in transatlantic trade (Hanjin and Hyundai) subsequently became parties to the TACA.

Like the TAA, the TACA covers eastbound and westbound transatlantic shipping routes between northern Europe and the United States of America. The TACA contains provisions on the fixing of the price for maritime transport in the strict sense, on the fixing of the price for inland transport operations provided as part of intermodal transport services, on the determination of the conditions under which service contracts may be concluded with shippers and of the content of such contracts (service contracts are contracts by which a shipper undertakes to provide a minimum quantity of freight to be transported either by the conference (conference service contracts) or by one or several individual carriers (individual service contracts) over a fixed period of time in exchange for a fixed rate and for the provision of specific services), on the fixing of the remuneration of freight forwarders where they act as shippers' agents in organising the

transport of goods, negotiating the terms and conditions on which the transport takes place and completing administrative formalities.

The TACA was notified to the Commission with a view to obtaining an individual exemption under Article 81(3) EC.

By decision of 16 September 1998 [20] ("the TACA decision"), the Commission, first, refused to grant an exemption for the agreement in question under the abovementioned provisions, with the exception of the terms relating to the fixing of the price for maritime transport, which fell within the block exemption provided for in Article 3 of Regulation No 4056/86; second, found that the parties to the TACA held a collective dominant position on the relevant market and that they had abused that dominant position and, third, imposed fines on each of the parties to the TACA for the two infringements of Article 82 EC which had been established.

Before the Court, the applicants submitted, inter alia, that the refusal to exempt the TACA provisions, with the exception of those fixing prices for maritime transport, which were covered by the block exemption provided for in Regulation No 4056/86, was unlawful.

With respect, first of all, to the agreement fixing the price for inland transport services, the Court had already held, in its judgment in *Compagnie générale maritime and Others* v *Commission*, cited above, that such an agreement does not fall within the block exemption provided for in Regulation No 4056/86, since that exemption covers only the maritime transport sector, and is not eligible for an individual exemption, whilst other, less restrictive agreements such as an agreement applying the "no below cost rule" (rule laying down that the price of inland transport may not be lower than the costs of such transport) may be eligible. In view of those factors, the applicants withdrew their plea at the hearing.

Second, with respect to the agreement determining the conditions under which service contracts may be concluded and their content, the Court found that, contrary to the applicants' claim, the TACA decision did not prohibit the shipping conferences, under Article 81 EC, from entering into conference service contracts and from freely determining the content of those agreements. Since the majority of the applicants' pleas were intended to challenge the existence of such a prohibition in the TACA decision, they were rejected as being devoid of purpose.

Finally, as regards the agreement on the remuneration of freight forwarders, the Court confirmed that such a horizontal price-fixing agreement is not eligible for the block

[20] Commission Decision 1999/243/EC of 16 September 1998 relating to a proceeding pursuant to Articles [81] and [82] of the EC Treaty (Case No IV/35.134 – Trans-Atlantic Conference Agreement (OJ 1999 L 95, p. 1).

exemption provided for in Regulation No 4056/86 for agreements laying down a uniform or common freight rate. The Court found, in particular, that the purpose of the agreement in question was not to remunerate maritime transport services but separate services which could not be regarded as equivalent to maritime transport services.

(c.3) Fines for infringement of Article 81 EC

The level of fines imposed by the Commission for infringement of Article 81 EC is generally challenged by the penalised undertakings and the complaints raised relate, inter alia, to the method of calculation used for or the assessments of the gravity and duration of the infringement, the extenuating or aggravating circumstances or cooperation with the Commission. Such challenges have enabled the Court to rule on the criteria taken into account in determining the level of fines.

The Court's clarifications can be found, principally, in the "*Lysine*" cases (judgments of 9 July 2003 in Cases T-220/00 *Cheil Jedang* v *Commission*, T-223/00 *Kyowa Hakko Kogyo and Kyowa Hakko Europe* v *Commission*, T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* (under appeal, Case C 397/03 P) and T-230/00 *Daesang and Sewon Europe* v *Commission*, not yet published in the ECR). Some of the undertakings penalised for participating in a cartel on the lysine market focused their actions for annulment of the Commission decision of 7 June 2000 [21] on aspects of the determination of the level of the fines. By that decision, the Commission found that, during the period from July 1990 to June 1995, there had been a series of agreements between undertakings covering the whole of the European Economic Area (EEA) on prices, sales volumes and the exchange of individual information on sales volumes of synthetic lysine ─ an amino acid used as an additive in animal feedstuffs ─ and imposed on those undertakings fines amounting in total to around EUR 110 million. For that purpose, the Commission applied the method set out in the Guidelines for calculating fines [22] and the 1996 Leniency Notice. [23]

Whilst a number of the Court's findings merely confirm principles already established (in particular, in the "*district heating*" cases; see the *Annual Report 2002*), others helped to clarify the rules on applying the criteria contained in the Guidelines and confirm that the Commission's assessment of the degree of cooperation by undertakings during the administrative procedure are subject to judicial review.

21 Commission Decision 2001/418/EC of 7 June 2000 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/36.545/F3 – Amino Acids) (OJ 2001 L 152, p. 24).

22 Guidelines for calculating fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3).

23 Commission Notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4). That notice of 1996 was, however, replaced in 2002 by Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3).

Moreover, the Court was thereby able to define the scope of the principle of *non bis in idem*, according to which a person who has already been tried cannot be the subject of further proceedings or be penalised for the same act. It should be noted that the level of the fines imposed on the applicant undertakings, which amounted to just over EUR 81 million, was reduced to around EUR 74 million.

From a general point of view, it may be noted from the "*Lysine*" cases that the facts on which the Commission relied when determining the level of the fine may not be called into question before the Court if the applicant expressly acknowledged them during the administrative procedure (judgment in *Archer Daniels Midland*, cited above). It is irrelevant whether such express acknowledgement has been rewarded with a reduction in the level of the fine on the ground that the applicant cooperated with the Commission.

Reference is likewise made to certain points made in the judgment in *General Motors Nederland and Opel Nederland* v *Commission*, cited above, by which the contested decision was annulled in part and the level of the fine imposed consequently reduced.

Finally, it should be noted that the level of the fines imposed by the Commission in the decision leading to the judgments, cited above, in *Marlines* v *Commission*, *Ventouris* v *Commission*, *Adriatica di Navigazione* v *Commission*, *Strintzis Lines Shipping* v *Commission* and *Minoan Lines* v *Commission* was reduced only with respect to the shipping companies Ventouris and Adriatica, the gravity and scope of whose infringements had been incorrectly assessed by the Commission when determining the level of the fines. The Court found, essentially, that, since the Commission had, in its decision, sanctioned two distinct infringements — in terms of the various shipping routes involved — it could not, for reasons of equity and proportionality, penalise with the same severity the undertakings which were found to have been involved in only one infringement (Ventouris and Adriatica in respect of the Patras to Bari and Patras to Brindisi routes) and those which had participated in both cartels. The Court took account of the size of those undertakings and the relative volume of trade on each of the routes concerned.

– The Guidelines

Observing, first of all, that, under Regulation No 17, [24] the Commission has a margin of discretion when fixing fines, in order that it may direct the conduct of undertakings towards compliance with the competition rules, that the Commission may adjust at any time the level of fines to the needs of Community competition policy (inter alia, *Archer Daniels Midland*) and that it has power to decide the level of fines so as to reinforce their deterrent effect, the Court nevertheless held that the Commission may not depart

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

from guidelines which it has imposed on itself and which are intended to specify, in accordance with the Treaty, the criteria which it proposes to apply in the exercise of its discretion in assessing the gravity of an infringement (same judgment). In the judgment in *CMA CGM and Others* v *Commission* [25] the Court stated that the Commission may depart from guidelines in a particular regard only where it sets out expressly the reasons justifying its decision for doing so, which is precisely what it had failed to do with respect to one of the sanctioned companies.

As is clear from the Guidelines, the starting amount of fines is determined according to the gravity and duration of the infringement. When assessing the gravity of an infringement, [26] the Commission is to take into account its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market.

As regards the nature of the infringement, the Court confirmed, in the judgment in *Archer Daniels Midland*, that the setting by competing undertakings of price objectives for a product in the EEA and of sales quotas for that market must be classified as "very serious" since such conduct adversely affects the undertakings' independence. [27] Similarly, it confirmed that an agreement aimed at the partitioning of the internal market is to be classified as very serious since it runs counter to the most fundamental aims of the Community (*General Motors Nederland and Opel Nederland* v *Commission*).

The judgment in *Archer Daniels Midland* also upheld the Commission's appraisal of the actual impact of the cartel on the relevant market, namely, in that case, an increase in prices to a level higher than they would otherwise have reached and a restriction on sales volumes. In that context, the Court stated that, in order to establish that pricing agreements have had an effect, the Commission must find that they have in fact enabled the undertakings concerned to achieve a higher level of transaction price than that which would have prevailed had there been no cartel and take into account all the objective conditions in the relevant market, having regard to the economic context and legislative background.

Another issue raised by the applicants related to the question whether the Commission may, without infringing the principle of proportionality and the Guidelines, rely on

25 In that judgment, the Court conceded that the Commission may rely on the Guidelines by analogy when calculating fines imposed under Regulations No 4056/86 and No 1017/68.

26 According to the Guidelines, infringements are to be classed in one of three categories: "minor infringements", "serious infringements" and "very serious infringements".

27 In the judgment in *CMA CGM and Others* v *Commission*, the Court took the view that the classification of an agreement on prices as a "serious infringement" was a rather mild classification, which, in that case, could be explained by the lack of evidence of the effects on price levels and the probable short duration of the potential harmful effects of the infringement.

worldwide turnover rather than turnover from the sale of the products concerned in the EEA. The Court was thus asked to review whether the Commission had correctly assessed one of the criteria set out in the Guidelines (Section 1.A, fourth paragraph), namely the effective economic capacity of the persons committing the infringement to cause significant damage to other operators. As regards assessments involving an appraisal of the influence of the undertakings concerned on the affected market, the Court found that, unlike market shares, total turnover does not make it possible to determine the influence which the undertakings may exert on that market. It found, moreover, that, although the Commission was under an obligation to do so, it was not clear from the Commission's decision that it had established the scale of the infringement committed by each of the undertakings, a fair indication of which is the proportion of turnover derived from sales of goods on the geographic market affected. However, that failure to comply with the Guidelines did not lead the Court to find, in the exercise of its unlimited jurisdiction, that there had been any infringement by the Commission of the principle of proportionality. The Court, which based its findings on data which were not contained in the Commission's decision, found that the taking into account of the applicant's turnover on the global lysine market did not constitute an infringement of the principle of proportionality since the proportion of turnover achieved from sales of lysine in the EEA was considered to be "significant" or "considerable", namely that it amounted to around 20% (judgments in *Archer Daniels Midland*, *Kyowa Hakko Kogyo and Kyowa Hakko Europe* v *Commission* and *Daesang and Sewon Europe* v *Commission*, cited above,) or between 30 and 40% (judgment in *Cheil Jedang* v *Commission*, cited above) of the global turnover in question.

As regards the taking into account of the duration of the infringement, the Court held that, where the Commission states in its decision that it has increased the basic amount of the fine by 10% per annum, it cannot increase the basic amount by 30% in respect of an undertaking which participated in the cartel for less than three years. In view of the criterion applied by the Commission, the Court, in the exercise of its unlimited jurisdiction, reduced proportionately the increase in the fine imposed on Cheil Jedang (judgment in *Cheil Jedang* v *Commission*).

The Court nevertheless stated that, as it had ruled in *General Motors Nederland and Opel Nederland* v *Commission*, "the guidelines do not prejudge the assessment of the fine by the Community judicature", which has unlimited jurisdiction in that respect.

– Aggravating or mitigating circumstances

The Guidelines state that aggravating circumstances (such as the fact that an undertaking played a leading role in or instigated the infringement) or mitigating circumstances (such as the fact that an undertaking played a passive role (see, in that regard, the judgment in *Cheil Jedang* v *Commission*)) surrounding the involvement of each undertaking may be taken into account in order to increase or reduce the basic amount.

First of all, the scope of the section of the Guidelines concerning "non-implementation in practice of agreements", which is referred to as a mitigating circumstance, was defined not as covering cases where a cartel as a whole is not implemented but rather as covering the individual conduct of each undertaking (judgments in *Archer Daniels Midland* and *Cheil Jedang* v *Commission*).

Moreover, the Court held that, given the wording of the Guidelines, any percentage increases or reductions decided upon to reflect aggravating or mitigating circumstances must be applied to the basic amount of the fine set by reference to the gravity and duration of the infringement and not to any increase already applied for the duration of the infringement or to the figure resulting from any initial increase or reduction to reflect aggravating or mitigating circumstances. Since the Commission had failed to do so, the Court applied that method and adjusted the level of the fines in *Archer Daniels Midland* and *Daesang and Sewon Europe* v *Commission*.

– The Leniency Notice

The conditions under which undertakings cooperating with the Commission during its investigation into a cartel may be exempted from fines or be granted reductions in the fines which would otherwise have been imposed on them are defined in the Commission's Leniency Notice of 1996. [28]

The amount of reductions in the levels of fines granted by the Commission under the Leniency Notice has given rise to several disputes, many undertakings claiming that their cooperation justified a greater reduction in the fine.

Thus, the Court reduced the fine imposed on Daesang, taking the view that the Commission had unjustly refused to grant a reduction to that undertaking, since none of the reasons given constituted a legal justification for that refusal. It stated that cooperation in a Commission investigation into a possible infringement of the Community rules on competition which does not go beyond that which undertakings are required to provide under Article 11(4) and (5) of Regulation No 17 does not justify a reduction in the fine. A reduction in the fine is, however, justified where an undertaking provides the Commission with information well in excess of that which the Commission may require under Article 11 of Regulation No 17. The fact that a request for information has been addressed to the cooperating undertaking under Article 11(1) of Regulation No 17 cannot of itself exclude the possibility of a substantial reduction of between 50% and 75% of the fine pursuant to Section C of the Leniency Notice, particularly as a request for information is a less coercive measure than an

[28] Already cited at footnote 21. That notice of 1996 was subsequently replaced by Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3).

investigation ordered by decision (judgment in *Daesang and Sewon Europe* v *Commission*).

The judgment in *Archer Daniels Midland* is also noteworthy as the Court, while finding that the applicant had failed to satisfy the conditions set out in the Leniency Notice for a further reduction in the fine, nevertheless took the view that the provision of certain information to the Commission had to be rewarded since it constituted a mitigating circumstance referred to in the Guidelines. It consequently granted an additional 10% reduction in the fine.

– The principle of *non bis in idem*

In response to the complaint raised by several applicants that the Commission infringed the principle prohibiting multiple penalties for the same infringement by refusing to deduct from the fines which it had imposed the amount of the fines which had already been imposed on them in the United States and Canada, the Court ruled that the Commission does not act in breach of the principle of *non bis in idem* by imposing fines on undertakings for participating in a cartel which has already been penalised by the American and Canadian authorities (judgments in *Kyowa Hakko Kogyo and Kyowa Hakko Europe* v *Commission* and *Archer Daniels Midland*).

The Court pointed out that, in the field of competition, that general principle of Community law 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 appeal.

However, it explained further that, as Community law stands, that principle does not preclude the possibility of concurrent sanctions, one a Community sanction and the other a national one, since they are imposed at the end of two sets of parallel proceedings, each pursuing different ends. However, a general requirement of natural justice demands that, in determining the amount of a fine, the Commission must take account of any penalties that have already been borne by the undertaking in question in respect of the same conduct where these were imposed for infringement of the cartel law of a Member State and where, consequently, the infringement was committed within the Community.

In the light of the principles thus laid down, the Court ruled that the principle of *non bis in idem* cannot apply where the procedures conducted and the penalties imposed by the Commission on the one hand and the authorities or courts of a non-member country on the other clearly pursue different ends. That conclusion is supported by the fact that, under Article 4 of Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the scope of that principle is limited to

the territory of a single state and that, at present, there is no principle of public international law that prevents authorities or courts of different States from trying and convicting the same person on the basis of the same facts.

Moreover, although the Commission is, in accordance with a requirement of natural justice, under an obligation to take into account, when determining the amount of a fine, penalties already imposed on the same undertaking in respect of infringements of the cartel law of a Member State (which, consequently, have been committed within the Community), that is the result of the particular situation arising from the close interdependence between the national markets of the Member States and the common market and from the special system for the sharing of jurisdiction between the Community and the Member States with regard to cartels on the common market. That justification is clearly lacking in cases where the first decision imposing penalties on an undertaking was adopted by the authorities or courts of a non-member State in respect of infringements of that state's rules on competition and the Commission is therefore under no obligation, when determining the amount of a fine to be imposed on that undertaking for infringement of Community competition law, to take account of such a decision.

– Reasonable period and limitation

As the Court observed in its judgment in *CMA CGM and Others* v *Commission*, it is a general principle of Community law, related to the principle of sound administration, that the Commission must act within a reasonable time when adopting decisions following administrative procedures relating to competition policy. Thus, the Commission may not defer defining its position indefinitely and, in the interests of legal certainty and of ensuring adequate judicial protection, the Commission is required to adopt a decision or to send a formal letter, if such a letter has been requested, within a reasonable time. In the judgment in *CMA CGM and Others* v *Commission*, the Court also observed that an unreasonable length of the procedure, particularly where it infringes the rights of defence of the parties concerned, justifies the annulment of a decision establishing an infringement of the rules of competition. However, the Court stated for the first time that the same does not apply where what is disputed is the amount of the fines imposed by that decision, since the Commission's power to impose fines is governed by Regulation No 2988/74, [29] which lays down a limitation period for that purpose. That regulation established a comprehensive system of rules governing in detail the periods within which the Commission is entitled, without undermining the fundamental requirement of legal certainty, to impose fines on undertakings which are the subject of procedures under the Community competition rules. Article 2(3) of

[29] Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1).

Regulation No 2988/74 provides that the limitation period expires in any event after 10 years where it is interrupted pursuant to Article 2(1) of that regulation, so that the Commission cannot put off a decision on fines indefinitely without incurring the risk of the limitation period expiring. In the light of those rules, there is no room for consideration of the Commission's duty to exercise its power to impose fines within a reasonable period. That institution is not, however, precluded from exercising its discretion to reduce, on grounds of fairness, the level of fines where it considers the administrative procedure to have been excessively long, even though it ended within the limitation period.

It is apparent from the same judgment that the five-year limitation period laid down in Regulation No 2988/74 may be interrupted by a request for information within the meaning of Article 11(1) of Regulation No 17, provided that that request is necessary for the investigation or proceedings relating to the infringement. Since the Commission had failed to show that certain requests were necessary, the Court was compelled to find that it had imposed fines on 16 May 2000 even though the five-year limitation period provided for in the relevant provisions, which had begun on 24 March 1995, had expired. It therefore annulled the decision in so far as it imposed fines.

(d) *Article 82 EC*

(d.1) Dominant positions and abuse

In 2003, the Court gave a ruling in four judgments on the basic conditions for application of Article 82 EC.

First, in the judgment in *Van den Bergh Foods* v *Commission*, the Court found that the agreements referred to above, which constituted an infringement of Article 81 EC, also infringed Article 82 EC on account of HB's dominant position on the Irish market for single-wrapped ice creams for immediate consumption.

Second, in its judgment of 17 December 2003 in Case T-219/99 *British Airways* v *Commission*, not yet published in the ECR, the Court clarified several points relating to the general conditions for applying Article 82 EC.

The Court stated, first of all, that Article 82 EC applies both to undertakings whose dominant position is established in relation to their suppliers and to those undertakings which are capable of being in a dominant position in relation to their customers.

The Court then explained that an abuse of a dominant position committed on the dominated product market but the effects of which are felt on a separate market on which the undertaking concerned does not hold a dominant position may fall within Article 82 EC provided that separate market is sufficiently closely connected to the first.

Third, in its judgment of 30 September 2003 in Case T-203/01 *Michelin* v *Commission*, not yet published in the ECR, and, subsequently, in the judgment in *British Airways* v *Commission*, cited above, the Court clarified a number of points relating to the circumstances in which a commercial practice of granting discounts, adopted by an undertaking in a dominant position, may be regarded as an abuse.

The judgment in *Michelin* v *Commission* was concerned with a decision of 20 June 2001 [30] by which the Commission penalised Michelin for having abused its dominant position on the French market for replacement tyres and on the market for retreads. The Commission sanctioned Michelin's commercial and pricing policy in France with regard to dealers, which was based on a complex system of rebates, discounts and/or various financial benefits. Certain rebates relating to quality ("quantity rebates") and certain rebates fixed according to the quality of the dealer's service to users ("service bonus"), which were not "invoice rebates" but were paid in the calendar year following the financial year, were specifically regarded as abusive. An "agreement on business cooperation and assistance service" between Michelin and its dealers (known as "the Michelin Friends Club") was likewise penalised.

Ruling on the action brought by Michelin, the Court examined each of the business practices which the Commission had treated as an abuse in its decision.

In assessing, first of all, the rebates granted by Michelin, the Court relied on its own case-law and that of the Court of Justice on loyalty rebates [31] and observed generally that, in determining whether a quantity rebate system is abusive, it is necessary to consider all the circumstances, particularly the criteria and rules governing the grant of the rebate, and to investigate whether, in providing an advantage not based on any economic service justifying it, the rebates tend to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition.

On the basis of those principles, the Court examined the rebates granted by Michelin and found that the discount in question was calculated on the dealer's entire turnover with Michelin and that the reference period applied for the purpose of the discount was one year. The Court held that a quantity rebate system in which there is a significant variation in the discount rates between the lower and higher steps, which has a

30 Commission Decision 2002/405/EC of 20 June 2001 relating to a proceeding pursuant to Article 82 of the EC Treaty (COMP/E-2/36.041/PO – Michelin) (OJ 2002 L 143, p. 1).

31 Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, Case C-163/99 *Portugal* v *Commission* [2001] ECR I-2613 and Case T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] ECR II-389.

reference period of one year and in which the discount is fixed on the basis of total turnover achieved during the reference period has the characteristics of a loyalty-inducing discount system.

Moreover, relying on settled case-law according to which discounts granted by an undertaking in a dominant position must be based on an economically justified countervailing advantage in order not to be prohibited under Article 82 EC, [32] the Court examined whether that was so in *Michelin* v *Commission* and found that Michelin had submitted no specific evidence in that regard. The Court concluded that the Commission was therefore correct to find that the system applied by the applicant infringed Article 82 EC.

Second, the Court assessed the "service bonus" applied by Michelin, which was an additional incentive offered by Michelin to dealers to improve their equipment and after-sales service based on a system of "points" granted in return for compliance with certain commitments. The Court ruled that a discount system which is applied by an undertaking in a dominant position, and which, as in the *Michelin* case, leaves that undertaking a considerable margin of discretion as to whether the dealer will obtain the discount, must be considered unfair and constitutes an abuse by an undertaking of its dominant position on the market within the meaning of Article 82 EC. The Court also held that, in addition to being unfair, that bonus had a loyalty-inducing effect since it included, inter alia, the grant of additional "points" where the dealer purchased new Michelin products of a specific percentage determined by reference to the regional market share of those products. Finally, the Court found that the Commission was also entitled to find that the fact that dealers could earn an extra "point" if they returned used Michelin tyres to Michelin for retreading encouraged them to favour retreading by Michelin and, consequently, had the effect of promoting tied sales.

Finally, the Court considered the "Michelin Friends Club", which is composed of tyre dealers wishing to enter into a closer partnership with Michelin. In accordance with its terms, Michelin participated in the financial outlay of dealers notably by contributing towards investment and training. In return, dealers were to comply with certain commitments as regards market shares, carry a certain stock of Michelin tyres and promote that brand. The Commission found that that agreement accorded Michelin an exceptionally far-reaching right to monitor the activities of the members and comprised practices having a tied-sales effect. The Court held that the Commission was right to find that various aspects of the club constituted abusive practices on the part of Michelin.

[32] Judgments in Case 322/81 *Michelin*, cited above, paragraph 85, *Portugal* v *Commission*, cited above, paragraph 52, and Case T-228/97 *Irish Sugar* v *Commission* [1999] ECR II-2969, paragraph 114.

Furthermore, in response to a plea alleging a failure to examine the actual economic effect of that conduct, the Court stated that, for the purposes of establishing an infringement of Article 82 EC, it is unnecessary to show that the conduct in question had a specific effect. It is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having that effect.

The Court made the same point in its judgment in *British Airways* v *Commission*. On 14 July 1999, the Commission adopted a decision [33] in which it found that BA was a purchaser in a dominant position on the United Kingdom market for air travel agency services. Travel agents supply airlines with certain promotional services and administrative assistance in return for which the airlines pay commissions to the agents based on ticket sales.

BA had concluded with a number of travel agents agreements comprising, inter alia, a performance award calculated on the basis of the volume of sectors flown on BA and a sliding scale based on the extent to which travel agents increased their income made on sales of BA tickets.

Having found that there was an undeniable close connection between the services performed by travel agents in the United Kingdom and the transport services provided on the United Kingdom air transport market and that BA held a dominant position on the market for air travel agency services, the Court found that the bonus system which was the subject of the Commission's decision was indeed abusive.

The Court held, first, that the system put in place by BA was discriminatory. The Court found that attainment by United Kingdom travel agents of their BA tickets sales growth targets led to an increase in the rate of commission not only on BA tickets sold after the target was reached but also on all BA tickets handled by the agents during the reference period in question, which could result in different rates of commission being applied to an identical amount of revenue generated by the sale of BA tickets by two travel agents.

Second, the Court concluded from its own case-law and that of the Court of Justice on rebates that, generally, any "fidelity-building" rebate system applied by an undertaking in a dominant position tends, in breach of Article 82 EC, to prevent customers from obtaining supplies from competitors, irrespective of whether the rebate system is discriminatory, and that the same applies to a loyalty-inducing performance reward scheme adopted by a purchaser in a dominant position in relation to its suppliers of services.

[33] Commission Decision 2000/74/EC of 14 July 1999 relating to a proceeding under Article 82 of the EC Treaty (IV/D-2/34.780 — Virgin/British Airways) (OJ 2000 L 30, p. 1).

In *British Airways* v *Commission*, the Court found that the rebates granted by BA were loyalty inducing. Given their progressive nature with a very noticeable effect at the margin, the increased commission rates paid were capable of rising exponentially from one reference period to another. Moreover, BA's five main competitors on the United Kingdom market for air travel agency services were not in a position to grant the same advantages to travel agents since they could not attain a sufficient level of revenue to establish a similar reward scheme and counteract the exclusionary effect operating against them on the United Kingdom market for air travel agency services.

The Court went on to find that BA had failed to demonstrate that the loyalty-inducing character of its performance reward schemes was based on an economically justified consideration and, in particular, that its performance reward schemes constituted the consideration for efficiency gains or cost savings resulting from the sale of BA tickets after attainment of those objectives.

Fourth, the *TACA* judgment gives some further clarification as to the possibility of a collective dominant position. On that point, the applicants submitted, essentially, that, despite the fact that the TACA operated by applying uniform or common rates, the parties to the TACA were engaged in internal competition which precluded them from holding a collective dominant position. The Court found that there was some competition between the parties to the TACA not only in terms of services but also in terms of prices, particularly as a result of the service contracts (which granted a discount on the tariff in return for the provision of minimum quantities) and of independent actions. Nevertheless, the Court found that that competition was relatively limited and that it was insufficient to call into question the collectivity arising from the application of the uniform or common tariff and from the other links between the parties to the TACA created by the shipping conference agreement.

As regards the question whether the position held by the parties to the TACA was a dominant one, the Court found that, irrespective of the data used (that of the applicants or that of the Commission), the size of the market shares held by the parties to the TACA over the period in question, namely at least 56% for three consecutive years, gave rise to a "strong presumption" of a dominant position. The Courts stated that, contrary to what the applicants had claimed, the dominance threshold required for Article 82 EC to apply to a collective position is the same as in the case of an individual position. Although the Court found that the Commission's assessment of the potential competition and the prices charged under the TACA was not free of errors, it held that the presumption of a dominant position based on the market share of the parties to the TACA was nevertheless sufficiently confirmed by other factors identified in the TACA decision, such as, in particular, the difference in the size of market share compared with that of the main competitors, the fact that the parties to the TACA held 70% of available capacity, the "leadership" of the parties to the TACA in pricing matters (their competitors being "followers" in that regard) and the ability of the parties to the TACA to discriminate between shippers by way of prices based on the value of the goods.

The members of the TACA were accused of having abused their collective dominant position in two ways from 1994 to 1996: first, by placing restrictions on the availability and content of the service contracts ("the first abuse") and, second, by taking measures to induce potential competitors to become members of the TACA rather than entering transatlantic trade as independent lines, thus altering the competition structure on the relevant market ("the second abuse").

The Court first of all confirmed, for the most part, the first abuse, not, however, without first having to define the exact scope of that abuse, particularly following the explanations given by the Commission at the hearing. The Court thus found that the first abuse covered not only the practices restricting the availability of the individual service contracts and their content (which were also regarded as restricting competition) but also practices relating to the *conference* service contracts, namely the obligation to comply with the rules laid down in the TACA with respect to duration, multiple clauses, contingency clauses and the level of liquidated damages.

The reasons put forward by the applicants to justify the practices constituting the first abuse were rejected by the Court, with the exception of that relied on to justify the disclosure of the terms of individual service contracts.

The Court conceded that the law of the United States imposed on the parties to the TACA an obligation to notify their individual service contracts to the Federal Maritime Commission, which published the "essential terms" of those contracts. The Court found that, as a result of that publication, the content of the individual service contracts had become public and, therefore, was available to both shippers and shipping lines. That being so, the parties to the TACA could not, in the Court's view, be taken to task for having agreed to "disclose" the content of those contracts. Under the case-law, exchanges of public information cannot infringe the Treaty competition rules.

By contrast, the Court held that US law could not be relied on to justify other practices constituting the first abuse, such as the prohibition of individual service contracts or the prohibition of contingency clauses. It stated that those practices were not imposed but merely permitted or even made easier by that law, which cannot preclude application of the Treaty competition rules.

With respect to the second abuse, the Court first of all observed that, although the strengthening of a dominant position may, according to the *Continental Can* case-law, [34] constitute an abuse, that was not the abuse complained of in the *TACA* case since the Commission did not criticise the parties to the TACA for accepting new conference members but solely for adopting measures, some specific and others general, to induce potential competitors to join the TACA. The specific measures

[34] Case 6/72 *Europemballage Corporation and Continental Can Company* v *Commission* [1973] ECR 215.

adopted by the TACA consisted of the disclosure by the parties to the TACA of confidential information to Hanjin and the expression by those parties of a collective willingness to build up a slot capacity for Hanjin on the traffic in question, and of the authorisation granted to Hyundai to participate immediately in the current conference service contracts. The general measures consisted of the conclusion of a large number of dual-rate service contracts and the fact that the former structured members of the TAA (essentially the traditional members of the conference) did not compete to enter into service contracts in relation to a certain category of freight.

As regards the specific measures, the Court found, after having examined the circumstances in which Hanjin and Hyundai became members of the TACA, that the Commission had failed to prove to the requisite legal standard that it was those measures which led those two shipping lines to join the conference and not their own business considerations. The Court stated, in particular, that the Commission had failed to explain why the specific measures in question were not practices enabling Hanjin and Hyundai to exercise activities covered by the block exemption for shipping conferences and, therefore, to become members of the TACA under the same conditions as the existing members.

The Court found in that regard that the Commission had infringed the rights of defence of the parties to the TACA by using, in support of its complaints, inculpatory documents obtained after the administrative hearing, without giving the parties an opportunity to comment on them. The Court held that, although the documents in question were produced by the TACA (they were documents drawn up by the TACA or the parties thereto which had been provided by the parties to the TACA themselves in response to requests for information) and, therefore, the parties were aware of their content, the Commission should have given them an opportunity to comment on the relevance and probative value of those documents because neither the statement of objections nor the terms of the requests for information which led to the production of those documents nor their content enabled the parties to the TACA reasonably to infer the conclusions which the Commission would draw from them. Consequently, the Court excluded those documents as evidence of the specific measures and held that, since those measures could be established only by the documents in question, they had not been properly proven.

As regards the general measures, the Court found that, in order to be regarded as measures "inducing" potential competitors to join the TACA, the effect of such measures must have been to lead potential competitors to become members of the conference. A measure described as an inducement to join the conference which is not followed by any new membership would show that that measure was not in fact an inducement to join the conference. In the *TACA* case, the Court found that there was no evidence in the case-file on the basis of which it could be concluded that the only two shipping lines to have joined the conference during the period of the infringements, namely Hanjin and Hyundai, had taken that decision as a result of the general measures referred to in the decision.

On those grounds, the Court annulled the TACA decision in so far as it accused the parties to the TACA of having abusively altered the market structure.

(d.2) Fines

Once again, reference must be made to the *TACA* judgment. Although the Commission did not impose a fine in respect of the infringements of Article 81 EC, it did impose fines, amounting to EUR 273 million in total, on each of the parties to the TACA for the two infringements of Article 82 EC. Having regard to the finding relating to the second abuse, only the fines imposed in respect of the first abuse, other than for the mutual disclosure of the content of the individual service contracts, had to be examined by the Court.

– Immunity from fines

First of all, the Court considered whether the fines were covered by the immunity from fines provided for in Article 19 of Regulation No 4056/86.

Having examined the wording and the purpose of that article, the Court rejected the Commission's argument that immunity is relevant only to infringements of Article 81 EC and not to those of Article 82 EC. Although the Court conceded that immunity must be strictly interpreted, it held that Article 19 of Regulation No 4056/86 expressly provides that immunity may be granted in cases of infringements of Article 82 EC. It is true that immunity may be relied on only in respect of acts which have been notified with a view to obtaining an exemption under Article 81(3) EC and only "within the limits of the activity described in the notification". However, that does not mean that immunity may be granted only in respect of infringements of Article 81 EC. The Court observed that, according to the case-law, agreements restricting competition which have been notified with a view to obtaining an exemption may, where dominant undertakings are involved, be treated by the Commission as abusive practices.

The Court held, moreover, that the grant of immunity for infringements of Article 82 EC is compatible with the objective pursued by that provision since a dominant undertaking which notifies agreements liable to be treated as abusive practices itself gives notice of a possible infringement of Article 82 EC and thus makes the Commission's task easier. In the *TACA* case, since all the abusive practices constituting the first abuse had been notified to the Commission, the Court held that the fines imposed in that respect had to be annulled.

However, the Court noted that that immunity did not apply to the total amount of the fines imposed for the first abuse. The fines were imposed not only under Regulation No 4056/86 but, in so far as the inland aspects of the practices relating to the service contracts were concerned, also under Regulation No 1017/68. In its judgment in Case

T-18/97 *Atlantic Container Line and Others* v *Commission* [2002] ECR II-1125, the Court ruled that Regulation No 1017/68 does not provide for a scheme of immunity and that no such scheme can be inferred from any general principle of Community law.

The Court therefore examined the legality of the part of the fines imposed under Regulation No 1017/68.

– Division into groups

The TACA decision was one of the first decisions to apply the Guidelines on the calculation of fines published by the Commission. The Court stated, first of all, that the method followed in this case to calculate the level of the fines was consistent with the applicable legal framework.

As in the case leading to the judgment in *CMA CGM and Others* v *Commission*, the Commission had fixed the level of the fines after having divided the parties to the TACA into four distinct groups. In doing so, the Commission intended to take account of the considerable differences in size between the parties to the TACA.

In its judgment in *CMA CGM and Others* v *Commission*, the Court found that the Commission's division of the parties into four groups was not objectively justified and lacked consistency. In that case, the division of the applicants into groups was regarded as being in breach of the principle of non-discrimination or, at the very least, as inadequately justified.

However, in the *TACA* judgment, the Court found that the Commission was justified in dividing the parties to the TACA into groups since that division was coherent, the Commission having distinguished each of those groups starting with the size of the largest of the TACA parties and making successive reductions by half of that size.

– Extenuating circumstances

Nevertheless, the Court, in the exercise of its unlimited jurisdiction, found that no fine should have been imposed in the *TACA* case in respect of the practices covered by the first abuse.

The Court rejected the Commission's argument that the parties to the TACA could not rely on any extenuating circumstances. The Court observed that:

– the parties to the TACA had cooperated with the Commission by notifying all the practices in question even though such notification was not compulsory under Regulations No 4056/86 and No 1017/68 for the grant of an exemption;

– the TACA decision was the first decision in which the Commission directly assessed the lawfulness of the practices on service contracts adopted by shipping conferences;

– the legal treatment that should be reserved for such practices raised complex legal issues, which is shown by the difficulty in determining the precise scope of the decision in that regard;

– the abuse resulting from the practices on service contracts did not constitute a classic abuse within the meaning of Article 82 EC;

– the parties to the TACA were legitimately entitled to believe that the Commission would not fine them, particularly in view of the fact that, in several previous decisions in which a notified agreement had been treated as an abuse by the Commission, no fine had been imposed.

2. Regulation No 4064/89

(a) *Actions for annulment of authorisation decisions*

– *The* BaByliss *and* Philips *cases*

In January 2002, the Commission approved, without initiating the second phase of the examination procedure, the purchase by SEB of certain assets of Moulinex, subject to the condition, inter alia, that SEB grant an exclusive licence to sell all the household electrical appliances under the Moulinex trade mark for a period of five years in nine Member States in which competition problems had been identified and that SEB be prohibited from using that trade mark for a further three years. The decision did not relate to the French market, the Commission having granted the French authorities' request for a partial referral.

BaByliss and Philips contested the Commission's conditional authorisation decision before the Court. The judgments in *BaByliss* and *Philips* have enriched the case-law on a number of matters.

Essentially, the judgments in *BaByliss* and *Philips*, first, confirm that the Commission is entitled to accept, during Phase I of the procedure, the lodging of commitments submitted by the parties to a concentration within the three-week time-limit prescribed by the applicable rules (Article 18(1) of Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time-limits and hearings provided for in Regulation

No 4064/89 [35]) but subsequently amended after expiry of that period. The time-limit is binding on the parties to the concentration and is intended to prevent commitments from being submitted at a time which does not leave the Commission a sufficient period within which to assess them and consult third parties. However, the time-limit is not binding on the Commission. Consequently, where it considers that it has the time necessary to examine the changes made to the commitments after the time-limit and that there is sufficient time remaining to make assessments and consult third parties, it must be in a position to approve the concentration in the light of the amended commitments.

Second, the Court clarified the conditions for initiating the Phase II procedure. It held that the Commission has no discretion as regards the initiation of the Phase II procedure where it encounters serious doubts as to the compatibility of a concentration with the common market. It nevertheless enjoys a certain margin of discretion in identifying and evaluating the circumstances of the case in order to determine whether or not they present serious doubts or, where commitments have been proposed, whether they continue to present them (*Philips* judgment).

The Court stated that, given the complex economic assessments which the Commission is required to carry out in exercising its discretion in examining the commitments proposed by the parties to the concentration, the applicant must, in order to obtain annulment of a decision approving a concentration on the ground that the commitments are insufficient to dispel the serious doubts, show that the Commission has committed a manifest error of assessment (*Philips* judgment). However, in exercising its power of judicial review, the Court must take into account the specific purpose of the commitments entered into during the Phase I procedure, which, unlike the commitments entered into during the Phase II procedure, are not intended to prevent the creation or strengthening of a dominant position but, rather, to dispel any serious doubts in that regard. It follows that the commitments entered into during the Phase I procedure must constitute a direct and sufficient response capable of clearly excluding the serious doubts expressed. Consequently, where the Court is called on to consider whether, having regard to their scope and content, the commitments entered into during the Phase I procedure are such as to permit the Commission to adopt a decision of approval without initiating the Phase II procedure, it must examine whether the Commission was entitled, without committing a manifest error of assessment, to take the view that those commitments constituted a direct and sufficient response capable of clearly dispelling all serious doubts expressed (*Philips* judgment).

The cases in question raised the issue of whether the Commission was entitled to regard the commitments as sufficient to overcome the competition problems created by the concentration. Whilst the Court was unable, on the basis of the pleas and

[35] OJ 1998 L 61, p. 1.

arguments submitted by Philips, to find that there had been a manifest error of assessment, the Court upheld in part the line of argument put forward by BaByliss.

In the judgment in *BaByliss*, the Court confirmed that commitments which are behavioural, such as a trade mark licence, may be capable of overcoming the problems created by a concentration and that, in the *BaByliss* case, the duration of the commitments was sufficient to enable the licensees to compete effectively with the entity emerging from the concentration after the licence period. However, the Court found that, where no commitments are submitted, the Commission may not conclude that no serious doubts are raised on certain geographic markets. It first examined the way in which the assessment criteria (dominance threshold, absence of significant overlap, position of the merged entity in relation to its competitors and range effect) which had been used to rule out any serious doubts on each of the geographic markets in respect of which it did not impose commitments (Spain, Italy, Ireland, Finland and the United Kingdom) had been applied by the Commission to all the other markets affected by the concentration and found that two of the four criteria applied for that purpose were insufficiently precise (absence of significant overlap and range effect). Second, it held that the Commission had erred in its assessment of the markets which were not covered by the commitments. It therefore upheld BaByliss's action in part and annulled the decision in so far as it concerned the markets in Spain, Finland, Ireland, Italy and the United Kingdom.

– *The* ARD *case*

By decision of 21 March 2000, the Commission approved, subject to conditions, the merger by which BSkyB and KVV acquired joint control of KirchPay TV, a company active on the pay-TV market in Germany. That decision was taken without initiating the Phase II procedure.

ARD, a company active on the free-television market, brought an action for annulment of that decision.

The applicant submitted that the numerous commitments accepted by the Commission during the Phase I procedure were insufficient to dispel all the serious doubts described in the contested decision. In its judgment of 30 September 2003 in Case T-158/00 *ARD* v *Commission*, not yet published in the ECR, the Court confirmed that, given the complex economic assessments which the Commission has to carry out when appraising the commitments proposed by the parties to the concentration, the applicant must, in order to obtain annulment of a decision approving a concentration on the ground that the commitments are insufficient to dispel the serious doubts, show that the Commission has committed a manifest error of appraisal. It also stated that the Commission enjoys a broad discretion in assessing whether it is necessary to obtain commitments in order to dispel the serious doubts raised by a concentration and that failure to take into consideration commitments suggested by a third party does not lead

to annulment of the contested decision where the Commission could reasonably find that the commitments accepted in the decision dispel the serious doubts. The applicant's line of argument was therefore rejected in its entirety.

ARD also claimed that, since the Commission had expressed serious doubts as to the compatibility of the concentration with the common market, it was under an obligation to initiate the Phase II procedure. The Court pointed out that a finding that there are serious doubts does not preclude the possibility of dispelling those doubts by way of the proposed commitments. Above all, it rejected the analogy which the applicant had suggested between the consequences for interested third parties of a failure to initiate the formal examination procedure provided for in Article 88(2) EC in the field of State aid and the consequences for interested third parties of a failure to initiate the Phase II procedure under Article 6(1)(c) of Regulation No 4064/89. The procedures for examination by the Commission under Article 6 of Regulation No 4064/89 cannot be regarded as equivalent to those under Article 88 EC. In particular, the Court stated, first of all, that interested third parties have no right to participate in the initial phase of State aid proceedings. It pointed out, next, that, if the Commission finds, in the course of the examination provided for in Article 88 EC, that the plan involves aid within the meaning of Article 87(1) EC and that there are therefore doubts as to its compatibility with the common market, it is required to initiate the formal procedure, whereas, if the Commission finds that a concentration raises serious doubts, it is under no obligation to initiate the second phase if the modifications to the concentration or the commitments offered by the undertakings concerned eliminate those doubts.

Finally, the Court confirmed that the Commission is entitled to accept, during Phase I, the lodging of commitments submitted by the parties to a concentration within the three-week time-limit prescribed by the applicable rules (Article 18(1) of Regulation No 447/98) but subsequently amended after expiry of that period. The time-limit is binding on the parties to the concentration but not on the Commission. Consequently, where it considers that it has the time necessary to examine them, it must be in a position to approve the concentration in the light of those commitments, even where amendments are made after expiry of the three-week time limit. [36]

– *The* Verband der freien Rohrwerke eV and Others *case*

By decisions of 5 September 2000 and 14 September 2000, the Commission approved, on the basis of Regulation No 4064/86 and Article 66(2) CS respectively, the acquisition by Salzgitter of control of Mannesmannröhren Werke. Verband der freien

[36] In contrast to the judgments in *Philips* and *BaByliss*, the Court held only that the time-limit must be sufficient to enable the Commission to examine the commitments proposed, without stating that the remaining period must be sufficient to allow it to consult third parties. It is therefore implied that a failure to consult third parties on the latest amended versions of the commitments is permissible.

Rohrwerke eV, an association of undertakings, brought, together with two of its members, an action for annulment of those two decisions. While the action brought under Article 33 CS was dismissed as inadmissible, the action brought under Article 230 EC was dismissed as unfounded (judgment of 8 July 2003 in Case T-374/00 *Verband der freien Rohrwerke and Others v Commission*, not yet published in the ECR). The Court held that the Commission had not committed any manifest error when assessing the impact of the concentration in question.

(b) *Actions for annulment of decisions to refer a concentration to a national authority*

Under Article 9 of Regulation No 4064/89, a notified concentration may, subject to certain conditions, be referred to the competent national authorities of a Member State.

On two occasions, the Court gave a ruling on the legality of decisions to refer to national authorities. The background to the first case was the Commission's decision to refer the concentration between SEB and Moulinex to the French competition authorities in so far as the French markets for small household electrical appliances was concerned, with a view to the application of national law (*Philips* judgment). In the second case, the examination of a concentration consisting of a merger between Vía Digital and Sogecable was referred to the Spanish authorities (judgment of 30 September 2003 in Joined Cases T-346/02 and T-347/02 *Cableuropa and Others* v *Commission*, not yet published in the ECR).

Essentially, the Court was asked to examine whether the conditions for a referral (under Article 9(2)(a)) were satisfied and whether the Commission was entitled to decide to refer (under Article 9(3)) the examination of the effects of the concentration to the national authorities instead of dealing with the matter itself.

Under those provisions, the Commission may decide to refer the examination of a concentration to the national authorities where two cumulative conditions are satisfied: the concentration must threaten to create or strengthen a dominant position which significantly impedes effective competition on a market within the Member State concerned and that market must present the characteristics of a distinct market.

– *The* Philips *case*

The Court found that those two conditions were satisfied. As regards the threat to create or strengthen a dominant position as a result of which effective competition will be significantly impeded on a market within the Member State concerned, the Court pointed out that the new entity would have an unrivalled range of products and portfolio of trade marks in France. As regards the existence of a distinct market, the Court observed that France was indeed such a market, particularly in view of the differences

in prices, the different trade marks and the national distribution, supply and logistic structures.

The Court took the view that the Commission had properly exercised the broad discretion which it enjoys in deciding on a referral, after finding that the Commission "cannot decide to make such a referral if, when the Member State's request for a referral is examined, it is clear, on the basis of a body of precise and coherent evidence, that such a referral cannot safeguard or restore effective competition on the relevant markets" and stating that review by the Community judicature of that question "must be restricted to establishing whether the Commission was entitled, without committing a manifest error of assessment, to consider that the referral to the national competition authorities would enable them to safeguard or restore effective competition on the relevant market so that it was unnecessary to deal with the case itself". While the Court found that referrals to the Member States in cases where the goods in question relate to distinct national markets might undermine the "one-stop-shop" principle (exclusive control by the European authorities), that risk was regarded as being inherent in the referral procedure currently provided for in Regulation No 4064/89.

Consequently, the Court dismissed in its entirety the action brought by Philips against the referral decision.

– *The* Cableuropa *case*

As in the preceding case, the Court held that the two conditions necessary for referral of the examination of the concentration to the national authorities were satisfied.

When examining the Commission's assessment of the second condition, the Court stated that the question whether there is a distinct market must be determined on the basis of, first, a definition of the relevant product or service market and, second, a definition of the relevant geographic market. In the *Cableuropa* case, the Court ruled that the Commission had not committed any manifest error of assessment in considering the relevant markets to be distinct markets with a national dimension. It thus rejected the appellants' arguments (based on the strong European presence of the parties to the concentration and of their parent companies in relation to both the telecommunications and pay-TV activities; the cross-border dimension of the markets for audiovisual rights to sports broadcasts and for certain films; the irrelevance of the linguistic factor to the definition of the geographic scope of the markets for pay-TV, broadcasting of audiovisual rights and telecommunications; and the cross-border dimension of the telecommunications market and the market for internet networks and associated services).

The Court held that the Commission had not committed any manifest error when exercising the broad discretion which it enjoys in deciding whether to refer a

concentration. In accordance with the rule laid down in the *Philips* judgment, it ruled that it was reasonable for the Commission to decide to refer the concentration since there was no precise and coherent evidence suggesting that a referral might undermine the maintenance of effective competition on the relevant markets and pointed out that the Spanish authorities had identified the precise competition problems raised by the concentration.

The Court found, moreover, that a complete referral to a national competition authority of a concentration the effects of which are limited to markets of a national dimension does not run counter to the principle that concentrations with a Community dimension are, where the relevant markets cover a substantial part of the common market, to be referred to national authorities only in exceptional cases.

Accordingly, the Court dismissed the action brought against the Commission's decision relating to the merger of Vía Digital and Sogecable.

(c) *Actions for annulment of decisions to refuse approval*

Proposals for commitments and their acceptance or refusal can be an important source of case-law. Another source of case-law is the implementation of commitments which have already been accepted by the Commission. In certain cases, such implementation requires, in particular, that the purchasers of the divested assets have to be approved. For that purpose, the Commission establishes that the purchaser is independent of the parties to the concentration, that it could become a competitor on the market and that, prima facie, the purchase of assets by that purchaser does not raise competition problems.

Refusal to approve the choice of prospective purchasers may give rise to a dispute. Thus, in the *TotalFina/Elf* case, the Commission refused to approve the purchasers originally proposed by the parties to the concentration.

The declaration that the concentration involving the repurchase of the undertaking Elf Aquitaine by TotalFina was compatible with the common market was made subject to the condition of compliance with certain commitments. [37] Those commitments required TotalFina Elf to divest 70 service stations on French motorways within a specified time-limit. In September 2000, the Commission decided to refuse to approve two of the purchasers proposed by TotalFina Elf within the framework of the proposed "package" on the ground that they were not in a position to maintain or develop effective competition on the relevant market. One of the two purchasers rejected, SG2R trading

[37] Commission Decision 2001/402/EC of 9 February 2000 declaring a concentration to be compatible with the common market (Case No COMP/M.1628 – TotalFina/Elf) (OJ 2001 L 143, p. 1).

under the name "Le Mirabellier", brought an action before the Court for annulment of the Commission's decision and lodged an application for interim relief with the President of the Court. Both the application for interim relief and the main action were dismissed (order of the President of the Court in Case T-342/00 R *Petrolessence and SG2R* v *Commission* [2001] ECR II-67 and judgment in Case T-342/00 *Petrolessence and SG2R* v *Commission* [2003] ECR II-1163).

In their plea alleging that the Commission had erred in its assessment of the applicants' suitability, the applicants contested the merits of the arguments put forward to substantiate the finding that they were not capable of competing effectively on the relevant market.

In response, the Court began by observing that the basic provisions of Regulation No 4064/89, in particular Article 2 thereof, which relates to the appraisal of concentrations, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature. It follows that review by the Community Courts of complex economic assessments made by the Commission in exercising the discretion conferred on it by Regulation No 4064/89 must be limited to ensuring compliance with the rules of procedure and the statement of reasons, as well as the substantive accuracy of the facts, the absence of manifest errors of assessment and of any misuse of power. In particular, it is not for the Court of First Instance to substitute its own economic assessment for that of the Commission.

In the context of the system of merger control established by Regulation No 4064/89, the Commission must assess, using a prospective analysis of the relevant market, whether the concentration which has been referred to it will lead to a situation in which effective competition in that market is significantly impeded by the undertakings involved in the concentration. In addition, the Commission may, pursuant to Article 8 of that regulation, attach conditions and obligations to its decision on the compatibility of a concentration.

In *Petrolessence and SG2R* v *Commission*, the Court held that the applicants had failed to establish that the Commission's appraisal of their suitability was manifestly incorrect. It thus confirmed that the Commission may refuse to accept purchasers where it appears that they will be unable to achieve the objective of the corrective measures.

(d) *Right to be heard*

Regulation No 4064/89 confers on third parties the right to be heard (Article 18(4)). They may therefore lodge written observations with the Commission, particularly in response to the publication in the *Official Journal of the European Union* of the notification of a concentration falling under Regulation No 4064/89 or in response to a request made to them by the Commission (see Article 16 of Regulation No 447/98). In

particular, they may be given the opportunity to submit their observations on the commitments which have been proposed by the notifying parties with a view to showing that the concentration neither creates nor strengthens a dominant position which significantly impedes competition on the relevant market.

In the case leading to the judgment in *ARD* v *Commission*, cited above, the applicant had just 24 hours in which to comment on the initial commitments. The Court took the view that such a time-limit was not capable of affecting the legality of the decision. [38]

The judgment in *ARD* v *Commission* also points out that, in Phase II, Article 18(4) of Regulation No 4064/89 does not require the Commission to send to qualifying third parties, for prior comment, the final terms of the commitments given by the undertakings on the basis of the objections raised by the Commission following, inter alia, receipt of the third parties' comments on the commitments proposed by the undertakings (Case T-290/94 *Kaysersberg* v *Commission* [1997] ECR II-2137). That is therefore a fortiori the case with decisions taken at the end of Phase I. The failure to consult ARD, as a qualifying third party already heard by the Commission during the same procedure, on one of the amendments to the initial engagements was not therefore such as to render the decision unlawful.

D. State aid

1. Constituent elements of State aid

According to consistent case-law, investment by the public authorities in the capital of an undertaking does not constitute State aid within the meaning of Article 87 EC in the case where, in similar circumstances, a private investor operating under normal market conditions and on a scale comparable to that of bodies managing the public sector might have been persuaded to provide the capital in question (Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959).

Two judgments provided the Court with an opportunity to define in greater detail the notion of a “private investor operating under normal market conditions”.

The judgment in Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission* [2003] ECR II-445, dealt with the consequences of a Law of 18 December 1991 by which the German *Land* of Nordrhein-Westfalen had transferred to the Westdeutsche Landesbank Girozentrale, which is a public-law banking institution, the Wohnungsbauförderungsanstalt, a

[38] It is therefore perfectly understandable that the Court held, in response to BaByliss's claim that the time-limit of 12 days in which it was to lodge its observations was insufficient, that such a time-limit is "manifestly more than sufficient".

separate public-law body wholly owned by the *Land*. This transfer had not resulted in any increase in the *Land*'s holding but brought a return fixed at 0.6% per annum after tax. In a decision of 8 July 1999, [39] the Commission had taken the view that this transaction constituted unlawful State aid that was incompatible with the common market inasmuch as an investor operating within a market economy would have sought appropriate remuneration for that capital and that a return in line with market value ought to have been fixed at 9.3% per annum after tax.

The Court first of all rejected the applicants' contention that Article 295 EC, which provides that the EC Treaty “shall in no way prejudice the rules in Member States governing the system of property ownership”, limits the scope of the concept of State aid within the meaning of Article 87(1) EC. [40]

Second, the Court pointed out that, in order to determine whether a State measure constitutes aid, the profitability or otherwise of the beneficiary undertaking is not in itself, in principle, conclusive as that issue must, rather, be taken into account for the purpose of determining whether the public investor behaved in the same way as a market economy investor or whether the beneficiary undertaking received an economic advantage which it would not have obtained under normal market conditions.

Applying, third, the concept of a private investor operating under normal market conditions, the Court formed the view that, in order to determine whether – and, if so, to what extent – the beneficiary undertaking was receiving an economic advantage which it would not have obtained under normal market conditions, the Commission may use as a criterion the average return noted in the sector concerned. The Court did, however, take pains to point out that use of this analytical tool does not release the Commission from its obligation to provide adequate reasons for its final decision and to carry out a full analysis of all the factors that are relevant to the transaction at issue and its context and, in particular, to take into account the possibility that the aid in question might satisfy the conditions for exemption under Article 86(2) EC. In the present instance, the Court took the view that the Commission had not provided sufficient grounds for its choice of two of the elements taken into account in its calculation of the appropriate rate of return, that is to say, the value of the basic rate of return and the increase applied to that rate for the purpose of applying it to the particular characteristics of the transaction. The Court accordingly took the view that, in view of the fact that those factors were of essential importance in the Commission's decision, that decision had to be annulled.

39 Commission Decision 2000/392/EC of 8 July 1999 on a measure implemented by the Federal Republic of Germany for Westdeutsche Landesbank – Girozentrale (WestLB) (OJ 2000 L 150, p. 1).

40 See also the Court's judgment of 5 August 2003 in Joined Cases T-116/01 and T-118/01 *P&O European Ferries (Vizcaya) and Diputación Foral de Vizcaya* v *Commission*, not yet published in the ECR, paragraph 152.

The judgment of 5 August 2003 in Joined Cases T-116/01 and T-118/01 *P&O European Ferries (Vizcaya) and Diputación Foral de Vizcaya* v *Commission*, not yet published in the ECR, (under appeal, Case C-442/03 P) constitutes one of the sequels to the Court's judgment in Case T-14/96 *BAI* v *Commission* [1999] ECR II-139, by which the Court annulled a Commission decision holding that an agreement signed between the Diputación Foral de Vizcaya (the Regional Council of Biscay) and the Ministry of Trade and Tourism of the Basque Government, of the one part, and P&O European Ferries ("P&O Ferries"), of the other, did not constitute State aid. That agreement related to the establishment of a ferry service by which the authorities which were signatories to the agreement acquired travel vouchers for use on the Bilbao-Portsmouth ferry route.

After reopening the procedure in order to take account of developments subsequent to the Court's judgment, the Commission found that, while the Diputación indicated that it was seeking, by its purchase of travel vouchers, to facilitate or subsidise trips for some of those living within its jurisdiction, the total number of vouchers obtained had not been fixed on the basis of its real needs and therefore did not correspond to the social needs which had been relied on. [41]

The Court confirmed that analysis by ruling that the mere fact that a Member State purchases goods and services under market conditions is not sufficient for that transaction to constitute a commercial transaction concluded under conditions which a private investor would have accepted if it transpires that the Member State in question did not genuinely need those goods and services. Finding, further, that numerous factors together led to the conclusion that the Diputación had not entered into the new agreement in order to meet actual needs, the Court ruled that the Commission had acted correctly in law in classifying the agreement in dispute as State aid.

The Court also stated in this judgment that the fact that the Commission had initially adopted a positive decision approving the aid at issue could not have induced the beneficiary of that aid to entertain any legitimate expectation, since that decision was challenged in proper time before, and subsequently annulled by, the Community Courts.

2. Procedural matters

In its two judgments in Case T-366/00 *Scott* v *Commission* [2003] ECR II-1766 (under appeal, Case C-276/03 P) and Case T-369/00 *Département du Loiret* v *Commission* [2003] ECR II-1793, the Court set out in detail the conditions governing the application of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules

41 Commission Decision 2001/247/EC of 29 November 2000 on the aid scheme implemented by Spain in favour of the shipping company Ferries Golfo de Vizcaya (OJ 2001 L 89, p. 28).

for the application of Article [88 EC], [42] which establishes the procedural rules in matters of State aid. In those two judgments, the Court pointed out that procedural rules, in contrast to substantive rules, are generally regarded as being applicable to all proceedings pending at the time when they enter into force. Regard being had to the fact that the rules laid down by Regulation No 659/1999, including the rule on limitation periods set out in Article 15, are procedural in nature, the Court concluded that those rules apply to all administrative procedures in matters of State aid pending before the Commission at the time when Regulation No 659/1999 entered into force, that is to say, on 16 April 1999.

The Court stated further that a request for information sent by the Commission to the authorities of a Member State interrupts the 10-year limitation period, in regard also to the beneficiary, even if the latter was unaware of the existence of that request.

E. Trade protection measures

In the course of 2003 the Court delivered two judgments in cases concerning trade protection measures.

In its judgment of 23 October 2003 in Case T-255/01 *Changzhou Hailong Electronics & Light Fixtures and Zhejiang Yankon* v *Council*, not yet published in the ECR, the Court specified the conditions under which the normal value of a product within the meaning of Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community [43] may be calculated according to the rules of a market economy in the case where the imports in question are from the People's Republic of China.

Note should also be taken of the judgment of 8 July 2003 in Case T-132/01 *Euroalliages and Others* v *Commission*, not yet published in the ECR, concerning the conditions under which a trade protection measure which is about to expire may or must be maintained and concerning the extent of the Court's control over the Commission's appraisal of the “Community interest” for the purposes of Regulation No 384/96.

In this latter case, the applicants had sought the annulment of a Commission decision [44] terminating antidumping proceedings in respect of imports of ferro-silicon originating in Brazil, China, Kazakhstan, Russia, Ukraine and Venezuela, in which the

42 OJ 1999 L 83, p. 1.

43 OJ 1996 L 56, p. 1.

44 Commission Decision 2001/230/EC of 21 February 2001 terminating the antidumping proceeding concerning imports of ferro-silicon originating in Brazil, the People's Republic of China, Kazakhstan, Russia, Ukraine and Venezuela (OJ 2001 L 84, p. 36).

Commission had taken the view that maintenance of the measures in question after their expiry would be contrary to the Community's interests, even if the expiry of those measures risked favouring the continuation or reappearance of dumping and the resultant damage.

The Court ruled that the conditions for maintaining an antidumping measure which was approaching its expiry were, *mutatis mutandis*, the same as those for the introduction of new measures. After establishing that Regulation No 384/96 did not confer on the complainant Community industry any right to the introduction of protection measures, including in the case where dumping and resulting damage had been established, the Court concluded that the same applied in regard to the maintenance of a measure approaching expiry, even where the probability of continuation or reappearance of the dumping and the resultant damage had been established.

The Court then went on to state that the Commission's assessment of the Community interest presupposed an appraisal of complex economic situations and proceeded from a choice of political economy, with the result that it was not for the Community Courts to substitute their assessment for that of the institutions competent to make that choice. That said, it was for the Community Courts to examine, in particular, whether the Commission had complied with the procedural rules of Regulation No 384/96. In conducting that examination, the Court stated that, for the purpose of assessing the Community interest, the Commission has not only the right but also the duty to carry out a full appraisal of the position of the market concerned by the measures and of the other markets on which the effects of those measures are felt, which means that it may take into account any element liable to be relevant to its appraisal, irrespective of its source, subject to the condition that it has satisfied itself as to the representative and stable character of that element.

F. Community trade marks

The registration of Community trade marks now constitutes a fertile source of litigation. 100 actions brought in 2003 sought annulment of decisions delivered by the Boards of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (“the Office”).

Although lower than the number of cases brought within this area, the number of cases closed by the Court is increasing inasmuch as 47 cases were disposed of (24 by way of judgment and the remainder by way of order) as against 29 in 2002. It may be noted that the cases in which judgment was delivered were in the main “inter partes” cases, thus indicating that litigation has its origin primarily in the opposition proceedings conducted before the Office on the initiative of individual parties.

For purposes of clear presentation, it should be borne in mind that, according to Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade

mark, [45] a Community trade mark is to be refused registration inter alia if it is devoid of any distinctive character (Article 7(1)(b)), if it is descriptive (Article 7(1)(c)) (these being absolute grounds for refusal), or in the case of opposition based on the existence of an earlier mark protected in a Member State or protected as a Community trade mark (Article 8) (relative grounds for refusal). A Community trade mark may also be declared invalid by the Office upon application made in that regard pursuant to Article 51(1) of Regulation No 40/94.

1. Absolute grounds for refusal of registration

On ten occasions the Court ruled by way of judgment on the legality of decisions taken by the Boards of Appeal relating to absolute grounds for refusal of registration, annulling two decisions (judgments of 6 March 2003 in Case T-128/01 *DaimlerChrysler* v *OHIM (vehicle grille)* [2003] ECR II-703, and of 3 December 2003 in Case T-305/02 *Nestlé Waters France* v *OHIM (bottle shape)*, not yet published in the ECR) but upholding all of the others (judgments of 5 March 2003 in Case T-194/01 *Unilever* v *OHIM (ovoid tablet)* [2003] ECR II-386, of 30 April 2003 in Joined Cases T-324/01 and T-110/02 *Axions and Belce* v *OHIM (brown cigar shape and gold ingot form)* [2003] ECR II-1900, of 3 July 2003 in Case T-122/01 *Best Buy Concepts* v *OHIM (BEST BUY)*; of 9 July 2003 in Case T-234/01 *Stihl* v *OHIM (combination of the colours orange and grey)*; of 15 October 2003 in Case T-295/01 *Nordmilch* v *OHIM (OLDENBURGER)*; of 26 November 2003 in Case T-222/02 *HERON Robotunits* v *OHIM (ROBOTUNITS)*; of 27 November 2003 in Case T-348/02 *Quick* v *OHIM (Quick)*; and of 3 December 2003 in Case T-16/02 *Audi* v *OHIM (TDI)*, not yet published in the ECR).

With regard to procedural aspects, the Court held that, as the purpose of the action before it was to review the legality of decisions taken by the Boards of Appeal of the Office, evidence adduced for the first time before the Court was inadmissible (*DaimlerChrysler* v *OHIM (vehicle grille)*, cited above).

With regard to substance, the Court had the opportunity to rule that a word, the form of a product, the shape or packaging of a product, or a colour or combination of colours could be registered as Community trade marks on condition, inter alia, that these are not signs that are normally used for the marketing of the goods or services in question. In this regard, the Court pointed out that a trade mark's distinctiveness must be assessed by reference to the goods or services for which registration of the sign is sought and to the perception of the target public, which comprises consumers of those goods or services. Furthermore, a minimum degree of distinctive character is sufficient to render inapplicable the ground for refusal set out in Article 7(1)(b) of Regulation No 40/94.

In the light of those principles, the Court ruled that a trade mark representing the front grille of a motor vehicle was to be considered capable of leaving an impression on the

[45] OJ 1994 L 11, p. 1.

memory of the target public as an indication of commercial origin and thus of distinguishing and setting apart motor vehicles bearing that grille from those of other undertakings in view of the fact that, by reason of its unusual character, it could not be regarded as the image that naturally comes to mind as the typical representation of a contemporary grille. The Court for that reason annulled the contested decision (*DaimlerChrysler* v *OHIM (vehicle grille)*, cited above). In *Nestlé Waters France* v *OHIM (bottle shape)*, cited above, the Court adopted a similar approach in concluding that the shape of a bottle, by reason of its particular appearance, was capable of holding the attention of the public concerned and was for that reason distinctive in character.

By contrast, in upholding the decisions of the Boards of Appeal, the Court ruled that the following did not have a distinctive character: an ovoid shape for preparations for dishwashers (*Unilever* v *OHIM (ovoid tablet)*, cited above); a three-dimensional shape representing a brown cigar and a three-dimensional form representing a gold ingot designed for chocolate (*Axions and Belce* v *OHIM (brown cigar shape and gold ingot form)*, cited above); the verbal mark BEST BUY for, inter alia, business management consultancy services (*Best Buy Concepts* v *OHIM (BEST BUY)*, cited above); and a combination of orange and grey for mechanical appliances (*Stihl* v *OHIM (combination of the colours orange and grey)*, cited above).

The Court expressed the view on several occasions that the distinctness of a sign cannot be derived solely from a marketing concept, whether it be a “range effect”, by which it is suggested to the consumer that several products have the same commercial origin because they are generally marketed together (*Stihl* v *OHIM (combination of the colours orange and grey)*, cited above), or by reason of the high price charged for the products (*Axions and Belce* v *OHIM (brown cigar shape and gold ingot form)*, cited above).

So far as concerns the decisions of the Boards of Appeal confirming the descriptive character of certain marks in respect of which registration was sought, all of these decisions were upheld by the Court on the ground that the trade mark requested consisted exclusively of a word indicating or capable of indicating to the relevant public the geographical origin of certain goods (*Nordmilch* v *OHIM (OLDENBURGER)*, cited above) or because it might serve to designate one of the possible intended purposes of the goods covered (*HERON Robotunits* v *OHIM (ROBOTUNITS)*, cited above), or alternatively because it indicated a quality of the goods in question, *in casu* the rapidity with which meals could be prepared and served (*Quick* v *OHIM (Quick)*, cited above) or the fundamental characteristic of cars and repair services (*Audi* v *OHIM (TDI)*, cited above).

Finally, Article 7(1)(f) of Regulation No 40/94 provides that registration must be refused for a mark that is contrary to public policy and to accepted principles of morality. According to the Court, that provision does not cover the situation in which a trade mark applicant acts in bad faith (Case T-224/01 *Durferrit* v *OHIM (NU-TRIDE)* [2003] ECR II-1592).

2. Relative grounds for refusal of registration

It is first of all necessary to point out that an agreement concluded between the applicant for a Community trade mark and the opposing party, which has been notified to the Office and consists of a withdrawal of opposition to the registration of the mark, will lead the Court to conclude that there is no need to adjudicate on the matter (orders in Case T-7/02 *Zapf Creation* v *OHIM – Jesmar (Colette Zapf Creation)* [2003] ECR II-271 and Case T-8/02 *Zapf Creation* v *OHIM – Jesmar (Colette Zapf Creation Kombi Collection)* [2003] ECR II-279, and order of 3 July 2003 in Case T-10/01 *Lichtwer Pharma* v *OHIM – Biofarma (Sedonium)*, not yet published in the ECR).

Next, the case-law confirmed the factors to be taken into account for the purpose of concluding that there is a likelihood of confusion or, if relevant, a likelihood of association (Article 8(1)(b) of Regulation No 40/94) and established whether the Boards of Appeal had taken proper account of those factors. Thus, addressing the comparisons made between, on the one hand, the products concerned and, on the other, between the signs in question (regarding an appraisal of their visual, auditory or conceptual similarities), the Court ruled, as the Boards of Appeal had already decided, that there was indeed a risk of confusion in the public mind between the mark applied for and an earlier protected mark (Case T-99/01 *Mystery Drinks* v *OHIM – Karlsberg Brauerei (MYSTERY)* [2003] ECR II-43; judgments of 3 July 2003 in Case T-129/01 *José Alejandro* v *OHIM – Anheuser-Busch (BUDMEN)*; of 4 November 2003 in Case T-85/02 *Pedro Díaz* v *OHIM – Granjas Castelló (CASTILLO)*; of 25 November 2003 in Case T-286/02 *Oriental Kitchen* v *OHIM – Mou Dybfrost (KIAP MOU)*, not yet published in the ECR) or, on the contrary, that there was no such risk (*Durferrit* v *OHIM (NU-TRIDE)*, cited above; judgments of 9 July 2003 in Case T-162/01 *Laboratorios RTB* v *OHIM – Giorgio Beverly Hills (GIORGIO BEVERLY HILLS)* and of 22 October 2003 in Case T-311/01 *Éditions Albert René* v *OHIM – Trucco (Starix)*, not yet published in the ECR) or no risk of association (*Durferrit* v *OHIM (NU-TRIDE)*, cited above).

By contrast, the judgment of 14 October 2003 in Case T-292/01 *Phillips-Van Heusen* v *OHIM – Pash Textilvertrieb und Einzelhandel (BASS)*, not yet published in the ECR, altered, pursuant to Article 63(3) of Regulation No 40/94 – and for the first time –, the decision of a Board of Appeal annulling the decision of the Opposition Division and upheld the opposition for a category of products. In contrast to the Board of Appeal, the Court took the view that there was no risk of confusion between the verbal sign BASS, registration of which as a Community trade mark was sought, and the verbal sign PASH, already registered as a trade mark in Germany, both of which were used for clothes. The Court accordingly altered the decision of the Board of Appeal in such a way that the action brought before the Office by the opposing party was dismissed.

In conclusion, it should be pointed out that submissions made by the Office that the Court should “take into account the parties' pleadings” were inadmissible inasmuch as

the Office, which was formally the defendant before the Court, did not express any views on either the applicant's claims or on the fate of the contested decision (*Mystery Drinks* v *OHIM – Karlsberg Brauerei (MYSTERY)*, cited above).

3. Applications for a declaration of invalidity brought before the Office

The invalidity of a Community trade mark may be absolute or relative depending on the grounds in justification.

The absolute grounds for invalidity of a Community trade mark are set out in Article 51 of Regulation No 40/94. The origin of the case which led to the judgment in Case T-237/01 *Alcon* v *OHIM – Dr Robert Winzer Pharma (BSS)* [2003] ECR II-415 (under appeal, Case C-192/03 P), was a decision of the Cancellation Division of the Office declaring a Community trade mark invalid on the basis of Article 7(1)(d) of Regulation No 40/94, which precludes – as an absolute ground for refusal – registration of trade marks consisting exclusively of signs or indications which have become customary in the current language or in bona fide and established commercial practices. The Board of Appeal had dismissed the appeal brought against that decision. The Court, in its turn, dismissed the action seeking annulment of the Board of Appeal's decision and confirmed, in its ruling, that the term “BSS” had become customary in medical circles and that BSS as a trade mark had not acquired a distinctive character through use within a substantial part of the European Union.

The relative grounds for invalidity of a Community trade mark are set out in Article 52 of Regulation No 40/94. By judgment of 9 July 2003 in Case T-156/01 *Laboratorios RTB* v *OHIM – Giorgio Beverly Hills (GIORGIO AIRE)*, not yet published in the ECR, the Court dismissed an action brought by the company Laboratorios RTB against a decision of the Board of Appeal annulling a decision taken by the Cancellation Division of the Office and dismissing the application for annulment of a Community trade mark. The Court thereby upheld the submission that no evidence of genuine use of earlier marks during the five-year period prior to the application for annulment had been adduced – specifying in that regard the level of proof required for genuine use to be established for legal purposes – and that there was no likelihood of confusion between the Community mark GIORGIO AIRE for toiletries and the earlier Spanish marks featuring the words “giorgi line” and “miss giorgi” for identical articles.

4. Formal issues

Article 73 of Regulation No 40/94 requires decisions of the Office to state the reasons on which they are based. [46] In *Audi* v *OHIM (TDI)*, cited above, the Court took the view

[46] See also Rule 50(2)(h) of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Regulation No 40/94 (OJ 1995 L 303, p. 1).

that the Board of Appeal was under an obligation to state why the evidence adduced by Audi did not allow the conclusion that the mark applied for had become distinctive through use. However, it went on, the finding that the Board of Appeal of the Office had failed in its duty to set out reasons was not sufficient to entail the annulment of that Board's decision in view of the fact that a fresh decision of the Office would necessarily lead to the same result as the first decision.

The second sentence of Article 73 of Regulation No 40/94 provides that decisions of the Office may be based only on reasons or evidence on which the parties have had an opportunity to present their comments. Breach of that provision by an examiner of the Office, however, does not oblige the Board of Appeal to annul the decision taken by that examiner in the absence of any substantive illegality (*Audi* v *OHIM (TDI)*, cited above).

Furthermore, as held in the judgment in Case T-174/01 *Goulbourn* v *OHIM – Redcats (Silk Cocoon)* [2003] ECR II-791, the Court ruled that procedural equity and the general principle of protection of legitimate expectations require that that provision be construed as meaning that the Board of Appeal is obliged to indicate at the outset to the party concerned that it intends to take into account a fact which, having been relied on by the other party after expiry of the period prescribed for that purpose in opposition proceedings, was not taken into account in the decision of the Opposition Division, in order that the party concerned might be in a position to determine whether it would at all be appropriate to submit substantive observations on that fact. Such an obligation exists even if the other party had relied anew on that fact in its pleadings before the Board of Appeal. Inasmuch as it had failed to comply with that obligation, the decision of the Board of Appeal was annulled.

5. Operational continuity of the departments of the Office

For an application in opposition to be successful, the owner of the earlier trade mark must, where appropriate, be able to demonstrate “genuine use” (Article 43(2) of Regulation No 40/94). A question arose as to whether a Board of Appeal, before which an application had been brought by a party whose opposition had previously been dismissed by the competent Office department on the ground of want of evidence, could lawfully form the view that it was not required exhaustively to examine the decision taken by that department. In response to that question, the Court held, in its judgment of 23 September 2003 in Case T-308/01 *Henkel* v *OHIM – LHS (UK) (KLEENCARE)*, not yet published in the ECR, that its case-law to the effect that there is continuity, in terms of their functions, between the examiner and the Boards of Appeal may also be applied appropriately to the relationship between the other Office departments taking decisions at first instance, such as the Opposition Divisions, Cancellation Divisions, and the Boards of Appeal, and that consequently the powers of the Office's Boards of Appeal imply that they must re-examine decisions taken by departments at first instance. From this the Court concluded that, even if the party who

had brought the appeal before the Board of Appeal had not raised a specific ground of appeal, that Board was none the less "bound to examine whether or not, in the light of all the relevant matters of fact and of law, a new decision with the same operative part as the decision under appeal may be lawfully adopted at the time of the appeal ruling". It followed that the Board of Appeal was required to base its decision on all the matters of fact and law which the party in question had introduced in the proceedings before the department which had ruled at first instance or, subject only to Article 74(2) of Regulation No 40/94, [47] on the appeal. *In casu*, the Court found against the Board of Appeal which had itself failed to examine the evidence which the applicant had produced in the proceedings before the Opposition Division.

G. Access to documents

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 [48] provides for a right of access to documents held by an institution, that is to say, documents drawn up or received by it and in its possession.

In a case brought by an individual against the Commission, the Court examined whether the Commission could lawfully refuse access to documents which were in its possession but which had been drawn up by the Italian authorities. The Court pointed out in this regard that the institutions may be required, in appropriate cases, to communicate documents originating from third parties, including, in particular, the Member States. The Court noted, however, that the Member States are subject to special treatment inasmuch as Article 4(5) of Regulation No 1049/2001 confers on a Member State the power to request an institution not to disclose documents originating from that State without its prior agreement. In that case, as the Italian authorities had opposed communication to the applicant of the documents emanating from them, the Commission had been entitled to reject the application for access (judgment of 17 September 2003 in Case T-76/02 *Messina* v *Commission*, not yet published in the ECR).

This was the only case decided in 2003 which concerned the legality of decisions to refuse access taken pursuant to Regulation No 1049/2001.

H. Public health

Authorisations for the marketing of certain substances, or the withdrawal of such authorisations, were matters which gave rise to proceedings before the Court.

47 Article 74(2) of Regulation No 40/94 provides: "The Office may disregard facts or evidence which are not submitted in due time by the parties concerned".

48 OJ 2001 L 145, p. 43.

Whereas the judgment in Case T-147/00 *Laboratoires Servier* v *Commission* [2003] ECR II-85 (under appeal, Case C-156/03 P) annulled a Commission decision concerning the withdrawal of authorisations for the marketing of medicinal products for human use containing certain substances on grounds identical to those in Joined Cases T-74/00, T-76/00, T-83/00, T-84/00, T-85/00, T-132/00, T-137/00 and T-141/00 *Artegodan and Others* v *Commission* [2002] ECR II-4945 (commented on in the *Annual Report 2002*), the judgment of 21 October 2003 in Case T-392/02 *Solvay Pharmaceuticals* v *Council*, not yet published in the ECR, dismissed the action challenging the legality of a Council regulation which had the effect of setting aside authorisation of nifursol, a substance used in animal feedingstuffs. [49]

In that case, the applicant's main argument was that the risk to human health which formed the basis of the contested regulation was merely hypothetical. In its appraisal of that argument, the Court confirmed that the precautionary principle is a general principle of Community law which obliges the authorities concerned to take, in the specific exercise of the powers conferred on them by the relevant legislation, appropriate measures to prevent potential risks to public health, safety and the environment by attaching greater importance to the requirements associated with the protection of those interests than to economic interests. Within the area of public health, this principle, in line with what is now well-established case-law, means that where uncertainties exist as to the existence or scope of risks to human health, the institutions may adopt precautionary measures without having to wait for the reality and gravity of those risks to be demonstrated in full.

So far as concerns the scope of discretion enjoyed by the competent institution, the Court noted that, in cases where the scientific evaluation did not make it possible to establish with sufficient certainty whether a risk exists, recourse or non-recourse to the precautionary principle will depend on the level of protection chosen by the competent authority in the exercise of its discretion, regard being had to the priorities which it defines with regard to the objectives which it pursues in accordance with the relevant Treaty rules and rules of secondary law, subject to the proviso, however, that this choice must be in accordance, first, with the principle that the protection of public health, safety and the environment takes precedence over economic interests and, second, with the principles of proportionality and non-discrimination.

As implementation of the precautionary principle is subject to limited judicial control, the Court ruled that no manifest error had been committed in the appraisal of the scientific opinions and that it could for that reason have been lawfully concluded that the withdrawal of authorisation for nifursol was justified by the existence of serious

[49] Council Regulation (EC) No 1756/2002 of 23 September 2002 amending Council Directive 70/524/EEC concerning additives in feedingstuffs as regards withdrawal of the authorisation of an additive and amending Commission Regulation (EC) No 2430/1999 (OJ 2002 L 265, p. 1).

indications giving rise to reasonable doubts as to its harmlessness. In that context, the Court noted that the precautionary principle is intended to obviate potential risks, whereas, in contrast, risks that are purely hypothetical – based on mere conjectures without any scientific basis – cannot be taken into account.

In its judgment of 18 December 2003 in Case T-326/99 *Olivieri* v *Commission and European Agency for the Evaluation of Medicinal Products*, not yet published in the ECR, which dismissed on grounds of inadmissibility an action seeking the annulment of a Commission decision authorising the marketing of a medicinal product (see above), the Court pointed out that the Commission, assisted by the European Agency for the Evaluation of Medicinal Products, must verify that the information provided by an applicant for marketing authorisation is correct and adequately and sufficiently demonstrates the quality, safety and efficacy of the medicinal product in question.

I. Community funding

For the period 2000 to 2006, the financial and structural actions referred to in Article 159 EC are to be governed by Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds. [50] The Court, however, did not in 2003 give rulings in any disputes concerning implementation of the new rules. The judgments delivered by the Court related essentially to the legality of Commission decisions reducing, suspending or withdrawing financial assistance on the basis of the legislative rules preceding Regulation No 1260/1999, that is to say, Regulation No 2052/88 [51] and Regulation No 4253/88. [52]

In general, the pleas in law most frequently relied on in support of forms of order seeking annulment of Commission decisions reducing or withdrawing financial assistance are derived from, first, errors in the appraisal of the facts, second, infringement of the general principle of respect for the rights of the defence and, third, infringement of the principle of proportionality.

With regard to the plea concerning errors of appraisal in regard to irregularities identified by the Commission, the Court, at the conclusion of a detailed examination, declared that plea to be partially founded in its judgment of 30 September 2003 in Case

50 OJ 1999 L 161, p. 1.

51 Council Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 185, p. 9).

52 Council Regulation (EEC) No 4253/88 of 19 December 1988 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 374, p. 1).

T-196/01 *Aristoteleio Panepistimio Thessalonikis* v *Commission*, not yet published in the ECR, which led the Court to annul the decision to withdraw assistance from the Guidance Section of the European Agricultural Guidance and Guarantee Fund ("EAGGF").

Respect for the rights of the defence in all open proceedings against a person which are liable to culminate in a measure adversely affecting that person is a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings in question. That principle requires that the addressees of decisions which significantly affect their interests should be placed in a position in which they may effectively make known their views. When infringement of that principle is pleaded in actions brought before the Court, the latter is obliged to examine whether the applicants were provided with a proper opportunity to set out their views prior to the adoption of the decisions the legality of which they dispute in regard to all of the heads of complaint laid against them. While the Court rejected a plea of this kind in its judgment in Case T-217/01 *Forum des migrants de l'Union européenne* v *Commission* [2003] ECR II-1566 (under appeal, Case C-369/03 P), it took the view, in its judgment of 9 July 2003 in Case T-102/00 *Vlaams Fonds voor de Sociale Integratie van Personen met een Handicap* v *Commission*, not yet published in the ECR, that, as the applicant in that case submitted, it had not been placed in a position in which it could submit its observations on a key element for the purpose of establishing the existence and extent of an alleged overpayment of assistance from the European Social Fund prior to the adoption of the decision reducing that assistance.

Concerning the plea in law alleging infringement of the principle of proportionality laid down in Article 5 EC, it was argued that the irregularities committed did not justify the reduction or withdrawal of the financial assistance. According to well-established case-law, the infringement of obligations whose observance is of fundamental importance to the proper functioning of a Community system may be penalised by forfeiture of a right conferred by Community legislation, such as entitlement to Community assistance. It followed that the discontinuance of financial assistance was not, in principle, disproportionate where it was established that the beneficiary of that aid had infringed an obligation fundamental to the proper operation of the Community system in question, such as the EAGGF. The Court thus ruled that the withdrawal of EAGGF assistance was justified in the light of that principle in the case where the recipient had failed to comply with fundamental obligations by not being involved in economic activity and by providing inaccurate information in its application for aid (judgment in Joined Cases T-61/00 and T-62/00 *APOL and AIPO* v *Commission* [2003] ECR II-639) or by suspending the activity of a production line and using a separate production line for the processing of a product excluded from the aid (judgment of 11 December 2003 in Case T-305/00 *Conserve Italia* v *Commission*, not yet published in the ECR). Such withdrawal is also justified where the recipient of the aid misled the Commission as to the commencement of work and began that work before the date on which the application for aid was received by that institution, in violation of the relevant rules (judgment in Case T-186/00 *Conserve Italia* v *Commission* [2003] ECR II-723) and

where unjustified expenditure was charged against the project (judgment in Case T-340/00 *Comunità montana della Valnerina* v *Commission* [2003] ECR II-814 (under appeal, Case C-240/03 P)).

By contrast, in its judgment of 11 December 2003 in Case T-306/00 *Conserve Italia* v *Commission*, not yet published in the ECR, the Court annulled a Commission decision reducing EAGGF assistance. The Court took the view that the method used for calculating the reduction in aid was in clear breach of the principle of proportionality inasmuch as it failed to take proper account of the relationship between the seriousness of the breach committed by the applicant and the reduction adopted, it being pointed out that the breach in question consisted in the commencement of the work which was the subject of the assistance before the date on which the application had been received by the Commission.

It should also be pointed out that, in the absence of any indication – whether in the relevant legislation or in the decision granting funding – that the recipient of aid is financially liable to the Community for the whole of a project, the completion of which falls to several parties, the principle of proportionality is infringed where the Commission, having established irregularities in the performance of that project, sought from the person designated as the recipient reimbursement of the full amount of assistance already paid without limiting that claim to the section of the project which was to be carried out by that person (*Comunità montana della Valnerina* v *Commission*, cited above).

Furthermore, in its judgment in *Aristoteleio Panepistimio Thessalonikis* v *Commission*, cited above (see also judgment in Case T-125/01 *José Martí Peix* v *Commission* [2003] ECR II-868, paragraphs 96 to 114, (under appeal, Case C-226/03 P); judgment in Joined Cases T-44/01, T-119/01 and T-126/01 *Eduardo Vieira and Others* v *Commission* [2003] ECR II-1216, paragraphs 165 to 180, (under appeal, Case C-254/03 P); judgment of 17 September 2003 in Case T-137/01 *Stadtsportverband Neuss* v *Commission*, not yet published in the ECR, paragraphs 125 to 134), the Court expressed the view that, although Article 24 of Regulation No 4253/88 does not specify particular time-limits, the Commission was under an obligation, in the procedure for the withdrawal of financial assistance, to reach its decision within a reasonable period. *In casu*, although it took the view that the administrative procedure had been very long, the Court found that the plea alleging infringement of the principle that decisions must be taken within a reasonable period was unfounded, regard being had to its "PVC II" case-law [53] (see the *Annual Report 1999*), to the effect that infringement of the principle that decisions must be taken within a reasonable period, assuming that infringement to have been established, would not justify the automatic annulment of the contested

[53] Judgment in Joined Cases T-305/94, T-306/94, T-307/94, T-313/94, T-314/94, T-315/94, T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931.

decision, and to the complexity of the case in conjunction with the uncooperative attitude shown by the applicant.

J. Community staff cases

The numerous decisions delivered in 2003 in Community staff cases dealt with a wide range of legal issues which included access to the European public service by way of competition (judgment of 23 January 2003 in Case T-53/00 *Angioli* v *Commission*; judgment of 27 March 2003 in Case T-33/00 *Martínez Páramo* v *Commission*; judgment of 25 June 2003 in Case T-72/01 *Pyres* v *Commission*; judgment of 17 September 2003 in Case T-233/02 *Alexandratos and Panagiotou* v *Council*; and judgment of 30 September 2003 in Case T-214/02 *Martínez Valls* v *Parliament*, not yet published in the ECR), the appointment of senior officials (judgment of 18 September 2003 in Case T-73/01 *Pappas* v *Committee of the Regions*; judgment of 5 November 2003 in Case T-240/01 *Cougnon* v *Court of Justice*, not yet published in the ECR), the promotion of officials or reports concerning them, the conditions for receiving allowances under the Staff Regulations of officials, cover in respect of risks relating to accidents or illness, disciplinary measures incurred through non-compliance with the Staff Regulations and transfer to the Community scheme of pension rights acquired prior to entry into the service of the Communities (judgment of 30 January 2003 in Joined Cases T-303/00, T-304/00 and T-322/00 *Caballero Montoya and Others* v *Commission*, not yet published in the ECR).

Among all of these decisions, it should be noted that the Court on several occasions dismissed actions for annulment of staff reports which had been drawn up late but ordered the Commission to compensate those officials who had been adversely affected by the late establishment of their reports (judgments of 7 May 2003 in Case T-278/01 *den Hamer* v *Commission* and Case T-327/01 *Lavagnoli* v *Commission*; judgment of 30 September 2003 in Case T-296/01 *Tatti* v *Commission*; judgments of 23 October 2003 in Case T-279/01 *Lebedef* v *Commission*, Case T-24/02 *Lebedef-Caponi* v *Commission* and Case T-25/02 *Sautelet* v *Commission*, not yet published in the ECR). On this first aspect, the Court pointed out that a staff report cannot, in the absence of exceptional circumstances, be annulled for the sole reason that it was drawn up late. While a delay in drawing up a staff report may give rise to a right to reparation on the part of the official concerned, that delay cannot affect the validity of the staff report or, consequently, justify its annulment. On the second aspect, the Court stressed that the delay in drawing up staff reports is a source of non-material damage for an official and that, in the absence of special circumstances justifying the delay found to have occurred, the administration commits a service-related fault of such a kind as to render it liable. The Court stated in its above judgments in *den Hamer* v *Commission* and *Lavagnoli* v *Commission* that the case-law which, in the light of the wording of Article 43 of the Staff Regulations, allows the Commission a reasonable period within which to draw up the staff reports of its officials cannot apply from that point in time at which provisions that are binding on the Commission, such as general implementing provisions, make the reporting procedure subject to specific time-limits

and that consequently any exceeding of that time-limit which that institution has imposed on itself must in principle be attributed to it.

The pursuit of multiple outside activities without prior permission of the appointing authority justifies the disciplinary sanction of removal of the official in question from her or his post, as held in the judgment of 16 January 2003 in Case T-75/00 *Fichtner* v *Commission* (ECR-SC II-51, under appeal, Case C-116/03 P). In the course of its assessment, the Court pointed out that, under the third paragraph of Article 12 of the Staff Regulations, the official concerned is required to seek permission from the appointing authority, regardless of the outside activity which he proposes to pursue, and to refrain from pursuing such an activity without valid permission. The Court also took the view that the confirmed failures to comply with Article 12 of the Staff Regulations, which had been practically continuous over a period of almost ten years, provided grounds for that conduct to be classified as particularly serious and justified the finding that the sanction of removal from post was not disproportionate.

Delivered by a Chamber consisting of five judges, infrequent in staff cases, the judgment of 30 January 2003 in Case T-307/00 *C* v *Commission* (ECR-SC II-221), declared the fourth paragraph of Article 80 of the Staff Regulations to be unlawful [54] and accordingly annulled a decision based on that article. Faced with the question whether the administration was entitled to reject an application for an orphan's pension on the ground that the provisions of the Staff Regulations refer only to the death of a spouse and therefore do not cover the case of the death of an unmarried partner, the Court first of all expressed the opinion that, in view of the purpose served by the fourth paragraph of Article 80 of the Staff Regulations, the situation of an unmarried official whose child has lost his or her other parent, who was not an official or a member of the temporary staff of the Communities and who in fact contributed to the child's upkeep pursuant to a legal obligation resulting from the recognition of paternity, is comparable to those situations which do come within the scope of that article. The Court went on to express the view that the exclusion of unmarried officials from the scope of Article 80 was not justified in so far as the additional expense incurred by an official who loses his or her spouse also arises in the case of the death of the other parent who is not the official's spouse but has recognised the child and is by virtue of that fact under a legal obligation of maintenance. From this the Court concluded that the fourth paragraph of Article 80 of the Staff Regulations drew an unjustified distinction and infringed the principle of equal treatment.

[54] The fourth paragraph of Article 80 of the Staff Regulations provides:

"Where the spouse, not being an official or member of the temporary staff, of an official or of a former official in receipt of a retirement pension or an invalidity pension dies, the children being dependent within the meaning of Article 2 of Annex VII on the surviving spouse shall be entitled to an orphan's pension in accordance with Article 21 of Annex VIII."

II. *Actions for damages* [55]

For the Community to incur non-contractual liability under Article 288 EC, 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 judgment in Joined Cases T-344/00 and T-345/00 *CEVA and Pharmacia entreprises* v *Commission* [2003] ECR II-229 (under appeal, Case C-198/03 P). The Court took the view that the damage resulting from the impossibility of marketing certain veterinary products which faced the applicant pharmaceutical companies was the direct consequence of inaction on the Commission's part which amounted to a manifest and serious infringement of the principle of sound administration.

In all of the other decisions, the Court took the view that one or more of those conditions had not been satisfied (see, inter alia, judgment in Case T-333/01 *Meyer* v *Commission* [2003] ECR II-117 (under appeal, Case C-151/03 P); judgment in Case T-61/01 *Vendedurias de Armadores Reunidos* v *Commission* [2003] ECR II-327; judgments in Case T-56/00 *Dole Fresh Fruit International* v *Council and Commission* [2003] ECR II-579, and Case T-57/00 *Banan-Kompaniet and Skandinaviska Bananimporten* v *Council and Commission* [2003] ECR II-609, judgment in Case T-273/01 *Innova Privat-Akademie* v *Commission* [2003] ECR II-1095, judgments in Joined Cases T-93/00 and T-46/01 *Alessandrini and Others* v *Commission* [2003] ECR II-1639 (under appeal, Case C-295/03 P) and Case T-195/00 *Travelex Global and Financial Services and Interpayment Services* v *Commission* [2003] ECR II-1681, judgment of 2 July 2003 in Case T-99/98 *Hameico Stuttgart and Others* v *Council and Commission*; and judgment of 17 December 2003 in Case T-146/01 *DLD Trading* v *Council*, not yet published in the ECR).

With regard to the first of the three conditions mentioned above – the unlawfulness of the conduct alleged against the Community institutions – the case-law requires it to be shown that there has been a sufficiently serious breach of a rule of law protecting individuals. As to the condition that the breach must be sufficiently serious, it follows from the case-law of the Court of Justice that the criterion to be applied is that of a manifest and grave disregard by a Community institution of the limits imposed on its discretion, it being stated that in the case where that institution has only a considerably reduced margin of discretion, or even no discretion at all, the mere infringement of Community law may suffice to establish that there has been a sufficiently serious breach.

The above judgments in *Dole Fresh Fruit International* v *Council and Commission* and *Banan-Kompaniet and Skandinaviska Bananimporten* v *Council and Commission* are particularly noteworthy as the Court there ruled for the first time that an illegality

[55] Excluding Community staff cases.

capable of resulting in the annulment or invalidity of a measure will not necessarily constitute a sufficiently serious breach, with the result that the inference may be drawn that it is not every illegality that is capable of rendering the Community liable.

In the event, the Court took the view that there was no doubt as to the fact that a legal rule had been breached, inasmuch as the Court of Justice had established the illegality and invalidity of the provisions in issue, and that the principle of non-discrimination, in breach of which those provisions had been adopted, was a general principle of Community law for the protection of individuals. It thus remained to be determined whether, in view of the broad discretion which the institutions enjoyed in these cases by virtue of the international dimension and the complex economic assessments involved in the introduction or amendment of the Community import scheme for bananas, the Council and the Commission had, in adopting the provisions under challenge, manifestly and gravely disregarded the limits of their discretion. At the conclusion of its examination of all these matters, the Court concluded that the principle of non-discrimination had not been infringed in a sufficiently serious way and accordingly dismissed the actions.

With regard to the condition that there must be a causal link, the Court took the view that this condition is satisfied if there is a direct link of cause and effect between the measure for which the institution concerned is criticised and the damage alleged. In the absence of evidence by the applicant that such a link exists, the action must be dismissed (judgment in *DLD Trading* v *Council*, cited above).

Although the principle of no-fault liability has not been established in Community law, the Court pointed out once again that, if this were to be recognised, a precondition for such liability would be the cumulative satisfaction of three conditions, that is to say, the reality of the damage allegedly suffered, the causal link between that damage and the act alleged against the Community institutions, and the special and unusual nature of that damage. The above judgments in *Travelex Global and Financial Services and Interpayment Services* v *Commission* and in *Hameico Stuttgart and Others* v *Council and Commission*, in which those conditions are set out, merely held that the damage alleged had not been shown to have actually occurred.

III. *Applications for interim relief*

The purpose served by the procedure for interim relief is to make it possible to avoid, whether through suspension of application of the contested act (Article 242 EC) or by the granting of any other interim measure (Article 243 EC), irremediable damage to a party's interests. In 2003, 39 applications for interim relief were lodged with the Registry, while 31 cases were concluded. It should be noted that one of these cases was concluded by the “judge responsible for granting interim relief”, whose function is

provided for by the Court's Rules of Procedure, [56] as most recently amended on 21 May 2003. [57]

The granting of interim relief is conditional on several conditions being satisfied: there must be a prima facie case in the action to which the application for interim relief relates ("*fumus boni juris*") and there must be an element of urgency. In addition, the balancing of the interests involved, to be made by the judge dealing with the application, must come down on the side of the party seeking the interim relief.

By orders of 1 August 2003 in Case T-198/01 R II *Technische Glaswerke Ilmenau* v *Commission* and in Case T-378/02 R *Technische Glaswerke Ilmenau* v *Commission* and of 31 October 2003 in Case T-253/03 R *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, not yet published in the ECR, the President of the Court formed the view that those conditions had been satisfied and ordered interim relief. None of the other decisions given in 2003 acceded to the requests made.

Case T-198/01 R II follows on from the order in Case T-198/01 R *Technische Glaswerke Ilmenau* v *Commission* [2002] ECR II-2153 (see the *Annual Report 2002*) granting suspension of operation of the Commission's decision ordering Germany to recover from the recipient company State aid that had been declared incompatible with the common market. This suspension was limited in time and was subject to compliance by the applicant with certain conditions, including reimbursement of an initial portion of the disputed aid. On expiry of this first period, the applicant sought an extension of the measures granted. These were ordered to be granted again, subject to compliance with a number of conditions.

The proceedings between the companies Akzo Nobel Chemicals and Akcros Chemicals, on the one hand, and the Commission, on the other, arose following an inspection carried out on the premises of those companies with a view to securing evidence of possible anti-competitive practices. The applicant companies essentially submitted that the documents seized by the Commission's agents in the course of that investigation were covered by professional confidentiality protecting correspondence with legal advisers ("legal professional privilege") and that the Commission could not therefore have access to such material. In the light of that challenge, the Commission's agents seized a number of documents and deposited them in a sealed envelope which they then removed. With regard to other documents, the Commission took copies and placed them on the file. The Commission subsequently adopted a decision stating its intention to open the envelope containing the first documents.

By his order in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, cited above, the President of the Court ordered that decision to be suspended.

56 Article 106 of the Court's Rules of Procedure.

57 OJ 2003 L 147, p. 22.

He first of all expressed the view that the pleas raised by the applicants constituted a prima facie case in law. He stated his opinion that the plea alleging infringement of professional privilege in regard to the first documents raised very important and complex questions concerning the possible need to extend, to a certain degree, the scope of professional privilege as currently delimited by the case-law. *In casu*, the question raised was whether the scope of professional privilege, which at present covers communication with an outside lawyer or any document reporting the text or content of such communication, could be extended to documents drawn up for the purpose of consultation with a lawyer. Second, the President expressed the view that, in so far as it concerned the documents copied by the Commission, the plea alleging infringement of professional privilege also raised the issue of principle as to whether the protection afforded to correspondence between independent lawyers and their clients [58] could be extended to cover also written communications with a lawyer employed by an undertaking on a permanent basis. Third, the President of the Court stated that it could not be ruled out that, in the course of its examination, the Commission had failed to comply with the procedure defined in the above judgment in *AM & S* v *Commission* by having consulted, even if only summarily, the documents which the applicants claimed were covered by professional privilege.

The President of the Court then went on to express the view that the applicants had demonstrated that it was necessary to suspend implementation of the contested decision in order to prevent their suffering serious and irreparable damage. On this point, the President found *inter alia* that the fact that the Commission was aware of the information in the documents contained in the sealed envelope would as such constitute a substantial and irreversible breach of the applicants' right to respect for the confidentiality protecting those documents.

Finally, the President ruled that the general interest and the Commission's interest in ensuring compliance with the rules of competition could not take precedence over the applicants' interest in ensuring that the documents contained in the sealed envelope would not be disclosed.

In conclusion, mention should be made of the order of 15 May 2003 made by the President of the Court in Case T-47/03 R *Sison* v *Council*, not yet published in the ECR. The background to that case was provided by the Council decision of 12 December 2002 updating the list of persons covered by Regulation No 2580/2001 [59] providing for the freezing of funds and assets of individuals or groups involved in terrorist activities and which included on that occasion on that list the name of Jose Maria Sison. The latter, who is a Philippines national resident in the Netherlands,

[58] Protection recognised by the Court of Justice in its judgment in Case 155/79 *AM & S* v *Commission* [1982] ECR 1575.

[59] Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ 2001 L 344, p. 70).

brought an action before the Court seeking annulment of that decision and applied in parallel for interim relief. The latter application was dismissed on the ground of want of urgency. The President of the Court expressed the view that, in regard to financial harm, it had not been established that the applicable legislation would not enable Mr Sison to avoid suffering serious and irreparable damage in so far as the national authorities could, on an *ad hoc* basis and in accordance with specified arrangements, authorise the use of certain funds to meet the essential needs of the persons included on that list. With regard to the non-material harm alleged, it was pointed out that the purpose of proceedings for interim relief is not to ensure reparation for damage but rather to guarantee the full effectiveness of the ruling to be given on the merits.

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B – Composition of the Court of First Instance

(Order of precedence as at 7 October 2003)

First row, from left to right:

R. García-Valdecasas y Fernández, Judge; J. Pirrung, President of Chamber; P. Lindh, President of Chamber; B. Vesterdorf, President of the Court; J. Azizi, President of Chamber; H. Legal, President of Chamber; V. Tiili, Judge.

Second row, from left to right:

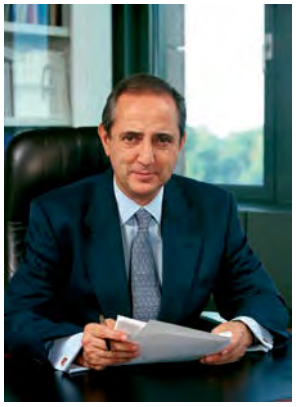
F. Dehousse, Judge; N.J. Forwood, Judge; A.W.H. Meij, Judge; M. Jaeger, Judge; J.D. Cooke, Judge; P. Mengozzi, Judge; M. Vilaras, Judge; M.E. Martins Ribeiro, Judge; H. Jung, Registrar.

1. The 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; Head of the Administrative Law Division in the Ministry of Justice; Head of Division 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; 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.

Koen Lenaerts

Born 1954; lic.iuris, Ph.D. in Law (Katholieke Universiteit Leuven); Master of Laws, Master in Public Administration (Harvard University); Lecturer (1979 to 1983), subsequently Professor of European Law, Katholieke Universiteit Leuven (since 1983); Legal Secretary at the Court of Justice (1984 to 1985); Professor at the College of Europe, Bruges (1984 to 1989); Member of the Brussels Bar (1986 to 1989); Visiting Professor at the Harvard Law School (1989); Judge at the Court of First Instance from 25 September 1989 to 6 October 2003.

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 (Constitutinal 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.

Rui Manuel Gens de Moura Ramos

Born 1950; Professor, Law Faculty, Coimbra, and at the Law Faculty of the Catholic University, Oporto; Jean Monnet Chair; Course Director (French language) at The Hague Academy of International Law (1984) and Visiting Professor in the Faculty of Law, Paris I University (1995); Portuguese Government delegate to the United Nations Commission on International Trade Law (UNCITRAL), The Hague Conference on Private International Law, the International Commission on Civil Status and the Council of Europe Committee on Nationality; member of the Institute of International Law; Judge at the Court of First Instance from 18 September 1995 to 31 March 2003.

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 to 1996; 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 to 1986; Visiting Fellow, Faculty of Law, University College Dublin; Fellow of the Chartered Institute of Arbitrators; President of the Royal Zoological Society of Ireland 1987 to 1990; Bencher of the Honourable 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; civil servant in the German Federal Ministry of Justice (Section for International Civil Procedure Law, Section for Children's Law); Head of the Section for Private International Law in the Federal Ministry of Justice; Head of a Subdivision for Civil Law; 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

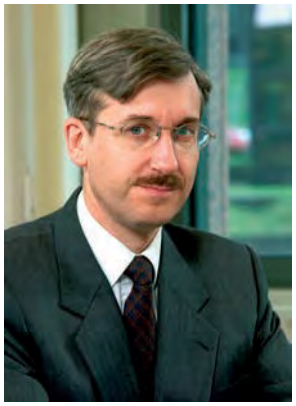
Born 1944; Justice at the Supreme Court of the Netherlands (1996); Judge and Vice-President at the College van Beroep voor het Bedrijfsleven (Administrative Court for Trade and Industry) (1986); Judge Substitute at the Court of Appeal for Social Security, and Substitute Member of the Administrative Court 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 (1974-1980); 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 (1996-1998); 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; graduated 1969 from Cambridge University (Mechanical Sciences and Law); called to the English Bar in 1970, thereafter practising in London (1971-1979) and also in Brussels (1979-1999); called to the Irish Bar in 1981; appointed Queen's Counsel in 1987, and 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; Governing Board member of the World Trade Law Association and European Maritime Law Organisation; 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 (1979-1985); rapporteur and subsequently Commissaire du Gouvernement in proceedings before the judicial sections of the Conseil d'État (1988-1993): legal adviser in the Permanent Representation of the French Republic to the United Nations in New York (1993-1997); 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 to 2000), then to the President of the Court of First Instance, Mr Vesterdorf (2000 to 2003); Judge at the Court of First Instance since from 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 of 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.

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 President Kutscher and subsequently in the Chambers of the German judge; Deputy Registrar of 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 2003

In 2003 the composition of the Court of First Anstance changed as follows:

On 31 March, Judge Rui Manuel Gens de Moura Ramos left the Court of First Instance. He was replaced by Mrs Maria Eugénia Martins de Nazaré Ribeiro as Judge.

On 6 October, Judge Koen Lenaerts, appointed to the Court of Justice, left the Court of First Instance. He was replaced by Mr Franklin Dehousse as Judge.

3. Order of precedence

from 1 January to 31 March 2003

B. Vesterdorf, President of the Court of First Instance
R. García-Valdecasas y Fernández, President of Chamber
K. Lenaerts, President of Chamber
V. Tiili, President of Chamber
N.J. Forwood, President of Chamber
P. Lindh, Judge
J. Azizi, Judge
R.M. Moura Ramos, Judge
J.D. Cooke, Judge
M. Jaeger, Judge
J. Pirrung, Judge
P. Mengozzi, Judge
A.W.H. Meij, Judge
M. Vilaras, Judge
H. Legal, Judge

H. Jung, Registrar

from 1 April to 30 September 2003

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

H. Jung, Registrar

from 1 to 6 October 2003

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
K. Lenaerts, 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 Ribeiro, Judge

H. Jung, Registrar

from 7 October to 31 December 2003

B. Vesterdorf, President of the Court of First Instance
P. Lindh, President of Chamber
J. Azizi, President of Chamber
J. Pirrung, président de chambre
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 Ribeiro, Judge
F. Dehousse, 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

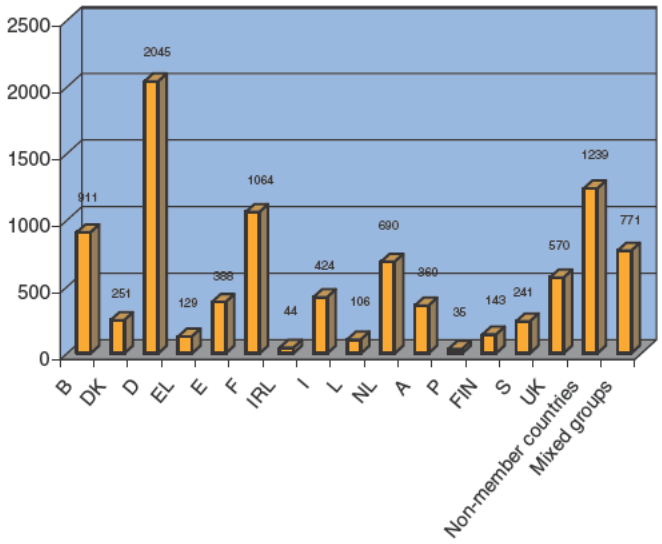
A — Official visits and functions at the Court of Justice and the Court of First Instance in 2003

13 January	Mrs Juliet Wheldon and Mr John Collins of the Treasury Solicitor's Department, United Kingdom
16 January	Delegation from the Board of Administration of the Association of Councils of State and Supreme Administrative Jurisdictions of the European Union
29 January	HSH Prince Radu of Hohenzollern-Veringen, Special Representative of the Romanian Government for Integration, Cooperation and Sustainable Development
30 January	Mr Mátyás Szilágyi, Chargé d'Affaires ad interim at the Hungarian Embassy in the Grand Duchy of Luxembourg
4 February	Mr Bruno Machado, President of the Boards of Appeal of the Office for Harmonisation in the Internal Market (OHIM), Alicante
13 February	The Right Rev. Dr Finlay Macdonald, Moderator of the General Assembly of the Church of Scotland
13 February	HE Kazuo Asakai, Ambassador Extraordinary and Plenipotentiary, Head of Mission of Japan to the European Union in Brussels
27 February	HE Aldebrhan Weldegiorgis, Ambassador Extraordinary and Plenipotentiary of the State of Eritrea to the Kingdom of Belgium and to the Grand Duchy of Luxembourg
4 March	HE Ampalavanar Selverajah, Ambassador Extraordinary and Plenipotentiary of the Republic of Singapore to the Kingdom of Belgium and to the Grand Duchy of Luxembourg
7 March	Final of the competition of the European Law Moot Court
10 March	HE Carlos Bastarreche Sagües, Ambassador Extraordinary and Plenipotentiary, Permanent Representative of Spain to the European Union in Brussels
from 10 to 19 March	Delegation from the Court of Justice of the Central African Economic and Monetary Community (CAEMC)
11 and 12 March	Delegation from the European Scrutiny Committee, House of Commons (United Kingdom)
13 March	HE Umberto Vattani, Ambassador Extraordinary and Plenipotentiary, Permanent Representative of Italy to the European Union in Brussels

19 and 20 March	Mr Jacob Söderman, European Ombudsman
9 April	Mr David O'Sullivan, Secretary-General of the European Commission
10 April	Mr Péter Bárándy, Minister for Justice of the Republic of Hungary, accompanied by Mrs Judit Fazekas, Deputy Secretary of State, and Mr Mátyás Szilágyi, Chargé d'Affaires ad interim
10 and 11 April	Mr Ivan Grigorov, President of the Supreme Court of Cassation of the Republic of Bulgaria
11 April	Delegation from the Finance Committee of the Parliament of Schleswig-Holstein
6 May	Mr Ivan Verougstraete, President of the Court of Cassation of the Kingdom of Belgium
7 and 15 May	HE Ingrid Apelbaum-Pidoux, Ambassador Extraordinary and Plenipotentiary of the Swiss Confederation to the Grand-Duchy of Luxembourg
20 May	HE Clay Constantinou, former Ambassador of the United States of America to the Grand Duchy of Luxembourg and Dean of Seton Hall School of Diplomacy and International Relations
22 May	HE Tudorel Postolache, Ambassador Extraordinary and Plenipotentiary of Romania to the Grand Duchy of Luxembourg
4 June	Mr Neil Kinnock, Vice-President of the European Commission
13 and 14 June	2nd Conference of the Association of European Competition Law Judges
16 and 17 June	Judges' Forum
19 June	Mrs Alina Dorobant, Second Secretary in the Mission of Romania to the European Union in Brussels
24 June	Mrs Pinky Anand, Senior Counsel at the Supreme Court of the Republic of India
26 June	HE Walter Hagg, Ambassador Extraordinary and Plenipotentiary of the Republic of Austria to the Grand Duchy of Luxembourg

7 July	Delegation from the Supreme Court of the United States of America
8 July	Mr Nikiforos Diamandouros, European Ombudsman
8 July	Mr Paul de Jersey AC, Chief Justice of Queensland
9 and 10 July	HE Agneta Söderman, Ambassador Extraordinary and Plenipotentiary of the Kingdom of Sweden to the Grand Duchy of Luxembourg
9 September	Delegation from the 12th Civil Chamber of the Bundesgerichtshof (Federal Court of Justice, Germany)
29 and 30 September	Delegation from the Bundesarbeitsgericht (German Federal Labour Court)
8 October	Mr Adrian Năstase, Prime Minister of Romania
15 October	HE Tassos Papadopoulos, President of the Republic of Cyprus
16 October	Delegation from the Supreme Court of the Kingdom of Norway
10 and 11 November	Judicial Study Visit
13 November	HE Porfirio Muñoz Ledo, Ambassador Extraordinary and Plenipotentiary of the United Mexican States to the Kingdom of Belgium and to the Grand Duchy of Luxembourg
17 November	Delegation from the Committee for European Integration of the Chamber of Deputies of the Czech Republic
18 November	Mrs Mary McAleese, President of Ireland
19 November	HE Peter Balàzs, Ambassador Extraordinary and Plenipotentiary, Head of Mission of the Republic of Hungary to the European Union in Brussels
24 November	HE Peter Terpeluk Jr, Ambassador Extraordinary and Plenipotentiary of the United States of America to the Grand Duchy of Luxembourg
26, 27 and 28 November	Delegation from the Supreme Administrative Court of the Republic of Lithuania
1 and 2 December	Delegation from the Supreme Court of the Republic of Cyprus
2 December	Delegation from the Constitutional Council of the Republic of Algeria

B — Study visits to the Court of Justice and the Court of First Instance in 2003 Distribution by Member State

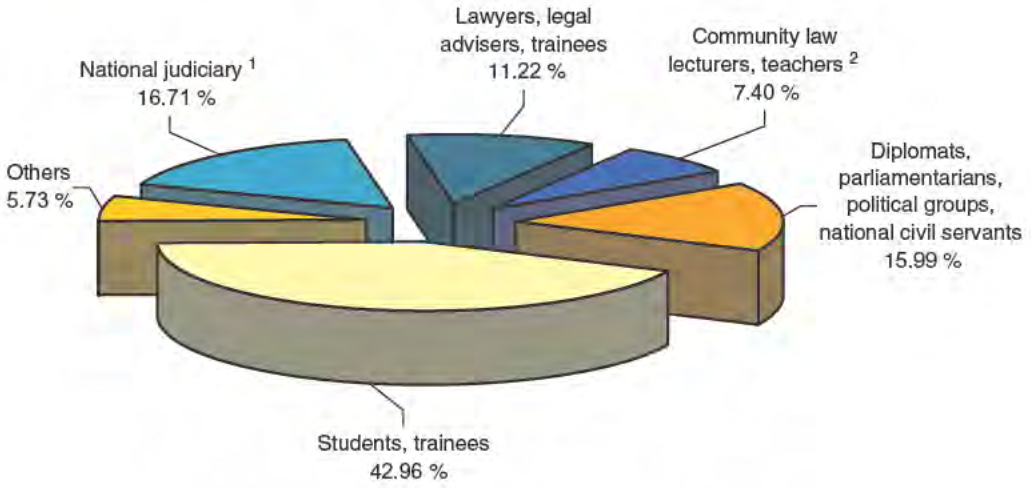


	National judiciary [1]	Lawyers, legal advisers, trainees	Community law lecturers, teachers [2]	Diplomats, parliamentarians, political groups, national civil servants	Students, trainees	Others	Total
B	49	33	2	90	567	170	911
DK	67		9	14	98	63	251
D	281	310	2	300	968	184	2045
EL	101		1	2	25		129
E	22	124		67	102	73	388
F	50	61	20	89	809	35	1064
IRL	6		2		36		44
I	19	1	6	30	336	32	424
L	2	26		15	38	25	106
NL	65	80		88	407	50	690
A	8		6	34	277	35	360
P	7		7		21		35
FIN	8	33		63	29	10	143
S	77	46	5	35	44	34	241
UK	72	24	11	53	410		570
Non-member countries	85	100	43	181	821	9	1239
Mixed groups	149	128		89	297	108	771
Total	**1068**	**966**	**114**	**1150**	**5285**	**828**	**9411**

[1] The judges of the Member States who participated in the Judges' Forum and the Judicial Study Visit organised by the Court of Justice are included under this heading. In 2003, the figures were as follows: Belgium: 7; Denmark: 8; Germany: 17; Greece: 7; Spain: 22; France: 22; Ireland: 6; Italy: 17; Luxembourg: 2; Netherlands: 8; Austria: 8; Portugal: 7; Finland: 8; Sweden: 8; United Kingdom: 21.

[2] Other than those accompanying student groups.

Study visits to the Court of Justice and the Court of First Instance in 2003
Distribution by type of group



	National judiciary [1]	Lawyers, legal advisers, trainees	Community law lecturers, teachers [2]	Diplomats, parliamentarians, political groups, national civil servants	Students, trainees	Others	Total
B	4	2	2	4	14	3	29
DK	5		1	1	3	3	13
D	11	12	1	12	38	5	79
EL	5		1	2	2		10
E	2	5		2	4	2	15
F	4	5	1	5	22	1	38
IRL	2		2		1		5
I	4	1	6	13	12	1	37
L	2	1		1	2	1	7
NL	4	4		5	13	1	27
A	2		6	2	9	1	20
P	2		7		3		12
FIN	2	2		4	1	1	10
S	5	3	1	2	2	2	15
UK	5	2	1	3	14		25
Non-member countries	6	7	2	8	32	1	56
Mixed groups	5	3		3	8	2	21
Total	**70**	**47**	**31**	**67**	**180**	**24**	**419**

[1] This heading includes, inter alia, the Judges' Forum and the Judicial Study Visit.

[2] Other than those accompanying student groups.

C — Formal sittings in 2003

31 March	Formal sitting on the occasion of the departure from office of Mr Rui Manuel Gens de Moura Ramos, Judge at the Court of First Instance, and the entry into office of Mrs Maria Eugénia Martins de Nazaré Ribeiro as Judge at the Court of First Instance
1 April	Formal sitting on the occasion of the solemn undertaking given by Mr Nikiforos Diamandouros, European Ombudsman
25 September	Formal sitting in memory of Mr Thomas Francis O'Higgins, former Judge of the Court of Justice
6 October	Formal sitting on the occasion of the partial renewal of the membership of the Court of Justice (see "Changes in the composition of the Court of Justice in 2003", p. 105) and the the entry into office of a new Judge at the Court of First Instance (see "Changes in the composition of the Court of First Instance in 2003", p. 191)

D — Visits and participation in official functions in 2003

23 January	Participation of a delegation from the Court of Justice, including the President, at the formal sitting of the European Court of Human Rights on the opening of the judicial year, in Strasbourg
17 February	Participation of the President of the Court of Justice in an exchange of views with the study group on the operation of the Court of Justice, within the framework of the European Convention on the future of Europe, in Brussels
from 14 to 19 March	Official visit of the President of the Court of Justice to the Constitutional Court and the Supreme Court of the Republic of Poland
from 27 to 29 March	Official visit of a delegation from the Court of Justice, including the President, to the Swiss Federal Court in Lausanne
from 17 to 19 April	Official visit of a delegation from the Court of Justice, including the President, to Greece at the invitation of the Presidents of the Council of State and of the Supreme Court of Cassation, on the occasion of the Greek six-month presidency of the European Union
13 June	Participation of a delegation from the Court of Justice at the 50th anniversary of the Bundesverwaltungsgericht (German Federal Administrative Court) in Leipzig
13 and 14 June	Participation of the President of the Court of Justice at the 54th plenary session of the European Commission for Democracy through Law (Venice Commission) in Venice
from 12 to 15 July	Official visit of a delegation from the Court of Justice, including the President, to the Consiglio di Stato (Council of State) in Rome
18 July	Participation of the President of the Court of Justice at a conference on "Judicial Review in the European Union" forming part of a programme organised by the Spanish Court of Auditors to mark the 25th anniversary of the Spanish Constitution, in El Escorial
4 and 5 September	Participation of the President of the Court of Justice at the international conference "Constitutional Justice and the Rule of Law" and presentation of a report on "National Constitutional Courts and European Community Law", on the occasion of the 10th anniversary of the Constitutional Court of the Republic of Lithuania, in Vilnius

11 and 12 September	Participation of the President of the Court of Justice at the celebration of the 10th anniversary of the appointment of Justice Ruth Bader Ginsburg to the Supreme Court of the United States of America and participation in a panel discussion on "The Relationship of United States Constitutional Law and Foreign Constitutional Law", at the invitation of Columbia University, New York
25 and 26 September	Participation of a delegation from the Court of Justice and of the President of the Court of First Instance at the third symposium for European judges in the field of trade marks at the Office for Harmonisation in the Internal Market (OHIM) in Alicante
26 November	Participation of the President and the First Advocate General of the Court of Justice at a meeting with the permanent representatives of the Member States to the European Union in Brussels
10 December	Participation of a delegation from the Court of Justice at a panel discussion on "The judge's function and his independence in European jurisdictions" organised by the Institute of European Studies in Brussels

Chapter IV

Tables and statistics

A – Statistics concerning the judicial activity of the Court of Justice [1]

General activity of the Court

1. Cases completed, new cases, cases pending (1999-2003)

Cases completed

2. Nature of proceedings (1999-2003)
3. Judgments, orders, opinions (2003)
4. Bench hearing actions (2003)
5. Subject-matter of the action (2003)
6. Proceedings for interim measures: outcome (2003)
7. Judgments concerning failure of a Member State to fulfil its obligations: outcome (2003)
8. Duration of proceedings (1999-2003)

New cases

9. Nature of proceedings (1999-2003)
10. Direct actions – Type of action (2003)
11. Subject-matter of the action (2003)
12. Actions for failure of a Member State to fulfil its obligations (1999-2003)

Cases pending as at 31 December

13. Nature of proceedings (1999-2003)
14. Bench hearing actions (2003)

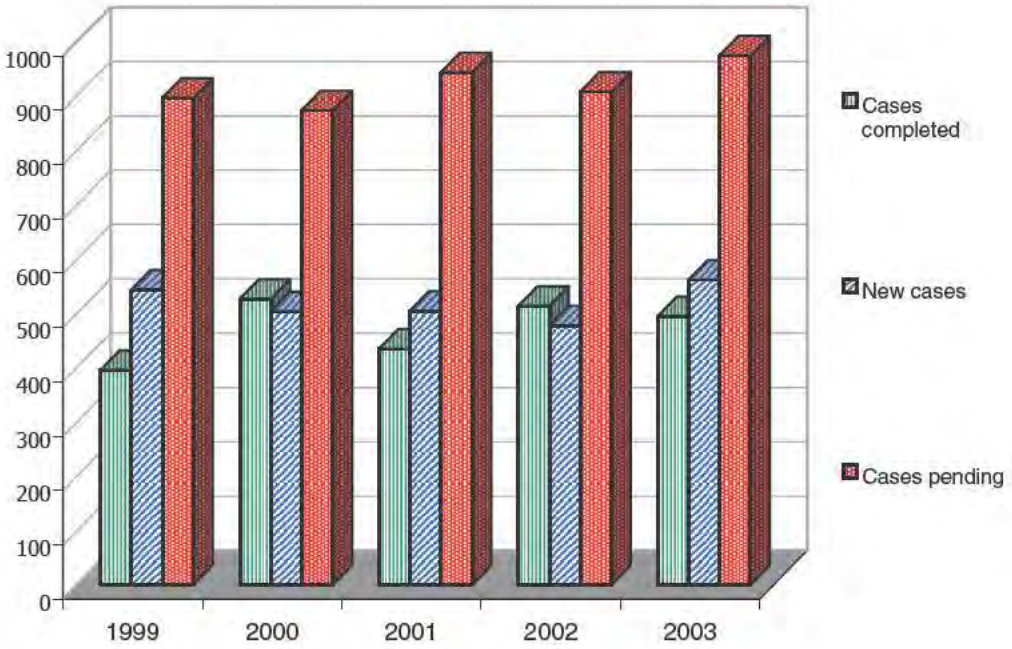
General trend in the work of the Court (1952-2003)

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

[1] The introduction of new software in 2002 has enabled the statistics in the Court's annual reports to be presented with greater clarity. The tables and figures have, in large part, been revised and improved, at the cost of certain adjustments. Consistency with the tables of past years has been preserved where possible.

General activity of the Court

1. Cases completed, new cases, cases pending (1999 - 2003) [1]

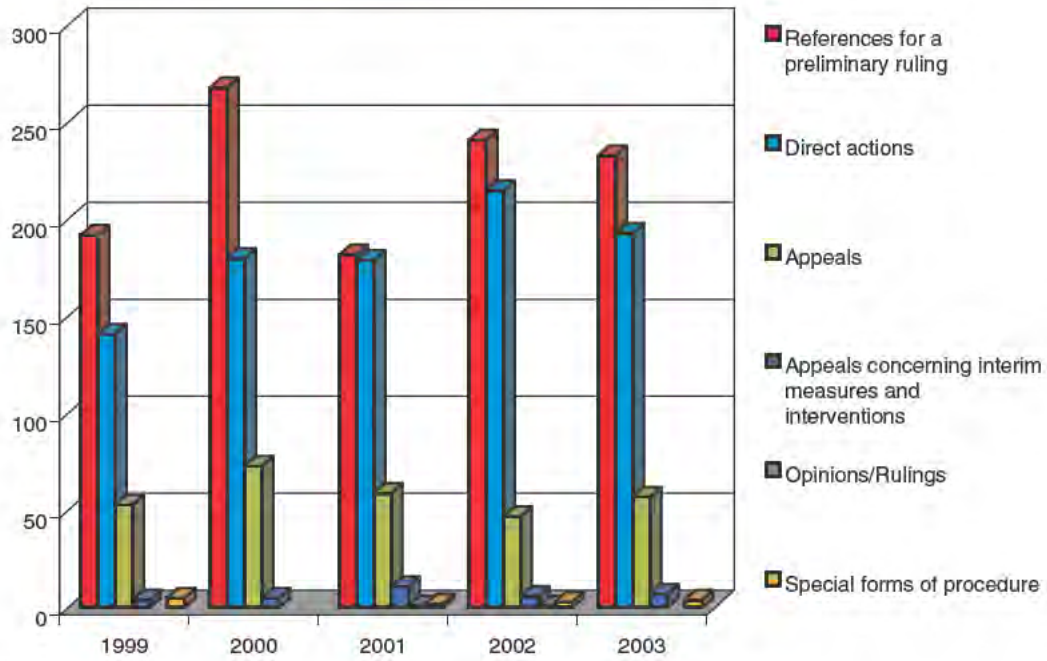


	1999	2000	2001	2002	2003
Cases completed	395	526	434	513	494
New cases	543	503	504	477	561
Cases pending	896	873	943	907	974

[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 (1999 - 2003) [1] [2]

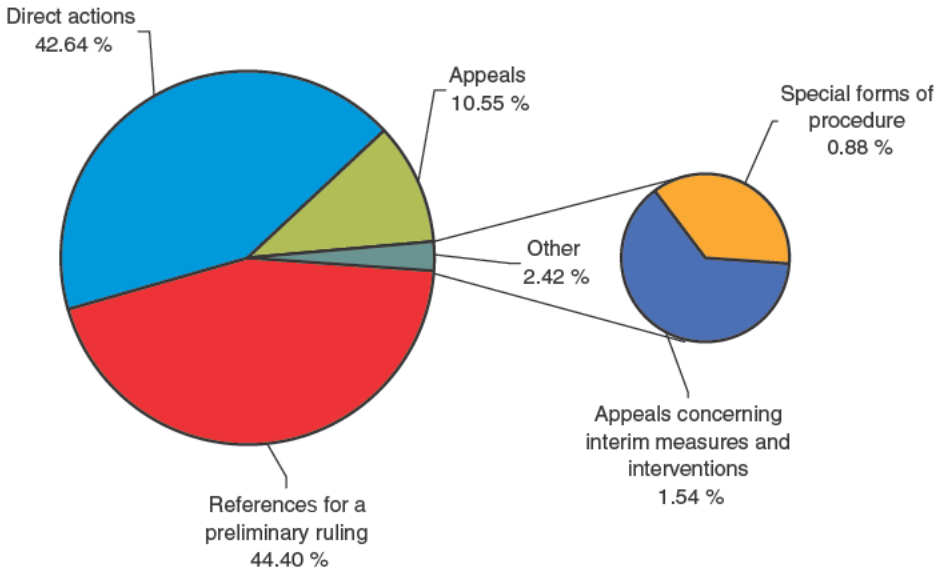


	1999	2000	2001	2002	2003
References for a preliminary ruling	192	268	182	241	233
Direct actions	141	180	179	215	193
Appeals	53	73	59	47	57
Appeals concerning interim measures and interventions	4	5	11	6	7
Opinions/Rulings			1	1	
Special forms of procedure	5		2	3	4
Total	**395**	**526**	**434**	**513**	**494**

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. Judgments, orders, opinions (2003) [1]



	Judgments	Non-interlocutory orders [2]	Interlocutory orders [3]	Other orders [4]	Opinions	Total
References for a preliminary ruling	158	14		30		202
Direct actions	118	1	3	72		194
Appeals	31	11	3	3		48
Appeals concerning interim measures and interventions			6	1		7
Opinions/Rulings						
Special forms of procedure	1	3				4
Total	**308**	**29**	**12**	**106**	**0**	**455**

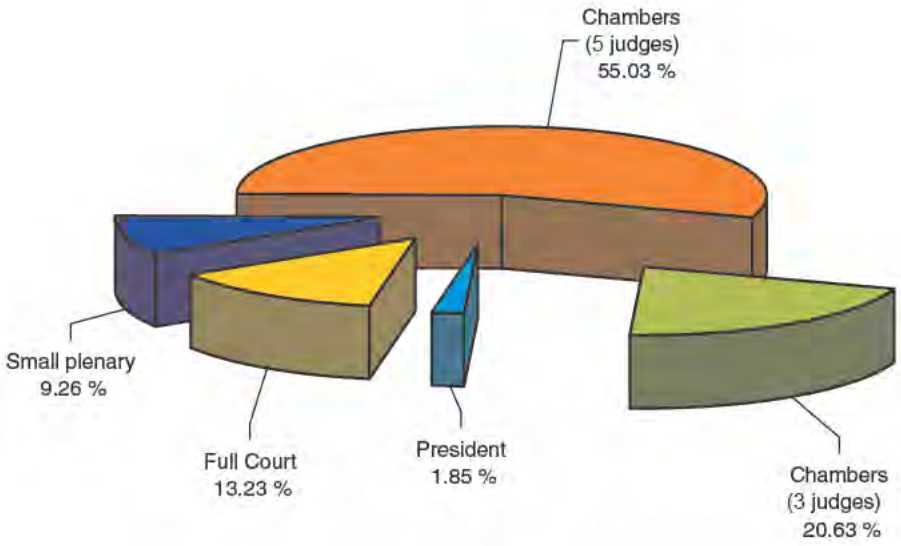
1 The figures given (net figures) represent the number of cases, after joinder on the grounds of similarity (a set of joined cases = one case).

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 (2003) [1]



	Judgments/ Opinions	Orders [2]	Total
Full Court	48	2	50
Small plenary	35		35
Chambers (5 judges)	200	8	208
Chambers (3 judges)	51	27	78
President		7	7
Total	**334**	**44**	**378**

[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 (2003) [1]

	Judgments/ Opinions	Orders [2]	Total
Accession of new States	2		2
Agriculture	34	3	37
Approximation of laws	33	1	34
Brussels Convention	4		4
Commercial policy	4		4
Community own resources	1		1
Company law	15	2	17
Competition	11	2	13
Customs union	7	1	8
Environment and consumers	42	6	48
European citizenship	1		1
External relations	5	3	8
Fisheries policy		2	2
Free movement of capital	3		3
Free movement of goods	19		19
Freedom of establishment	9	4	13
Freedom of movement for persons	11		11
Freedom to provide services	15		15
Industrial policy	4		4
Intellectual property	4		4
Justice and home affairs	2	1	3
Law governing the institutions	9	3	12
Principles of Community law	7	1	8
Privileges and immunities	1		1
Social policy	20		20
Social security for migrant workers	5		5
State aid	14	7	21
Taxation	25	1	26
Transport	6		6
EC Treaty	313	37	350
CS Treaty	14	1	15
EA Treaty	2		2
Privileges and immunities		1	1
Procedure	1	2	3
Staff Regulations	4	3	7
Others	5	6	11
OVERALL TOTAL	**334**	**44**	**378**

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).

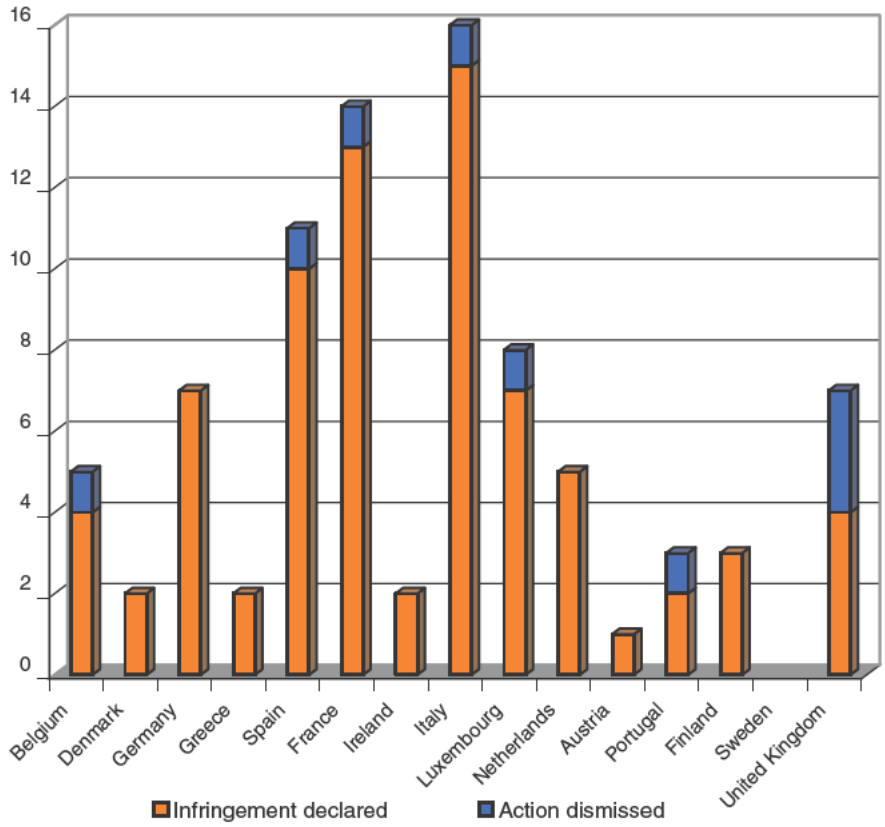
2 Orders terminating proceedings by judicial determination (other than those removing a case from the register, declaring that there is no need to give a decision or referring a case to the Court of First Instance).

6. Proceedings for interim measures: outcome (2003) [1]

	Number of applications for interim measures	Number of appeals concerning interim measures and interventions	Outcome	
			Dismissed/ Contested decision upheld	Granted/Contested decision set aside
Accession of new States	1		1	
State aid	1			1
Competition		1	1	
Law governing the institutions	1	1	2	
Environment and consumers	2	1	2	1
External relations		2	2	
Transport	1			1
Total EC Treaty	6	5	8	3
Others		2	2	
OVERALL TOTAL	**6**	**7**	**10**	**3**

[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 (2003) [1]

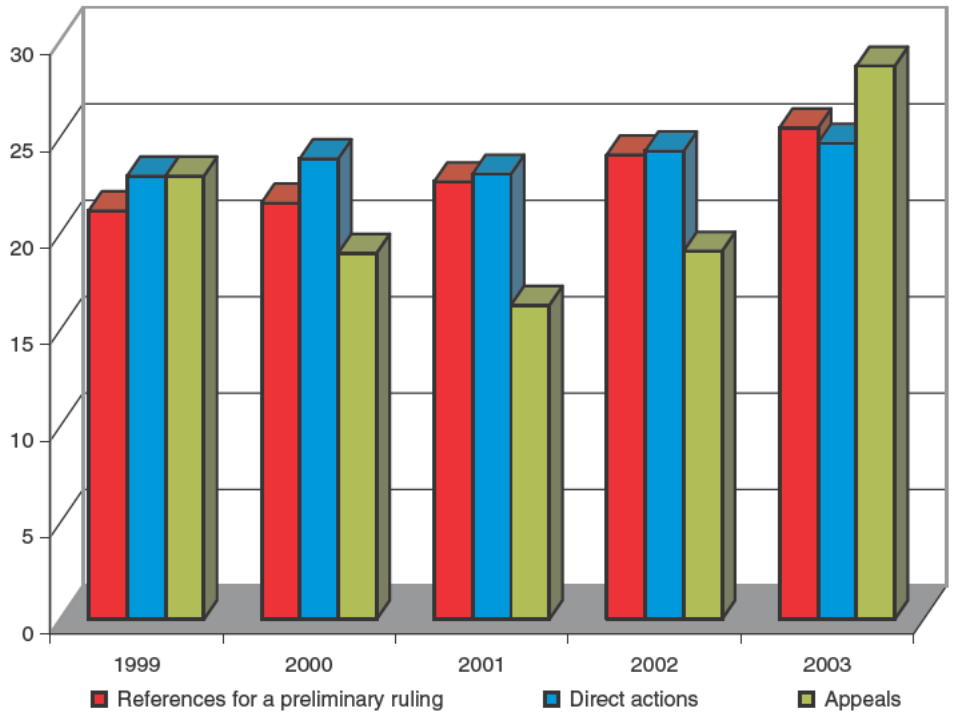


	Infringement declared	Action dismissed	Total
Belgium	4	1	5
Denmark	2		2
Germany	7		7
Greece	2		2
Spain	10	1	11
France	13	1	14
Ireland	2		2
Italy	15	1	16
Luxembourg	7	1	8
Netherlands	5		5
Austria	1		1
Portugal	2	1	3
Finland	3		3
Sweden			
United Kingdom	4	3	7
Total	**77**	**9**	**86**

[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).

8. Completed cases - Duration of proceedings (1999 - 2003) [1]

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



	1999	2000	2001	2002	2003
References for a preliminary ruling	21.2	21.6	22.7	24.1	25.5
Direct actions	23	23.9	23.1	24.3	24.7
Appeals	23	19	16.3	19.1	28.7

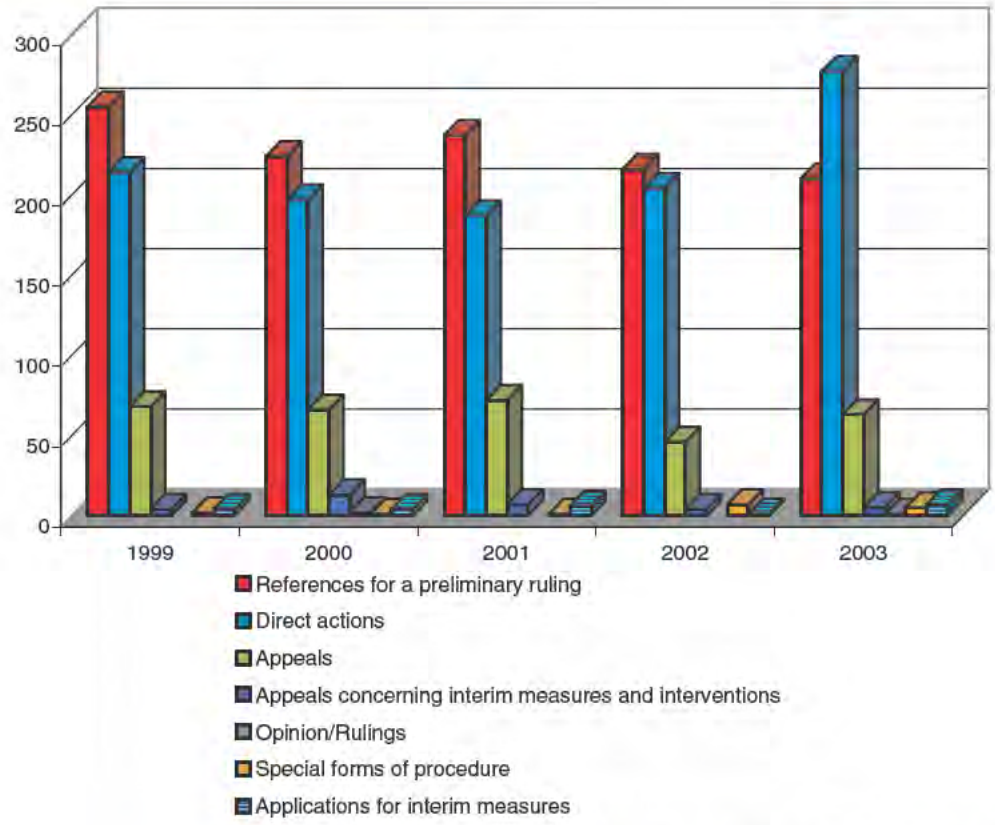
1 The following types of cases are excluded from the calculation of the duration of proceedings: cases involving an interlocutory judgment or a measure of inquiry; opinions and rulings on agreements; special forms of procedure (namely taxation of costs, legal aid, application to set a judgment aside, 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

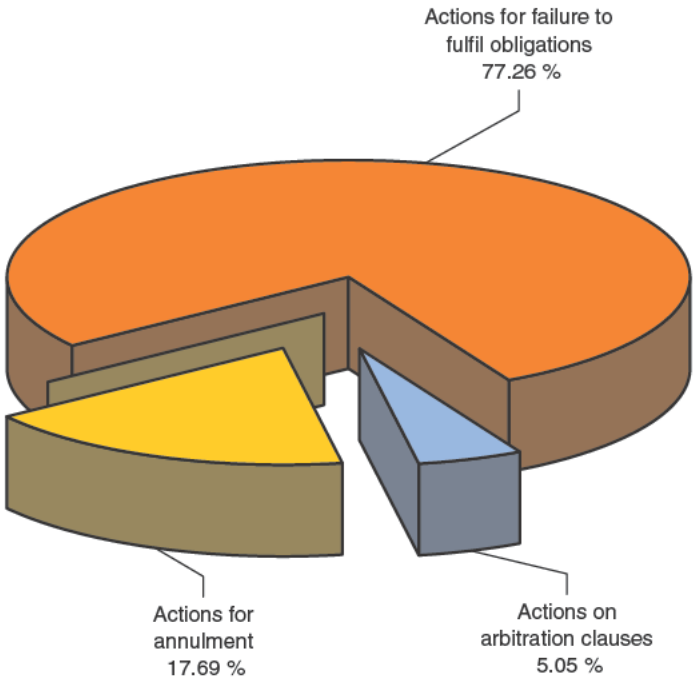
9. Nature of proceedings (1999 - 2003) [1]



	1999	2000	2001	2002	2003
References for a preliminary ruling	255	224	237	216	210
Direct actions	214	197	187	204	277
Appeals	68	66	72	46	63
Appeals concerning interim measures and interventions	4	13	7	4	5
Opinion/Rulings		2			1
Special forms of procedure	2	1	1	7	5
Total	**543**	**503**	**504**	**477**	**561**
Applications for interim measures	4	4	6	1	7

[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 (2003) [1]



Actions for annulment	49
Actions for failure to act	
Actions for damages	
Actions for failure to fulfil obligations	214
Actions on arbitration clauses	14
Total	**277**

[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).

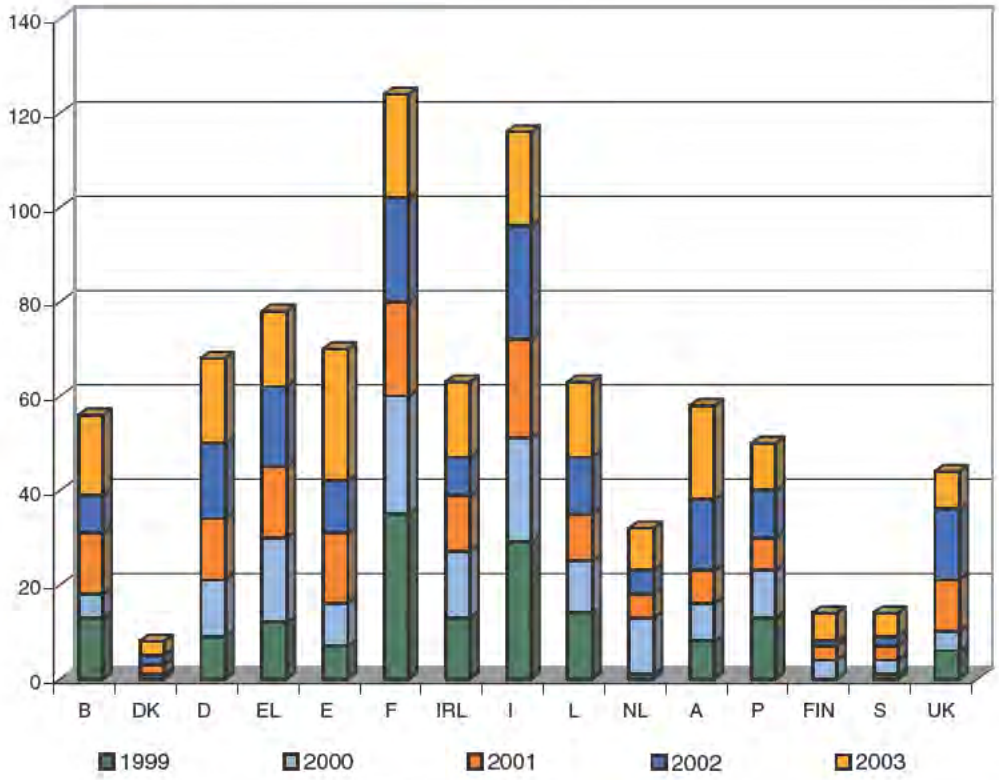
11. New cases [1] – Subject-matter of the action (2003) [2]

	Direct actions	References for a preliminary ruling	Appeals	Appeals on interim relief + interventions	Total	Special forms of procedure
Accession of new States	1				1	
Agriculture	19	22	4		45	
Approximation of laws	22	28			50	
Association of the Overseas Countries and Territories			3		3	
Brussels Convention		6			6	
Commercial policy		1			1	
Commun Customs Tariff		4			4	
Community own resources	2				2	
Company law	10	19	1		30	
Competiton	6	6	8	1	21	
Customs union	1	7	1		9	
Economic and monetary policy		1			1	
Energy	1	3			4	
Environment and consumers	54	11	3	1	69	
European citizenship		1			1	
External relations		7	4	2	13	1
Fisheries policy	12	1	2		15	
Free movement of capital	1	4			5	
Free movement of goods	9	7			16	
Freedom of establishment	4	8			12	
Freedom of movement for persons	10	12	1		23	
Freedom to provide services	7	6	2		15	
Industrial policy	15	1			16	
Intellectual property	2		7		9	
Justice and home affairs	1	2	2		5	
Law governing the institutions	21	1	4	1	27	
Principles of Community law		2			2	
Regional policy	7				7	
Research, information, education and statistics	1				1	
Social policy	20	12			32	
Social security for migrant workers	1	6			7	
State aid	14	4	12		30	
Taxation	9	24			33	
Transport	22	1			23	
EC Treaty	272	207	54	5	538	1
EU Treaty	1	3			4	
EA Treaty	3				3	
Privileges and immunities						1
Procedure						4
Staff Regulations	1		9		10	
Others	1		9		10	5
OVERALL TOTAL	**277**	**210**	**63**	**5**	**555**	**6**

[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 (1999 - 2003) [1]



	B	DK	D	EL	E	F	IRL	I	L	NL	A	P	FIN	S	UK	TOTAL [2]
1999	13	1	9	12	7	35	13	29	14	1	8	13		1	6	**162**
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**

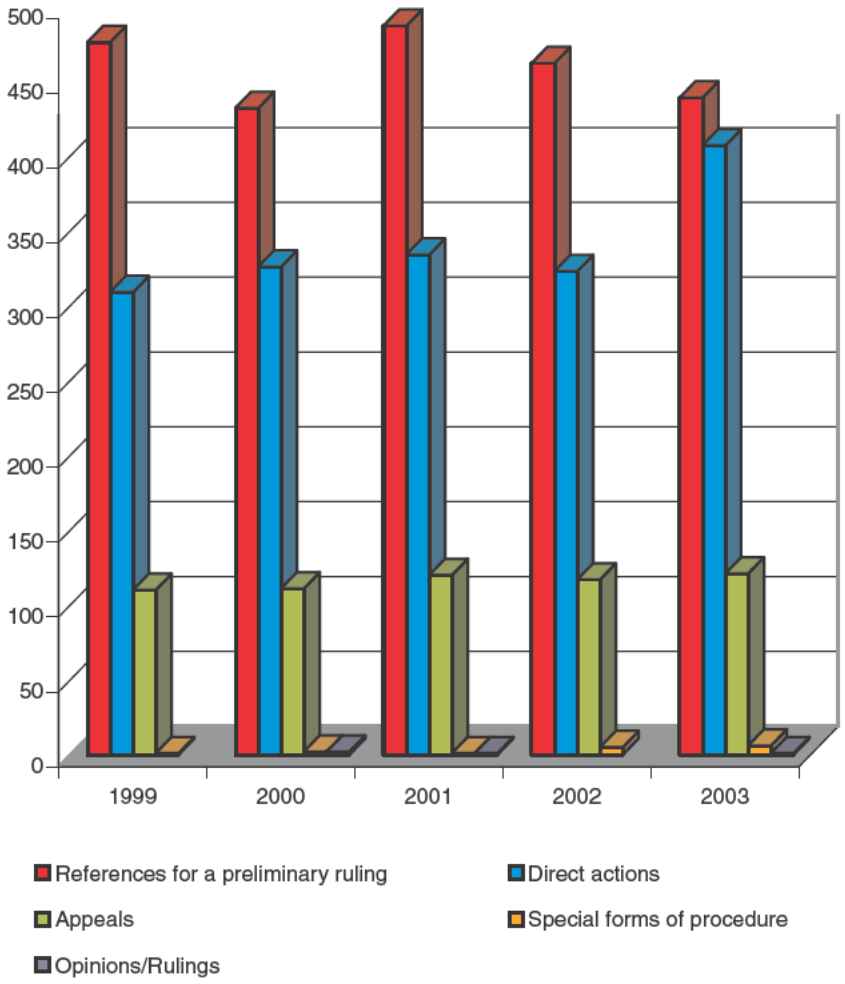
[1] The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the grounds of similarity (one case number = one case).

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] No action was brought in these years under Article 170 of the EC Treaty (now Article 227 EC).

Cases pending as at 31 December [1]

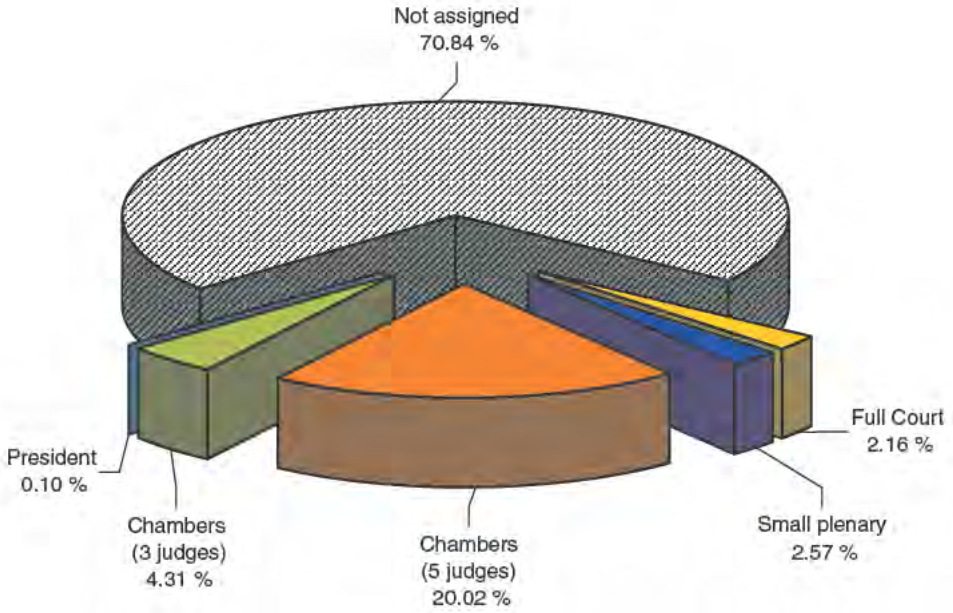
13. Nature of proceedings (1999 - 2003)



	1999	2000	2001	2002	2003
References for a preliminary ruling	476	432	487	462	439
Direct actions	309	326	334	323	407
Appeals	110	111	120	117	121
Special forms of procedure	1	2	1	5	6
Opinions/Rulings		2	1		1
Total	**896**	**873**	**943**	**907**	**974**

[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 (2003) [1]



	Direct actions	References for a preliminary ruling	Appeals	Other proceedings	Total
Not assigned	338	276	74	2	690
Full Court	5	12	4		21
Small plenary	3	19	3		25
Chambers (5 judges)	47	110	37	1	195
Chambers (3 judges)	14	22	3	3	42
President				1	1
Total	**407**	**439**	**121**	**7**	**974**

[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 – 2003)

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	61	69			130	5	78
1976	51	75			126	6	88
1977	74	84			158	6	100
1978	145	123			268	7	97
1979	1216	106			1322	6	138
1980	180	99			279	14	132
1981	214	108			322	17	128
1982	216	129			345	16	185
1983	199	98			297	11	151
1984	183	129			312	17	165
1985	294	139			433	22	211
1986	238	91			329	23	174
1987	251	144			395	21	208
1988	194	179			373	17	238
1989	246	139			385	20	188
1990 [4]	222	141	15	1	379	12	193
1991	142	186	13	1	342	9	204
1992	253	162	24	1	440	4	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	5	244
2002	204	216	46	4	470	1	269
2003	278	210	63	5	556	7	308
Total	**7305**	**5044**	**563**	**51**	**12963**	**334**	**6090**

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 - 2003)

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

	B	DK	D	EL	E	F	IRL	I	L	NL	A	P	FIN	S	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
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
Total	**471**	**100**	**1364**	**74**	**145**	**655**	**44**	**796**	**56**	**582**	**249**	**54**	**34**	**45**	**374**	**1**	**5044**

[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*.

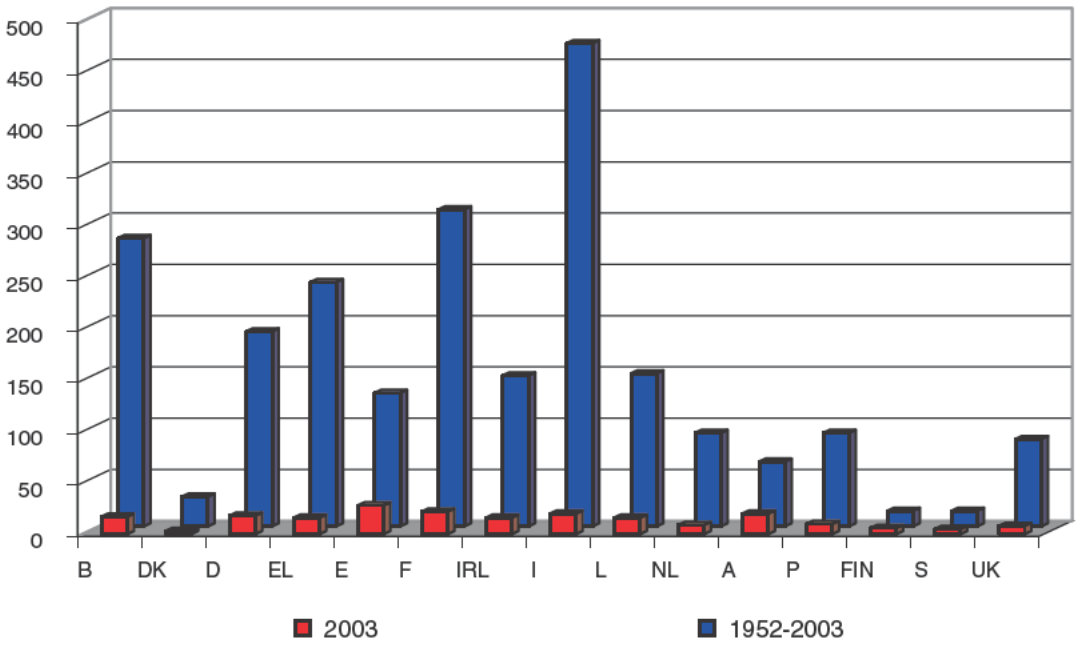
17. General trend in the work of the Court (1952 – 2003)

New references for a preliminary ruling (by Member State and by court or tribunal)

			Total
Belgium	Cour de cassation	56	
	Cour d'arbitrage	2	
	Conseil d'État	32	
	Other courts or tribunals	381	471
Denmark	Højesteret	19	
	Other courts or tribunals	81	100
Germany	Bundesgerichtshof	87	
	Bundesarbeitsgericht	16	
	Bundesverwaltungsgericht	58	
	Bundesfinanzhof	206	
	Bundessozialgericht	69	
	Staatsgerichtshof	1	
	Other courts or tribunals	927	1364
Greece	Arios Pagos	4	
	Simvoulio tis Epikratias	9	
	Other courts or tribunals	61	74
Spain	Tribunal Supremo	10	
	Audiencia Nacional	1	
	Juzgado Central de lo Penal	7	
	Other courts or tribunals	127	145
France	Cour de cassation	66	
	Conseil d'État	26	
	Other courts or tribunals	563	655
Ireland	Supreme Court	13	
	High Court	15	
	Other courts or tribunals	16	44
Italy	Corte suprema di Cassazione	77	
	Consiglio di Stato	43	
	Other courts or tribunals	676	796
Luxembourg	Cour supérieure de justice	10	
	Conseil d'État	13	
	Cour administrative	4	
	Other courts or tribunals	29	56
Netherlands	Raad van State	43	
	Hoge Raad der Nederlanden	123	
	Centrale Raad van Beroep	42	
	College van Beroep voor het Bedrijfsleven	111	
	Tariefcommissie	34	
	Other courts or tribunals	229	582
Austria	Verfassungsgerichtshof	4	
	Oberster Gerichtshof	51	
	Bundesvergabeamt	22	
	Verwaltungsgerichtshof	39	
	Vergabekontrollsenat	3	
	Other courts or tribunals	130	249
Portugal	Supremo Tribunal Administrativo	30	
	Other courts or tribunals	24	54
Finland	Korkein hallinto-oikeus	10	
	Korkein oikeus	5	
	Other courts or tribunals	19	34
Sweden	Högsta Domstolen	4	
	Marknadsdomstolen	3	
	Regeringsrätten	13	
	Other courts or tribunals	25	45
United Kingdom	House of Lords	31	
	Court of Appeal	27	
	Other courts or tribunals	316	374
Benelux	Cour de justice/Gerechtshof (1)	1	1
Total			**5044**

1 Case C-265/00 *Campina Melkunie*.

18. General trend in the work of the Court (1952-2003)
New actions for failure of a Member State to fulfil its obligations [1]



	B	DK	D	EL	E	F	IRL	I	L	NL	A	P	FIN	S	UK	Total
2003	17	3	18	16	28	22	16	20	16	9	20	10	6	5	8	**214**
1952-2003	281	29	190	238	130	309	147	471	149	91	63	91	15	15	85	**2304**

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 two actions under Article 170 of the EC Treaty (now Article 227 EC), brought by France and Spain respectively.

[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 [1]

General activity of the Court of First Instance

1. New cases, completed cases, cases pending (1995-2003)

New Cases

2. Nature of proceedings (1999-2003)
3. Type of action (1999-2003)
4. Subject-matter of the action (1999-2003)

Completed cases

5. Nature of proceedings (1999-2003)
6. Subject-matter of the action (2003)
7. Bench hearing action (2003)
8. Duration of proceedings in months (1999-2003)

Cases pending as at 31 December of each year

9. Nature of proceedings (1999-2003)
10. Subject-matter of the action (1999-2003)

Miscellaneous

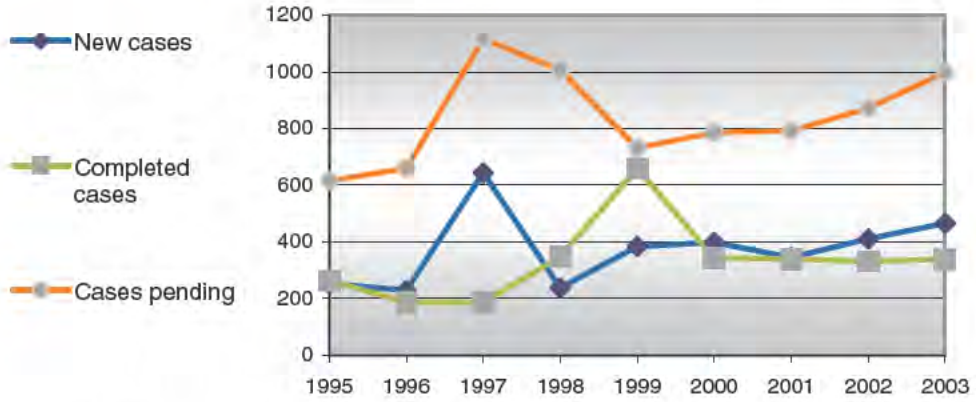
11. Decisions in proceedings for interim measures: outcome (2003)
12. Appeals against decisions of the Court of First Instance
13. Results of appeals
14. General trend (1989-2003) – New cases, completed cases, cases pending

[1] The introduction of new software in 2002 has enabled the statistics in the Court of Justice's annual reports to be presented with greater clarity. The tables and figures have, in large part, been revised and improved, at the cost of certain adjustments. Consistency with the tables of past years has been preserved where possible.

General activity of the Court of First Instance

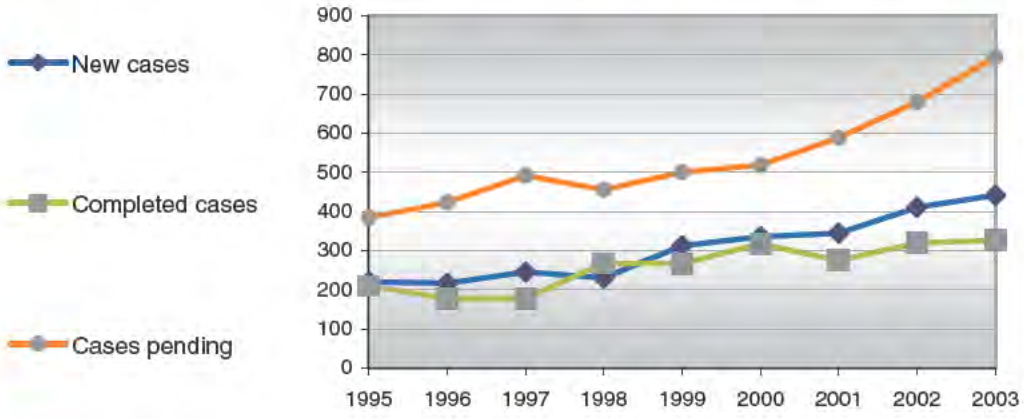
1. New cases, completed cases, cases pending (1995-2003)

	1995	1996	1997	1998	1999	2000	2001	2002	2003
New cases	253	229	644	238	384	398	345	411	466
Completed cases	265	186	186	348	659	344	340	331	339
Cases pending	616	659	1117	1007	732	786	792	872	999



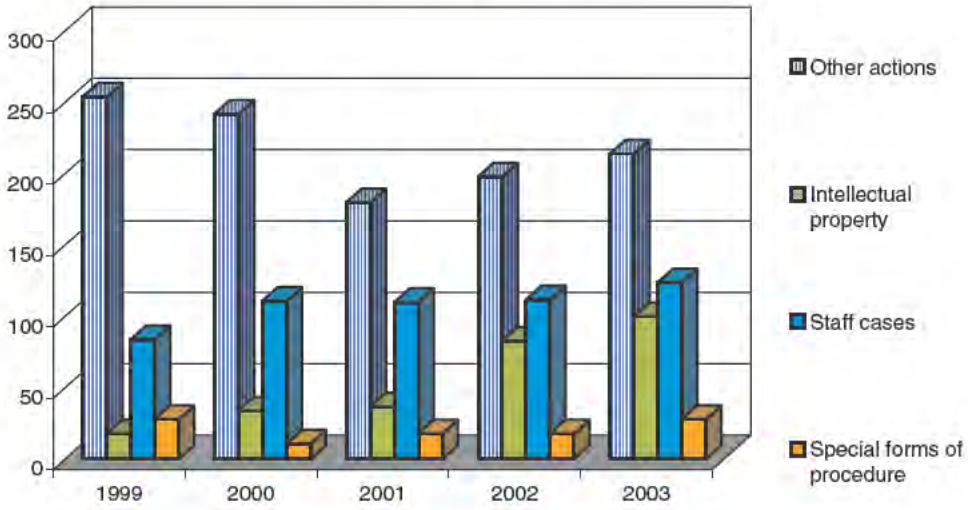
In the above table, the figures include certain groups of identical or related cases (cases concerning milk quotas, customs agents, State aid in the Netherlands for service-stations and State aid in the region of Venice, the restructuring of the fisheries sector, and staff cases). If those sets of cases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

	1995	1996	1997	1998	1999	2000	2001	2002	2003
New cases	221	217	246	231	313	336	345	411	442
Completed cases	210	178	178	268	267	318	275	320	327
Cases pending	385	424	492	456	501	519	589	680	795



New cases

2. Nature of proceedings (1999-2003) [1] [2]



	1999	2000	2001	2002	2003
Other actions	254	242	180	198	214
Intellectual property	18	34	37	83	100
Staff cases	84	111	110	112	124
Special forms of procedure	28	11	18	18	28
Total	**384**	**398**	**345**	**411**	**466**

1999: The figures include 71 cases concerning State aid in the Netherlands for service-stations.

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.

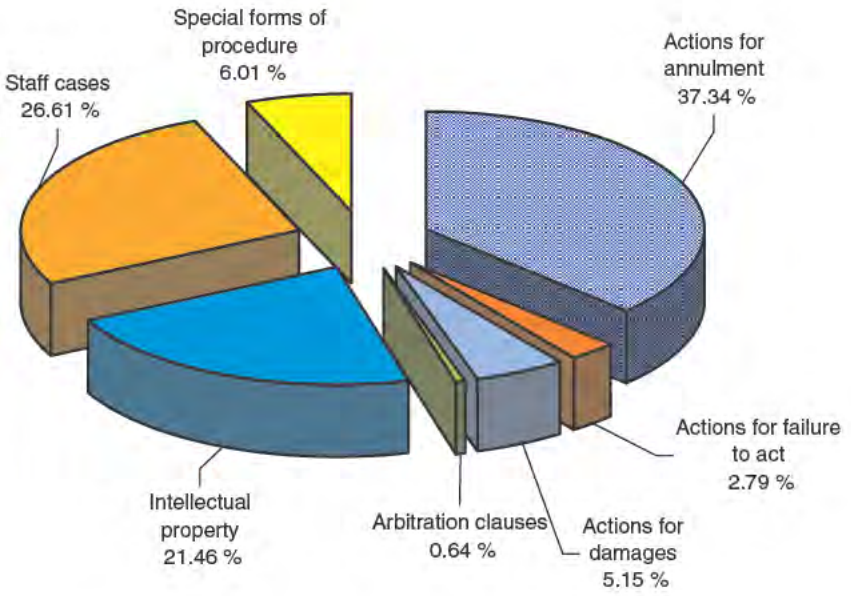
2003: The figures include 24 cases concerning the restructuring of the fisheries sector.

[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 38 of the EC Statute; Article 122 of the Rules of Procedure of the Court of First Instance); third party proceedings (Article 39 of the EC Statute; Article 123 of the Rules of Procedure); revision of a judgment (Article 41 of the EC Statute; Article 125 of the Rules of Procedure); interpretation of a judgment (Article 40 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 — Type of action

Distribution in 2003



	1999	2000	2001	2002	2003
Actions for annulment	220	220	134	171	174
Actions for failure to act	15	6	17	12	13
Actions for damages	19	17	21	13	24
Arbitration clauses	1		8	2	3
Intellectual property	18	34	37	83	100
Staff cases	83	110	110	112	124
Special forms of procedure	28	11	18	18	28
Total	**384**	**398**	**345**	**411**	**466**

1999: The figures include 71 cases concerning State aid in the Netherlands for service-stations.

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.

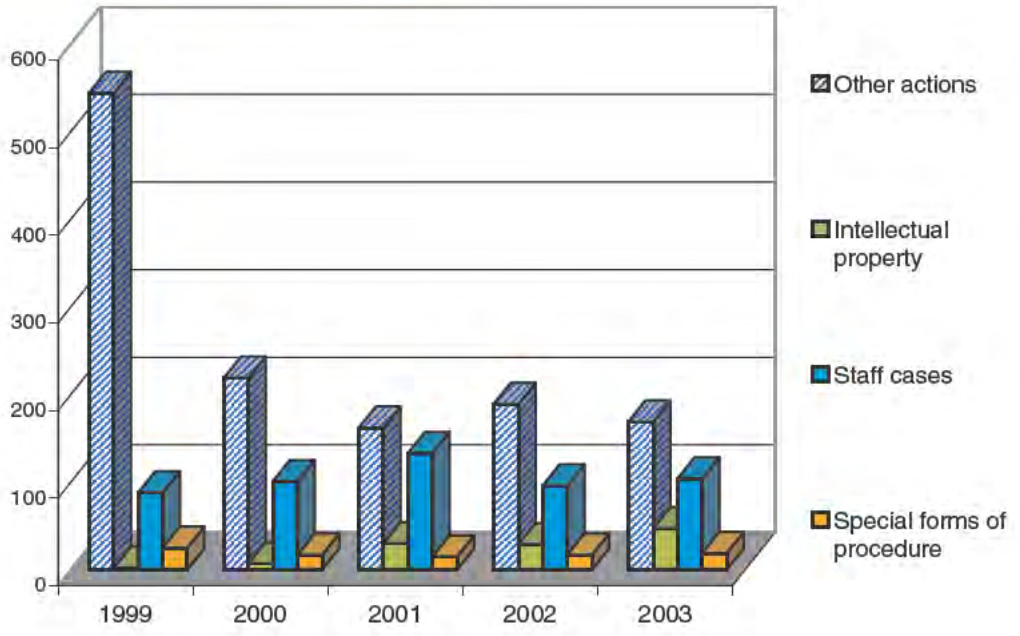
4. New cases – Subject-matter of the action (1999-2003) [1]

	1999	2000	2001	2002	2003
Accession of new States					1
Agriculture	42	23	17	9	11
Approximation of laws			2	1	4
Arbitration clause			2	1	
Association of the Overseas Countries and Territories	4	6	6		1
Commercial policy	5	8	4	5	6
Common Customs Tariff			2	1	
Company law	2	4	6	3	3
Competition	34	36	39	61	43
Culture		2	1		
Customs union			2	5	5
Energy			2		2
Environment and consumers	5	14	2	8	13
European Citizenship		2			
External relations	1	8	14	8	10
Fisheries policy	2	1	3	6	25
Foreign and security policy			6	3	2
Free movement of goods	10	17	1		
Freedom of establishment			1		
Freedom of movement for persons	2	8	3	2	7
Freedom to provide services	1				
Intellectual property	18	34	37	83	101
Justice and home affairs			1	1	
Law governing the institutions	19	29	12	18	26
Regional policy	2		1	6	7
Research, information, education and statistics	1	1	3	1	3
Social policy	12	7	1	3	2
Staff Regulations			1		
State aid	100	80	42	51	25
Taxation				1	5
Transport	2		2	1	1
Total EC Treaty	262	280	213	278	303
State aid	6	1	2	1	
Competition				1	10
Iron and steel	1		2		1
Total CS Treaty	7	1	4	2	11
Law governing the institutions	1				
Nuclear energy				1	
Total EA Treaty	1			1	
Staff Regulations	86	106	110	112	124
OVERALL TOTAL	**356**	**387**	**327**	**393**	**438**

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

Completed cases

5. Nature of proceedings (1999-2003)



	1999	2000	2001	2002	2003
Other actions	544	219	162	189	169
Intellectual property	2	7	30	29	47
Staff cases	88	101	133	96	104
Special forms of procedure	25	17	15	17	19
Total	**659**	**344**	**340**	**331**	**339**

1999: the figures include 102 cases concerning milk quotas, 284 cases concerning customs agents and six cases concerning the regrading of officials.

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.

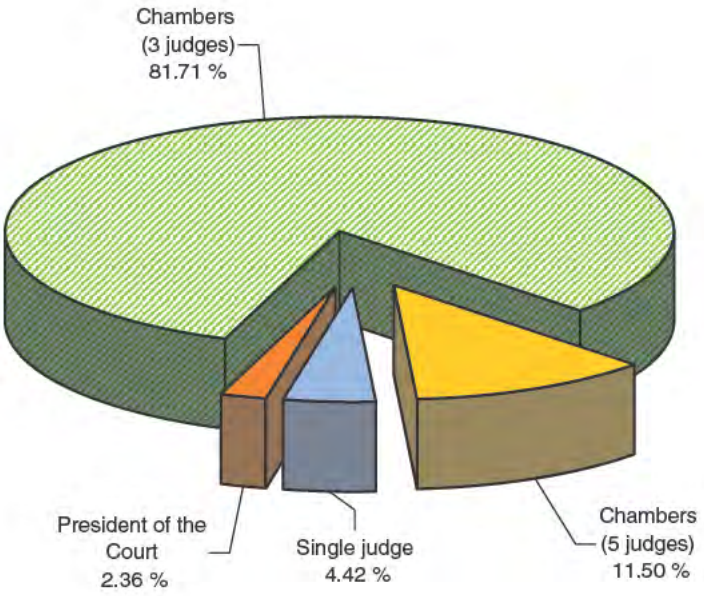
2003: the figures include 4 cases concerning milk quotas and 8 cases concerning State aid in the Netherlands for service-stations.

6. Completed cases - Subject-matter of the action (2003)

	Judgments	Orders	Total
Accession of new States		1	1
Agriculture	14	7	21
Approximation of laws		1	1
Arbitration clause	1		1
Association of the Overseas Countries and Territories	1	3	4
Commercial policy	2	4	6
Common Customs Tariff	2		2
Company law	2		2
Competition	30	8	38
Culture		1	1
Customs union	3		3
Environment and consumers	2	7	9
External relations	5	6	11
Fisheries policy	2		2
Freedom of movement for persons		8	8
Intellectual property	24	23	47
Justice and home affairs	1		1
Law governing the institutions	10	10	20
Research, information, education and statistics	1	3	4
Social policy	1		1
State aid	7	19	26
Taxation		5	5
Transport	1	1	2
Total EC Treaty	109	107	216
Staff Regulations	68	36	104
OVERALL TOTAL	**177**	**143**	**320**

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

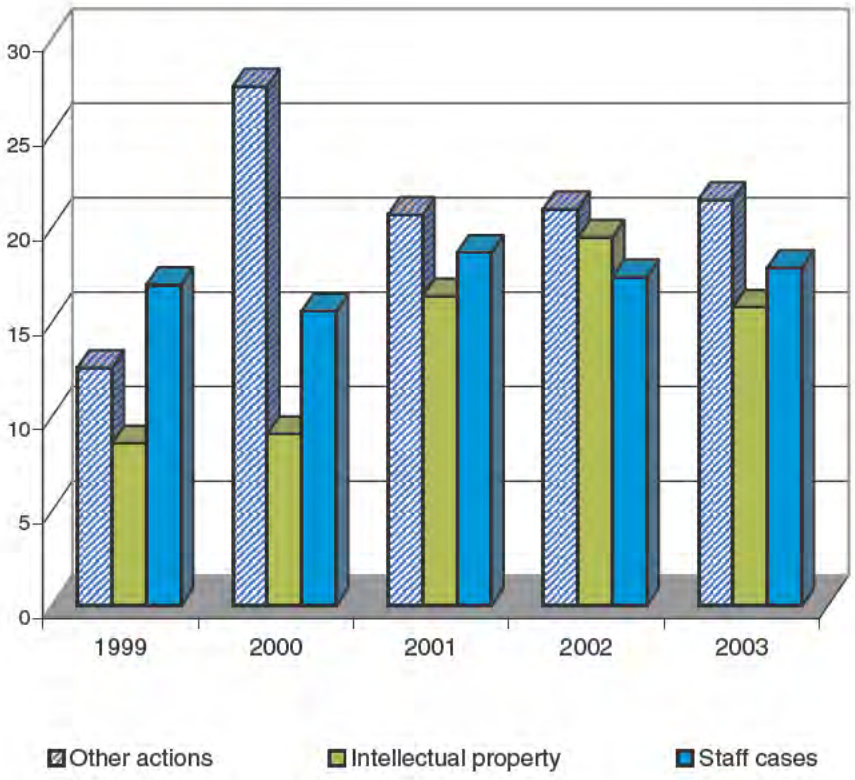
7. Completed cases - Bench hearing action (2003)



	Judgments and Orders
Chambers (3 judges)	277
Chambers (5 judges)	39
Single judge	15
President of the Court	8
Total	**339**

8. Completed cases - Duration of proceedings in months (1999-2003)

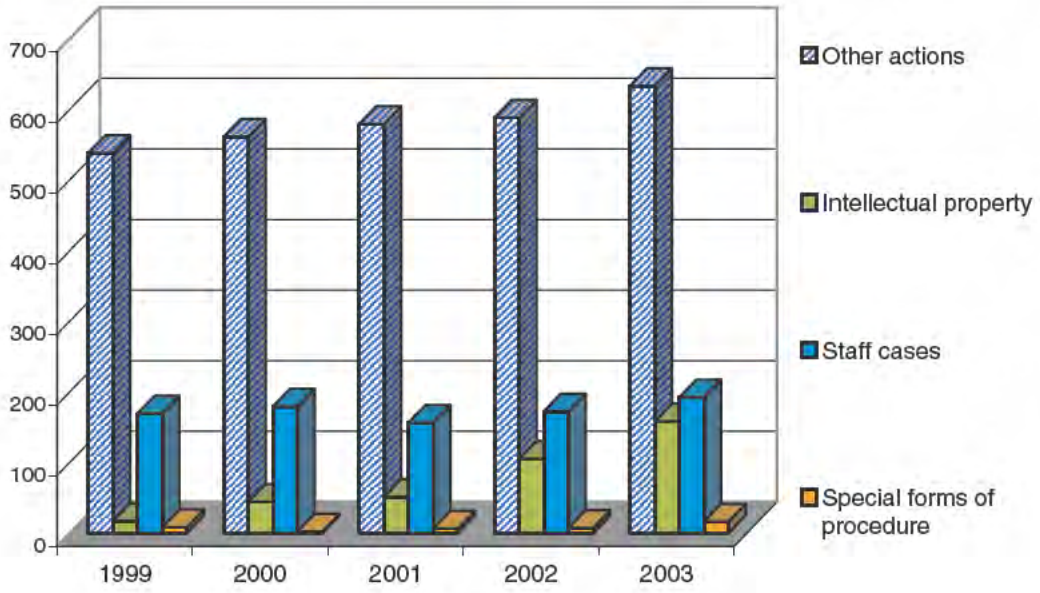
(judgments and orders)



	1999	2000	2001	2002	2003
Other actions	12.6	27.5	20.7	21	21.5
Intellectual property	8.6	9.1	16.4	19.5	15.8
Staff cases	17	15.6	18.7	17.4	17.9

Cases pending as at 31 December of each year

9. Nature of proceedings (1999-2003)



	1999	2000	2001	2002	2003
Other actions	538	561	579	588	633
Intellectual property	17	44	51	105	158
Staff cases	169	179	156	172	192
Special forms of procedure	8	2	6	7	16
Total	**732**	**786**	**792**	**872**	**999**

1999: the figures include 88 cases concerning milk quotas, 13 actions brought by customs agents, 71 cases concerning State aid in the Netherlands for service-stations and 59 cases concerning the regrading of officials.

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 conerning the restructuring of the fisheries sector.

10. Cases pending as at 31 December of each year – Subject-matter of the action (1999-2003)

	1999	2000	2001	2002	2003
Agriculture	140	144	114	95	85
Approximation of laws			2	1	4
Arbitration clause	2		2	3	2
Association of the Overseas Countries and Territories	6	11	15	9	6
Commercial policy	25	16	15	14	14
Common Customs Tariff	2	3	2	3	
Company law	4	4	6	5	6
Competition	104	79	96	114	119
Culture		2	3	1	
Customs union	24	33	20	7	10
Energy			2	2	4
Environment and consumers	8	15	17	13	17
European Citizenship		1			
External relations	7	9	21	23	22
Fisheries policy	4	8	7	8	31
Foreign and security policy	2	3	3	9	11
Free movement of goods		2	3	1	1
Freedom of establishment	1	5	2		
Freedom of movement for persons			1	3	2
Freedom to provide services	1				
Intellectual property	17	44	51	105	159
Justice and home affairs			1	1	
Law governing the institutions	34	27	20	27	32
Regional policy	5		1	6	13
Research, information, education and statistics	1	1	4	3	2
Social policy	15	4	3	4	5
Staff Regulations		2	2	1	
State aid	131	176	207	227	226
Taxation				1	1
Transport	3	1	3	2	1
Total EC Treaty	536	590	623	688	773
State aid	9	7	6	3	3
Competition	6	6		1	11
Iron and steel	1	1	2	2	3
Total CS Treaty	16	14	8	6	17
Law governing the institutions	1	1			1
Total EA Treaty	1	1			1
Staff Regulations	171	179	155	171	192
OVERALL TOTAL	**724**	**784**	**786**	**865**	**983**

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

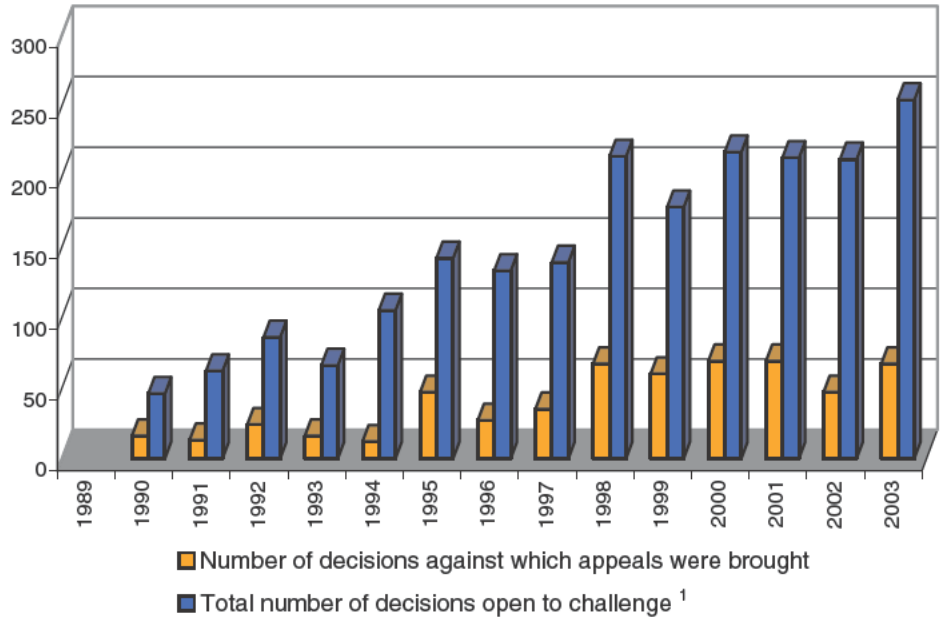
Miscellaneous

11. Decisions in proceedings for interim measures: outcome (2003)

	New proceedings for interim measures	Completed proceedings for interim measures	Outcome [1]	
			Dismissed	Granted
Accession of new States	1	1		
Agriculture	1	1	1	
State aid	3	4		3
Competition	13	7	5	1
Environment and consumers	3	1	1	
Taxation	1			
Foreign and security policy	1	1	1	
Approximation of laws	1	1	1	
Research, information, education and statistics	2	3	1	
External relations	3	3	2	
Total EC Treaty	29	22	12	4
Staff Regulations	10	9	5	
OVERALL TOTAL	**39**	**31**	**17**	**4**

[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



	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

[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
Agriculture	6				6
Commercial policy	1	3			4
Competition	4	4		2	10
Environment and consumers	1	1			2
External relations	2				2
Fisheries policy	2				2
Intellectual property	1		1		2
Iron and steel	6	1	1		8
Justice and home affairs	1				1
Law governing the institutions	3		1	2	6
Principles of Community law		1			1
Staff Regulations	5		1	1	7
State aid	9	1	3		13
Total	**41**	**11**	**7**	**5**	**64**

14. Miscellaneous – General trend (1989-2003)

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
Total	**4819**	**3821**	

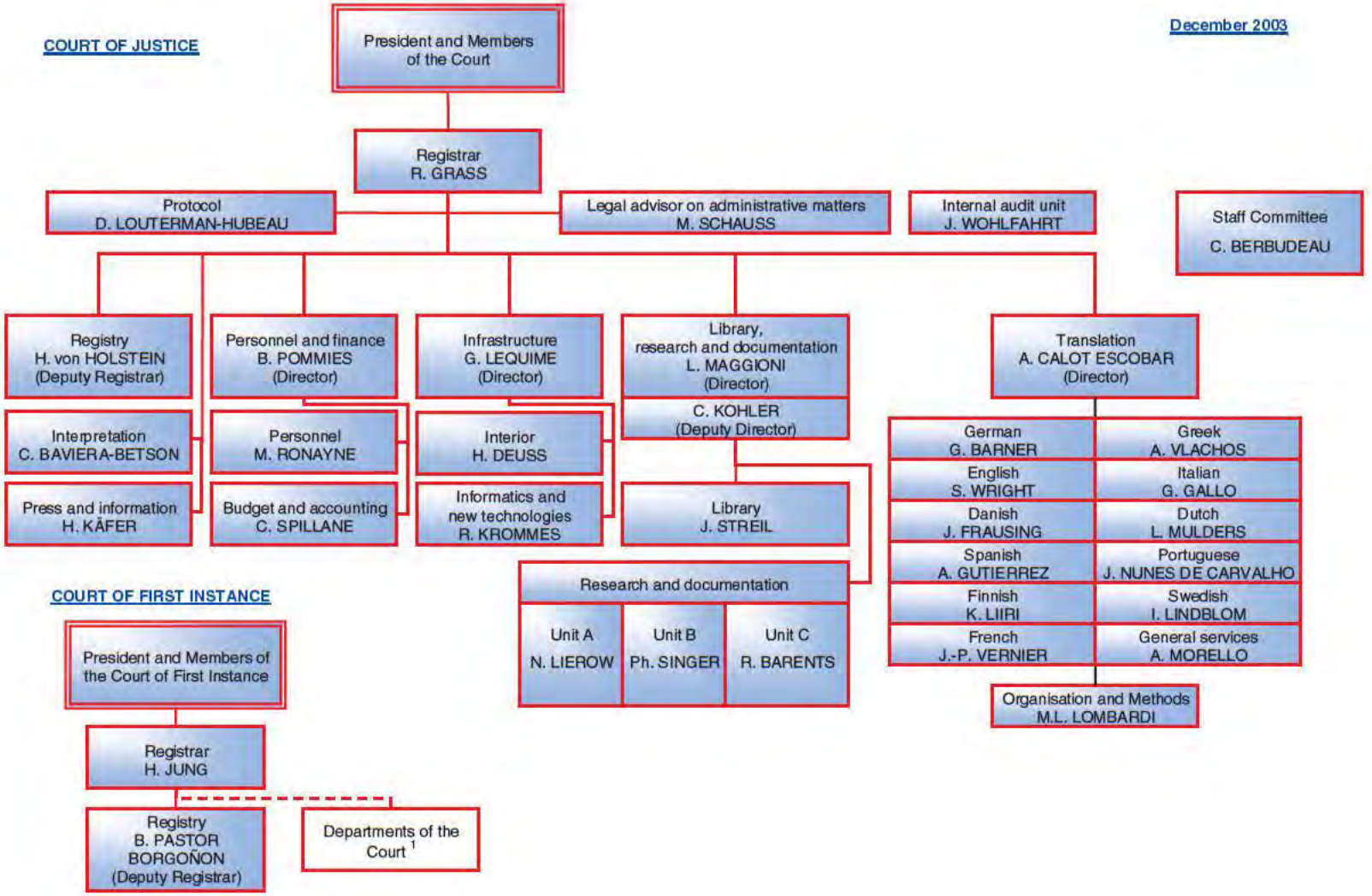
If the groups of identical or related cases are excluded (see '1. New cases, completed cases, cases pending (1995-2003)'), the following figures are obtained:

	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

[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.

Abridged Organisational Chart

December 2003



[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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